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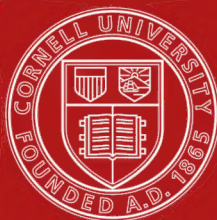
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THE
ENCYCLOPÆDIA
OF
PLEADING AND PRACTICE

UNDER THE CODES AND PRACTICE ACTS,
AT COMMON LAW, IN EQUITY
AND IN CRIMINAL CASES.

COMPILED UNDER THE EDITORIAL SUPERVISION OF
WILLIAM M. MCKINNEY.

VOL. XI.

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THE ENCYCLOPÆDIA OF PLEADING AND PRACTICE.

INSOLVENCY.

By E. A. CRAIGHILL, JR.

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I. DEFINITION. — Insolvency is the state of a person who is unable to pay his debts as they fall due, in the usual course of trade or business.¹

II. JURISDICTION — 1. **Original Jurisdiction** — a. **WHAT COURTS HAVE.** — Proceedings in insolvency are purely statutory in their nature and origin. Consequently, the only courts having juris-

1. In *Thompson v. Thompson*, 4 Cush. (Mass.) 127, Shaw, C. J., said: "By the term 'insolvency' * * * as used in these statutes we do not understand an absolute inability to pay one's debts at some future time, upon a settlement and winding up of all a trader's concerns; but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts in

the ordinary course, as persons carrying on trade usually do." To the same effect see also *Lee v. Kilburn*, 3 Gray (Mass.) 594; *Herrick v. Borst*, 4 Hill (N. Y.) 650; *Ferry v. Central New York Bank*, 15 How. Pr. (N. Y. Supreme Ct.) 445.

For a full discussion as to what constitutes insolvency, see Am. and Eng. Encyc. of Law, title *Insolvency*.

diction over such cases are those which are designated by the statute providing for such proceedings.¹

b. EXTENT OF JURISDICTION. — The courts having cognizance of insolvency proceedings being creatures of the statute, their jurisdiction is special and limited in its character, and confined to the authority conferred by the statute.²

It Is Impossible to Lay Down Any General Rules as to what is within the jurisdiction of such courts and what is not, and the practitioner can only be referred to the statutes, and to the cases cited in the notes.³

1. *Kitson v. Farwell*, 132 Ill. 327; *State v. Williams*, 3 Md. 163; *Bowie v. Jones*, 1 Gill (Md.) 208; *Carter v. Denison*, 7 Gill (Md.) 157; *Powles v. Dilley*, 9 Gill (Md.) 222; *Dearborn v. Ames*, 8 Gray (Mass.) 1; *Osgood v. Fernald*, 10 Gray (Mass.) 57; *Conroe v. Bull*, 7 Wis. 408.

2. *Paul v. Locust Point Co.*, 70 Md. 288; *Purviance v. Glenn*, 8 Md. 202.

Where a debtor under the *New York Insolvent Act of 1811* presented his petition to the first judge of the county, who appointed a day for the creditors to appear and show cause, etc., and before the day a commissioner was appointed for the county, and the insolvent on that day presented his petition, etc., to the commissioner, who completed the proceedings so begun before the first judge and granted a discharge to the insolvent, it was held that the discharge was void for want of jurisdiction in the commissioner, the act having made no provision in such case, and he having no authority unless the proceedings were commenced *de novo*. *Muzzy v. Whitney*, 10 Johns. (N. Y.) 226.

3. Examination of Debtor. — In *California* the Superior Court has jurisdiction to make an order requiring a debtor to appear and be examined touching the affairs of his estate, upon the application of a receiver. *Goodday v. Superior Ct.*, 65 Cal. 580.

Cannot Modify Order Pending Appeal.

— On a petition by a debtor to the Superior Court the usual order was made, adjudging him insolvent and staying all proceedings against him. Subsequently S., a creditor, took an appeal to the Supreme Court from said order of adjudication. Thereafter, and during the pendency of the appeal, on application of a judgment creditor, C., the Supreme Court made an order modifying said order of adjudication to the extent of permitting C. to take

out execution upon his said judgment and levy it upon certain real estate, constituting the homestead of the insolvent. On certiorari to the Supreme Court by S., it was held that the Superior Court had no authority, during the pendency of the appeal, to modify the order appealed from. *Stateler v. Superior Ct.*, 107 Cal. 536.

Sale of Lands Outside County. — In *Kentucky* Gen. Stat., c. 44, art. 2, § 3, provides that proceedings by creditors to have a debtor adjudged insolvent "shall be conducted as actions and proceedings for the settlement of the estates of deceased persons are now required to be conducted, so far as the same are applicable." Under this statute, in connection with the *Kentucky Civil Code*, § 65, providing that "an action to settle the estate of a deceased person must be brought in the county in which his personal representative was qualified," the trial court in insolvency proceedings has jurisdiction to decree the sale of lands situated elsewhere in the state than in the county in which the action was brought. *Fishback v. Green*, 87 Ky. 107.

Injunction. — In *Maryland* the Court of Common Pleas, when acting as an insolvent court, can issue an injunction in such proceedings only in the instance provided for by the *Maryland Act of 1880*, c. 172, to prevent the disposition of the insolvent's property, pending inquiry to determine the insolvency of the debtor. *Paul v. Locust Point Co.*, 70 Md. 288.

Summary Proceedings Against Trustees.

— The insolvent courts have exclusive jurisdiction in the distribution of insolvents' estates, and may proceed in a summary way against the trustees for default or neglect of duty. *Purviance v. Glenn*, 8 Md. 202.

Cannot Annul Discharge Without Notice.

— In *Massachusetts*, where it appeared

Amendment of Record. — Where the insolvency court is a court of record, it has authority to amend errors in its record.¹

2. Equity Jurisdiction — *a.* IN GENERAL. — Since the jurisdiction of insolvency courts is limited and statutory, it follows that when the limit of such jurisdiction is reached, further relief must be sought in equity.²

b. SUPERVISORY JURISDICTION IN SUPREME COURT. — In some states the Supreme Court is given a general equitable jurisdiction over all proceedings in the insolvency courts.³ Under

from the record of the Insolvent Court that a decree had been entered in due form for the issue of a certificate of discharge to an insolvent debtor, it was held that the judge of that court could not pass an order annulling such discharge without notice to the parties interested, if a decree was actually made and truly recorded, or without formal amendment of such record, if it was erroneous. *Marsh v. McKenzie*, 99 Mass. 64.

Stay of Proceedings Against Corporation. — A commissioner of insolvency has no jurisdiction to stay proceedings in the case of an insolvent corporation. *Cheshire Iron Works v. Gay*, 3 Gray (Mass.) 531.

Setting Aside Verdict of Jury. — In *New Jersey* if an insolvent debtor applies to the Court of Common Pleas for a discharge, and the case is tried before a jury, the court has power to set aside the verdict for sufficient reasons and order a new trial. *Van Waggoner v. Coe*, 25 N. J. L. 197.

Admitting Further Testimony. — In *New York* after the testimony was declared closed, in proceedings for a discharge, and the judge was holding the case under consideration, the consenting creditors moved for and obtained an order to admit further testimony; it was held that this order was clearly within the discretion of the judge. *Matter of Dimock*, 4 N. Y. App. Div. 301.

Continuance with Consent of Parties. — On a petition in insolvency by a debtor, the judge does not lose his jurisdiction by continuing the hearing for more than thirty days with the consent of both parties. *People v. Behrman, Hill & D. Supp.* (N. Y.) 81.

Order of Lower Court Staying Execution. — In *Rhode Island* the Supreme Court, upon the dismissal of an insolvent's petition, has no power to dissolve an order of the Court of Common Pleas

staying an execution of that court against the insolvent until further order. *Matter of Allen*, 5 R. I. 384.

Power of Federal Court to Stay Proceedings. — Where a debtor petitions to the Supreme Court of Rhode Island for a discharge in insolvency, the United States District Court has no authority, pending the petition, to grant a stay of proceedings against the insolvent. *Matter of Hopkins*, 2 Curt. (U. S.) 567.

1. *Marsh v. McKenzie*, 99 Mass. 64.

2. *Gable v. Scott*, 56 Md. 176.

May Compel Assignee to Perform Trust. — Courts of equity have jurisdiction to compel an assignee in insolvency to perform his trust and account for the property assigned. The remedy afforded creditors, under the law regulating insolvency proceedings, is not exclusive. *Sanderson v. McIntosh*, 65 Cal. 36.

3. Maine. — Under the Maine Rev. Stat. of 1883, c. 70, § 13, the Supreme Judicial Court has jurisdiction to revise the proceedings, orders, and decrees of the courts of insolvency, in all cases in which no other remedy is given by statute. *Harris v. Peabody*, 73 Me. 262.

Massachusetts. — Under the Massachusetts Pub. Stat., c. 157, § 15, the Supreme Judicial Court is given a general superintendence and jurisdiction of all cases arising under the insolvent laws of that state. *Kimball v. Morris*, 2 Met. (Mass.) 573; *Cushing v. Arnold*, 9 Met. (Mass.) 23; *Thayer v. Mann*, 2 Cush. (Mass.) 371; *Barnard v. Eaton*, 2 Cush. (Mass.) 294; *Harlow v. Tufts*, 4 Cush. (Mass.) 448; *Richards v. Merriam*, 11 Cush. (Mass.) 582; *Hill v. Hersey*, 1 Gray (Mass.) 584; *Cheshire Iron Works v. Gay*, 3 Gray (Mass.) 531; *Hanson v. Paige*, 3 Gray (Mass.) 239; *Merriam v. Sewall*, 8 Gray (Mass.) 316; *Gross v. Potter*, 15 Gray (Mass.) 556; *Lee v. Wells*, 15 Gray (Mass.) 459; *Bartholomew v. McKinstry*, 2 Allen (Mass.) 448; *Lancaster v. Choate*, 5 Allen

such a statute the Supreme Court has jurisdiction to revise the proceedings of the insolvency courts,¹ and will, for sufficient cause, vacate the proceedings for a discharge.²

How Application Made. — Application for the benefit of this jurisdiction may be made by any party aggrieved,³ and must be by bill, petition, or other proceeding in equity.⁴

(Mass.) 530; Rice, Appellant, 7 Allen (Mass.) 112; Marsh v. McKenzie, 99 Mass. 64; Kempton v. Saunders, 132 Mass. 466; Claflin v. Lowe, 157 Mass. 252; Clarke v. Stanwood, 166 Mass. 379; Fairweather v. McKim, (Mass. 1897) 46 N. E. Rep. 427.

To Expunge Proof of Fraudulent Claim. — The Supreme Judicial Court has power, under its general superintendence and jurisdiction, as a court of chancery, of all cases arising under the insolvent law, to expunge the proof of a fraudulent claim against the estate of an insolvent debtor, on the petition of his assignee, who did not know of the fraud until the expiration of the time allowed by the law for an appeal from the allowance of the claim by the commissioner of insolvency. Hill v. Hersey, 1 Gray (Mass.) 584.

To Compel Transfer of Fraudulent Mortgage. — The Supreme Judicial Court has jurisdiction in equity to compel the grantee in a fraudulent mortgage of real estate, who took the mortgage with knowledge of fraud, to transfer the same to the assignee in insolvency of the grantor. Bartholomew v. McKinstrey, 2 Allen (Mass.) 448.

1. Harris v. Peabody, 73 Me. 262; Harlow v. Tufts, 4 Cush. (Mass.) 448.

Matters of Fact. — The Supreme Judicial Court of Massachusetts has jurisdiction to revise and correct the decisions of a judge of insolvency as to matters of fact; and in the exercise of this jurisdiction is not limited to the evidence which was before him, but may allow the parties to introduce other evidence. Lancaster v. Choate, 5 Allen (Mass.) 530.

To Reverse Decree of Insolvency Court. — Under the Massachusetts Public Statutes, c. 157, § 15, giving the Supreme Judicial Court supervisory jurisdiction of proceedings in the Court of Insolvency, that court has jurisdiction to entertain a bill by creditors to reverse a decree of the Insolvency Court, confirming a discharge, notwithstanding that the debtor has departed from the commonwealth, so that service

upon him can only be made by a publication. Claflin v. Lowe, 157 Mass. 252.

Sale of Mortgaged Property. — Where a petition in insolvency proceedings was presented to the Supreme Judicial Court, praying a revision of the proceedings of a master in chancery in relation to an application by a mortgagee for a sale of the mortgaged property, and it appeared that the petition had all the characteristics of an original proceeding, the court entertained jurisdiction and adjudicated upon it accordingly. Barnard v. Eaton, 2 Cush. (Mass.) 294.

2. See *infra*, IX. 1. *In General*.

3. **Who Is a "Party Aggrieved."** — Massachusetts Pub. Stat., c. 157, § 15, gives the Supreme Judicial Court supervisory jurisdiction over insolvency matters, on proper process of any party aggrieved. Under this statute it was held that the creditor was not a "party aggrieved" by the refusal of the judge of the Insolvency Court to permit certain creditors to withdraw their assent to the discharge. Clarke v. Stanwood, 166 Mass. 379.

4. Cushing v. Arnold, 9 Met. (Mass.) 23.

Petition in Nature of Appeal. — Under the Massachusetts Pub. Stat., c. 157, § 15, giving to the Supreme Court supervisory jurisdiction over insolvency proceedings, that court has no jurisdiction of a petition in the nature of an appeal by a creditor from the decision of the Court of Insolvency granting a discharge to the debtor. Kempton v. Saunders, 132 Mass. 466.

Remedy Not by Writ of Prohibition. — Under the Massachusetts Pub. Stat., c. 157, § 15, providing that the Supreme Judicial Court shall have a general superintendence and jurisdiction over cases in the Insolvency Court, an error of a judge of insolvency in proceeding irregularly in insolvency to confirm a proposal of the insolvent for composition cannot be corrected by a writ of prohibition; the remedy is by petition or bill to the Supreme Court. Fair-

3. How Jurisdiction Acquired — On Debtor's Application. — Since an insolvent court proceeds under special powers conferred by statute, therefore, in order to invoke its jurisdiction, the statutory requirements must be complied with.¹ As to what steps are necessary before the court can acquire jurisdiction, reference must be had to the statutes. The practice, as far as embodied in decisions, is indicated in the notes.²

On Creditor's Application. — On an application by a creditor to have a debtor adjudged insolvent, the requirements of the statute must be complied with in order to give the court jurisdiction.³

weather v. McKim, (Mass. 1897) 46 N. E. Rep. 427.

1. *McDonald v. Katz*, 31 Cal. 167; *Purviance v. Glenn*, 8 Md. 202.

2. In California the court acquires jurisdiction of the subject matter and of the parties interested on the filing of a sufficient petition and schedules duly subscribed and verified, and by making the proper orders and giving the proper notice. *Langenour v. French*, 34 Cal. 92; *Friedlander v. Loucks*, 34 Cal. 18; *Bennett v. His Creditors*, 22 Cal. 38.

Jurisdiction Before Notice. — Under the California Insolvent Act of 1852 it was held that the court could acquire jurisdiction to discharge an insolvent from his debts only by due publication of the notice to creditors, but that the jurisdiction to make the orders which precede publication of the notice to creditors attaches when the petition and schedule are filed. *Cerf v. Oaks*, 59 Cal. 132.

In Maryland, under the Act of 1805, c. 110, the presentation of a petition by a party in confinement was alone necessary to give jurisdiction, and since the proof of confinement has been dispensed with by the Act of 1830, c. 130, the jurisdiction of the County Court attaches by the presentation of a petition such as is prescribed by the acts in relation to insolvent debtors. *Bowie v. Jones*, 1 Gill (Md.) 208.

In New Jersey, in order to give the court jurisdiction of an application by a debtor for the benefit of the insolvent laws, the debtor, at the time of giving bond, should be under arrest or held in custody. *Bond v. Cox*, 30 N. J. L. 381.

Failure to Deliver Inventory. — The Court of Common Pleas has not jurisdiction for the discharge of an insolvent debtor unless he has complied with all the requirements in the Act of 1830, Harr. Comp. 299: Giving bond upon

arrest, and omitting to deliver to the officer arresting him an inventory of his estate, etc., under oath, is not such compliance as will authorize the court to hear his application for discharge. *Davis v. Hendrickson*, 15 N. J. L. 481.

In Massachusetts, under the Pub. Stat., c. 157, § 17, on the filing of a petition in insolvency by a debtor the court acquires jurisdiction to issue a warrant directing the sheriff, his messenger, to take possession of the debtor's property; and under Massachusetts Statute of 1884, c. 236, § 3, such warrant may be issued after the filing of a proposition for a composition. *Jordan v. Palmer*, 165 Mass. 317.

3. In California, in a proceeding by creditors under the Insolvent Act of 1880, where the petition is properly signed, verified, and filed, and a copy thereof, together with a copy of the order to show cause, is regularly served on the debtor in the manner provided by law for the service of summons in civil actions, the court thereby acquires jurisdiction. *Luhrs v. Kelly*, 67 Cal. 289.

In Massachusetts, to authorize the issuing of a warrant under Stat. 1844, c. 178, to seize the estate of a debtor on the ground of his having made a fraudulent conveyance by way of preference, it must be shown, first, that the debtor was insolvent, or contemplated proceedings in insolvency, at the time of making the conveyance, and that he made it with a view of giving a preference to a pre-existing creditor; second, that he then had no reasonable cause to believe himself solvent; and third, that the creditor, at the time of receiving the conveyance, had reasonable cause to believe the debtor to be insolvent; and the burden of proving the first and third of these propositions is on the creditor who

III. WHO MAY APPLY FOR DISCHARGE — 1. Debtor. — It is a general provision of the insolvent acts, that the only persons entitled to be discharged in insolvency are debtors having their residence in the state wherein the application is made.¹

Partnership. — Under these statutes a partnership is generally allowed to apply for a discharge like any other debtor.²

2. Creditor. — The statutes in some of the states provide for proceedings in involuntary insolvency upon the application of a creditor. Under these statutes it seems that the petitioning creditor need not be a resident of the state.³

petitions for the issuing of the warrant. *Ex p. Jordan*, 9 Met. (Mass.) 292.

Nonresident Debtor. — If a nonresident debtor voluntarily appears by attorney on an order to show cause why he should not be adjudged insolvent, and consents to an adjudication, the court thereby acquires jurisdiction over both his person and property. *Frankel v. Their Creditors*, 20 Nev. 49.

1. California. — Under the California Insolvent Act of 1895, § 2, a residence of six months in the county wherein the application is made is a condition precedent to the right to institute proceedings for a discharge. *Barrett v. Carney*, 33 Cal. 530; *In re Thomas*, (Cal. 1896) 44 Pac. Rep. 327.

Massachusetts. — Under Mass. Pub. Stat. of 1882, c. 157, § 16, application may be made by an inhabitant of that state in the county in which he resides. *Ryan v. Merriam*, 4 Allen (Mass.) 78; *Hassan v. Hodges*, 12 Gray (Mass.) 208.

New Jersey. — Three months' residence in the state is a prerequisite to an application for a discharge. *Stagg v. Austin*, 18 N. J. L. 82.

New York. — The New York Code Civ. Pro., § 2149, requires that the debtor shall be a resident of the state at the time of presenting his petition. And see *Otis v. Hitchcock*, 6 Wend. (N. Y.) 433; *Matter of Wrigley*, 8 Wend. (N. Y.) 134; *Jenks v. Stebbins*, 11 Johns. (N. Y.) 224; *People v. Machado*, 16 Abb. Pr. (N. Y. Supreme Ct.) 460; *Rusher v. Sherman*, 28 Barb. (N. Y.) 416.

County in Which Debtor Resides. — Under the New York Code Civ. Pro., § 2150, requiring an application by a debtor for a discharge in insolvency to be addressed to the court of the county in which he resides, the debtor must have his "domicil" in such county in order to come within the terms of the

statute. *Matter of Dimock*, 4 N. Y. App. Div. 301, *affirming* 24 Civ. Pro. Rep. (Ulster County Ct.) 312, 11 Misc. Rep. (N. Y.) 610; *People v. Machado*, 16 Abb. Pr. (N. Y. Supreme Ct.) 460.

Loss of Residence. — A foreigner who, after a residence of seven years in this state, transacting business as a commission merchant, returns home taking with him his effects, uncertain whether he will return or not, loses his character of an inhabitant; so that though he returns to this state after a sojourn of only three weeks in his native land, he is not entitled to be discharged as an insolvent debtor if after his return he engages in no business, and his residence is merely of a temporary character. *Matter of Wrigley*, 8 Wend. (N. Y.) 134.

Animus Revertendi. — It lies upon a petitioner for the benefit of the insolvent laws, who has been absent from the state prior to the filing of his petition, to show that when he left he went with a clear intention of returning; and if the intent be doubtful the letter of the law will prevail, and the petitioner must be dismissed. *Senior's Case*, 2 Ashm. (Pa.) 118.

2. See *infra*, IV. 2. *Petition by Partnership*.

California. — Under the California Insolvent Act of 1852 partners could not apply, in their joint name, for the benefit of the act. *Meyer v. Kohlman*, 8 Cal. 44. But the California Insolvent Act of 1895, § 66, expressly provides that the word "debtor" shall include partnerships and corporations.

3. Under the Connecticut General Statutes, § 507, providing for the institution of insolvency proceedings by a creditor, the creditor need not be a resident of the state. *Mechanics', etc., Bank v. Versailles Woollen Co.*, 59 Conn. 347.

A nonresident creditor may institute

IV. PETITION FOR DISCHARGE — 1. Petition by Debtor — a. IN GENERAL. — The petition of a debtor for a discharge in insolvency should in general conform to the statute under which it is drawn, in order to give the court jurisdiction of the proceedings.¹

Formal Objections to the debtor's petition should be taken advantage of when the petition is presented, and come too late in a collateral action.²

Allegation of Insolvency. — The petition should contain an allegation that the debtor is insolvent.³

Account of Creditors. — The statutes generally require the debtor's petition to contain an account of his creditors.⁴

insolvency proceedings under the Maryland Code, art. 48, § 8. *Brown v. Smart*, 69 Md. 320.

1. *Merry v. Sweet*, 43 Barb. (N. Y.) 475.

New Jersey — No Form of Petition Prescribed. — Where an application is made for the benefit of the insolvent laws no form of petition is prescribed by law. The petition will be sufficient if it shows that the petitioner is so under arrest as to be entitled to a discharge, and thus gives the court jurisdiction of his case. *Van Waggoner v. Coe*, 25 N. J. L. 197.

Sufficient Petition. — The petition of an applicant for the benefit of the insolvent laws, setting forth that he was arrested by virtue of a *capias* ad respondendum at the suit of the plaintiff, and being arrested, he entered into bond to apply, etc., is sufficient. It need not appear on the face of the petition that an inventory of his property was delivered to the officer with the bond. *Stagg v. Austin*, 18 N. J. L. 82.

California — Need Not Allege Debts Not Created in State. — Under the California Insolvent Act of 1852 it was unnecessary for a petitioning debtor to allege in his petition that his debts were created in that state. *Sharp v. His Creditors*, 10 Cal. 419.

Need Not Allege Debts Not Fiduciary. — The petition in insolvency need not aver that the debts were not fiduciary, etc., so as to show that the petition is not within the thirteenth section of the California Insolvent Act of 1852. *Brewster v. Ludekins*, 19 Cal. 162.

Insolvent Need Not Sign Petition. — Under the California Insolvent Act of 1852 an insolvent's petition might be signed by an attorney, the signature of the insolvent not being required by the terms of the statute. *Brewster v. Ludekins*, 19 Cal. 162; *Wilson v. His Creditors*, 32 Cal. 406.

Pennsylvania — Need Not Recite Arrest and Giving Bond. — In Pennsylvania a debtor's petition for a discharge need not recite that he has been arrested and has given bond. *Lincoln v. Williams*, 12 S. & R. (Pa.) 105.

2. *Greenwaldt v. Kraus*, 148 Pa. St. 517. See also *infra*, XI. 2. a. (2) *Certiorari*.

Bad Grammar and Crudities of Language used by a debtor in his petition are not fatal to the jurisdiction, and will not vitiate the pleading. *In re Ramazina*, 110 Cal. 488.

3. Assets Exceeding Liabilities. — Although the petition of a debtor may show that his assets exceed his liabilities this showing is not necessarily inconsistent with a state of insolvency, and unless controverted by the creditors, the allegation of insolvency is of itself sufficient to invoke the jurisdiction of the court. *In re Chope*, 112 Cal. 630.

Where it appears from the petition that the valuation of the partnership assets exceeds considerably the liabilities of the partnership, but the petition further discloses that the partners undoubtedly are hopelessly insolvent, it is a sufficient showing of insolvency, within the purview of the California Insolvent Act of 1880. *In re Ramazina*, 110 Cal. 488.

Cause of Insolvency. — Under the Pennsylvania Insolvency Act of 1798 a petitioning debtor was not required to state the cause of his insolvency. *David's Case*, 1 Browne (Pa.) 377.

4. California. — Under the California Insolvent Act of 1852 a petition in insolvency was required to state the name of each creditor, if known, and if unknown, to state such to be the fact. *McAllister v. Strobe*, 7 Cal. 428.

New York — No Particular Form of Account. — Under New York Laws of

Conclusion. — It is held in *California* that the petition need not conclude with a formal prayer for a discharge.¹

Amendment. — The petition may, in proper cases, be amended before the hearing.²

b. TO WHOM ADDRESSED. — It seems that the petition may be addressed either to the judge or to the court, the terms being regarded as convertible.³

c. ALLEGING RESIDENCE. — The statutes of some of the states require that the debtor's petition shall specify his place of residence.⁴ But it seems that although the statute may require a certain period of residence as a prerequisite to an application

1831, c. 300, § 13, requiring a debtor who petitioned for a discharge to deliver an account of his creditors, but prescribing no particular form in which to deliver such account, it is sufficient if there be a full and intelligible account of creditors delivered in any form. *People v. Behrman, Hill & D. Supp.* (N. Y.) 81.

Name of Deceased Creditor Instead of Administrator. — Where, in a list of creditors in a debtor's petition for his discharge, the name of a deceased creditor appeared instead of that of his administrator, there being no evidence that the petitioner was aware of the death of the creditor, it was held that the court was not obliged to set aside the discharge on that account. *Wheeler v. Emmeluth*, 58 Hun (N. Y.) 369.

Consideration of Indebtedness. — Under 2 New York Rev. Stat. 200, § 8, an insolvent must set forth in his petition the consideration of his indebtedness to each creditor. *Wright v. Crawford*, 2 Hilt. (N. Y.) 338.

Amount Unknown, or in Dispute. — If an insolvent debtor, in his petition, or upon the exhibit made by him on the hearing, puts down a creditor without naming the sum due to such creditor, but sets it down as unknown to him, or in dispute, it is no ground for dismissing his application. *Le Chevallier v. Hamilton*, 18 N. J. L. 260.

1. *In re Chope*, 112 Cal. 630.

2. *In re Brown*, 5 Phila. (Pa.) 473.

In Johnson's Case, 1 Ashm. (Pa.) 157, it is held that whenever, in the investigation of the petition of an insolvent debtor, the court is satisfied that he is a fair and *bona fide* applicant, it will not dismiss his application because his petition is not in all formal particulars in strict compliance with the requisitions of the insolvent laws, but will afford him an opportunity of

conforming to the law by postponing the hearing of his petition to another term, with liberty to attend in the interval.

3. Addressed to Court. — It is no objection to insolvent proceedings that the petition is addressed to the court and not to the judge, as required by statute. The court has jurisdiction of the matter, and the words "judge" and "court" are in this and other places used as convertible terms. *Brewster v. Ludekins*, 19 Cal. 162; *Wilson v. His Creditors*, 32 Cal. 406.

Addressed to Judge. — Where a debtor petitions the County Court for a discharge in insolvency, the fact that his petition is addressed to the judge in person, and not to the court, will not invalidate the discharge. *Borthwick v. Howe*, 27 Hun (N. Y.) 505.

4. California. — Insolvent Act, 1895, § 2. See *In re Thomas*, (Cal. 1896) 44 Pac. Rep. 327.

New York. — Code Civ. Pro., § 2151. Formerly, in New York, preliminary proof of the fact of residence was required. *Jenks v. Stebbins* 11 Johns. (N. Y.) 224; *Matter of Wrigley*, 8 Wend. (N. Y.) 134; *People v. Machado*, 16 Abb. Pr. (N. Y. Supreme Ct.) 460; *Rusher v. Sherman*, 28 Barb. (N. Y.) 416. But an averment of residence was sufficient proof. *Russell, etc., Mfg. Co. v. Armstrong*, 12 Abb. Pr. (N. Y. Supreme Ct.) 472. And see *Develin v. Cooper*, 84 N. Y. 410.

Massachusetts — *Need Not Allege Residence.* — Although a petitioner for the benefit of the insolvent laws must be a resident of this commonwealth, and have his residence or place of business in the county in which the proceedings are instituted, his petition need not allege these facts. *Ryan v. Merriam*, 4 Allen (Mass.) 78; *Whiton v. Nichols*, 15 Gray (Mass.) 95.

for a discharge, such period of residence need not be alleged in the petition.¹

d. AFFIDAVIT TO PETITION. — Where the statute requires an affidavit by the debtor to be annexed to his petition, such affidavit must be made in the manner and at the time prescribed by the statute, or the court acquires no jurisdiction.²

e. CONSENT OF CREDITORS — (1) *In General.* — In *New York* the petitioner for a discharge in insolvency must annex to his petition the written consent of creditors holding at least two-thirds of all the debts owing by him to creditors within the United States.³

1. Although the *California* Insolvent Act of 1880 makes a residence of six months in the county, next preceding the filing of his petition, a condition precedent to the right of the petitioner to institute the proceedings for his discharge, yet it is not necessary that this fact should be stated in the petition in order to clothe the court with jurisdiction in the premises. *Barrett v. Carney*, 33 Cal. 530; *In re Thomas*, (Cal. 1896) 44 Pac. Rep. 327. *Compare* *Langenour v. French*, 34 Cal. 92.

In *New Jersey* it was held that the petition need not state that the applicant resided in the state three months before his arrest, which residence was requisite under the Act. *Stagg v. Austin*, 18 N. J. L. 82.

2. *Ely v. Cooke*, 28 N. Y. 365.

Affidavit before Wrong Officer. — The affidavit must be sworn to before the officer to whom the petition is presented. Therefore where an affidavit was sworn to before a commissioner of deeds it was held that, as that officer had no statutory right to administer the oath, the discharge was void for want of jurisdiction; and permitting the petitioner to make another affidavit on the hearing did not remedy the defect, as the proceedings in this respect are not amendable. *Small v. Wheaton*, 4 E. D. Smith (N. Y.) 306.

Sworn to in Presence of, and Subscribed by, Judge. — Under 2 N. Y. Rev. Stat. 16, if the affidavit annexed to the debtor's petition is not sworn to in the presence of the judge, nor subscribed by him prior to the order to show cause, the discharge will be void for want of jurisdiction. *Ely v. Cooke*, 28 N. Y. 365, *affirming* 9 Abb. Pr. (N. Y.) 366.

Defective Affidavit. — Under 2 N. Y. Rev. Stat., c. 5, tit. 1, art. 3, § 7, the affidavit annexed to a debtor's petition must state that the petitioner had not

disposed of or made over any part of his estate for the future benefit of himself or his family, and an affidavit which used the words "for the future benefit of himself and family" was held to be so defective as not to confer jurisdiction on the trial court. *Merry v. Sweet*, 43 Barb. (N. Y.) 475; *Hale v. Sweet*, 40 N. Y. 97.

An affidavit verifying a petition for discharge in insolvency, which omits the words, "that I have in no instance created or acknowledged a debt for a greater sum than I honestly owed," fails to conform to section 5438, Mich. Comp. Laws, and is so defective as not to confer jurisdiction on the commissioner. *Young v. Stephens*, 9 Mich. 500.

Massachusetts — Sufficient Verification. — A petition in insolvency is sufficiently verified by an oath which states the allegation therein contained to be true, according to the petitioner's best knowledge and belief. *American Carpet Lining Co. v. Chipman*, 146 Mass. 385.

3. *New York Code Civ. Pro.*, § 2152.

Two-thirds of Creditors Must Consent. — Where it appeared on the face of the proceedings that less than two-thirds of the creditors had joined in the petition, it was held that the officer had no jurisdiction of the case and a discharge rendered therein was void. *Morrow v. Freeman*, 61 N. Y. 515. See also *Frary v. Dakin*, 7 Johns. (N. Y.) 75. The same rule applied under the *New York Act of 1813*. *Salters v. Tobias*, 3 Paige (N. Y.) 338.

No Amount Opposite Names. — Where names were signed to the petition without any amounts set opposite to them, it was held that such persons not being named in the schedule as creditors, they were not to be considered as consenting creditors. *Rusher v. Sherman*, 28 Barb. (N. Y.) 416.

The *Massachusetts* statutes require the written assent of a majority of creditors who have proved their claims, only when the insolvent's assets do not pay fifty per cent. of his debts.¹

(2) *Relinquishment of Securities.* — A consenting creditor must include in his consent a written declaration relinquishing to the trustee any security held by him which is a lien upon the real or personal property of the petitioner.²

In *Minnesota* creditors may, under certain circumstances, share in the distribution of the insolvent's assets without releasing their claims.³

Creditors Residing in Other States. — In *Warrin's Case*, 16 Abb. Pr. (N. Y.) 457, note, it was held that when creditors residing in other states petition, they must annex the original accounts or sworn copies thereof, and the original specialties or securities, if any, upon which their demands arise; and that an omission to do so is fatal to the proceedings, and the defect cannot be supplied.

1. Mass. Pub. Stat. 1882, c. 157, §§ 86-90.

Where Assent of Requisite Majority Not Filed. — The *Massachusetts* Pub. Stat., c. 157, § 90, provides that when a discharge is refused for the reason that the assent of the requisite majority of creditors has not been filed, the judge, on application of the debtor, with the assent of a majority of the "creditors who have proved their claims," may grant a discharge. Under this section the assent of a majority of creditors who have proved their claims at the time of their application, although not within six months of the assignment, is sufficient. *In re Ruffin*, (Mass. 1897) 46 N. E. Rep. 626.

Second Application. — The assent of three-fourths in value of the creditors of an insolvent debtor, which is requisite to his second discharge under Stat. 1844, c. 178, § 5, must be filed within six months of the date of assignment. *Wills v. Prichard*, 10 Gray (Mass.) 327.

Assent by Attorney. — In *Massachusetts* an attorney may assent to the discharge of the insolvent, in the name of a creditor, without showing by written evidence his authority to do so. *Clarke v. Stanwood*, 166 Mass. 379.

2. New York Code Civ. Pro., § 2158.

Sufficient Relinquishment. — A statement that "for value received, I hereby release to the assignee to be appointed all claims of the estate of C. C. that I have by reason of the judgment against

him assigned to me," is a sufficient compliance with the requirements of the statute. *Augsbury v. Crossman*, 10 Hun (N. Y.) 389.

Omission to Relinquish Security. — Where, on signing a petition for the discharge of an insolvent debtor, judgment creditors omit to add to their signatures a declaration that they relinquish their judgments to the assignee to be appointed, the omission is a mere irregularity which can be cured by attaching such relinquishments to the petition afterwards, and does not deprive the judge of jurisdiction. *Matter of Phillips*, 43 Barb. (N. Y.) 108; *Saule v. Chase*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 48; *Russell, etc., Mfg. Co. v. Armstrong*, 12 Abb. Pr. (N. Y. Supreme Ct.) 472.

Minnesota — Who Must Release. — Under the provisions of our Insolvent Act, the person in whose favor a claim against the insolvent is filed and allowed is the creditor by whom a release must be made and filed, and to whom notice of the time limited for filing releases must be given, if such notice be ordered by the court. *Adamson v. Cheney*, 35 Minn. 474.

3. *Minnesota* Stat. 1894, § 4249.

Sufficient Complaint. — In proceedings by creditors under the proviso in section 10 of the Insolvent Law of 1881, for the purpose of obtaining an order allowing them to share in the insolvent estate without filing releases, a complaint is sufficient which alleges that the debtor has fraudulently concealed, encumbered, and disposed of his property with intent to cheat and defraud his creditors. *Matter of Gazett*, 35 Minn. 532.

Need Not Allege Preference. — A petition under Laws 1881, c. 148, § 2, against an insolvent debtor, on the ground that he has confessed judgment in favor of one of his creditors, need not allege that the creditor thereby ob-

(3) *Affidavit of Consenting Creditors.* — The consent of a creditor must be accompanied by an affidavit stating his demand, its nature, and the general ground or consideration of the indebtedness.¹ Where the judge decides that the affidavit of a creditor is in compliance with the statute, the question as to any omission therein is no longer open.²

f. SECOND APPLICATION. — It is held that the pending application of an insolvent debtor to be discharged relieves him from the necessity of making a second application in pursuance of a bond given to another creditor upon a subsequent arrest.³ Where there has once been a full hearing and decision on the merits, the court will not hear another petition made under the same circumstances.⁴

ained a preference. *In re Graeff*, 30 Minn. 476.

1. New York Code Civ. Pro., § 2160.

What Particularity Required. — The grounds of creditors' claims need not be stated with such particularity as is required in a statement for a judgment by confession. *Soule v. Chase*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 48.

Sufficient Statement of Ground and Consideration. — Where the affidavit of a petitioning creditor stated that a sum of money, being the sum annexed to his name, subscribed to the petition, is justly due to him from the said insolvent for goods, wares, and merchandise sold and delivered, secured by indorsement of M.'s note, it was held sufficient to support an insolvent's discharge. *Pratt v. Chase*, 19 Abb. Pr. (N. Y. Supreme Ct.) 150.

Insufficient Statement of Ground and Consideration. — An affidavit of a creditor specifying that the indebtedness to him is "on account of a judgment entered against said insolvent upon a promissory note," does not sufficiently state the ground and consideration. *Merry v. Sweet*, 43 Barb. (N. Y.) 475; *Hale v. Sweet*, 40 N. Y. 97.

An affidavit of a creditor specifying the indebtedness to him to be "on account of judgment entered against said insolvent, justly due to him from said insolvent," is insufficient as not showing the ground and consideration. *Merry v. Sweet*, 43 Barb. (N. Y.) 475; *Hale v. Sweet*, 40 N. Y. 97.

The affidavit of a petitioning creditor that a certain sum "is justly due to this deponent from the said insolvent, on a note of hand given by the said E. C. [the insolvent] to this deponent, on a settlement of accounts between us," is insufficient because not stating the

nature of the account on which the settlement took place or the general ground of indebtedness. *Matter of Cook*, 15 Johns. (N. Y.) 183.

A specification that the debt is due on a promissory note, without setting forth the consideration thereof, is insufficient. *Slidell v. McCrea*, 1 Wend. (N. Y.) 156; *Wright v. Crawford*, 2 Hilt. (N. Y.) 338.

Affidavit Sworn to in Another State. — An affidavit of a petitioning creditor, sworn to before a New York commissioner resident in another state, need not have annexed to it the certificate of the secretary of the latter state, proving the official character of such commissioner, in order to give jurisdiction to the judge before whom the proceedings are pending. *Rusher v. Sherman*, 28 Barb. (N. Y.) 416.

2. *People v. Stryker*, 24 Barb. (N. Y.) 650.

3. *M'Clure v. Foreman*, 4 W. & S. (Pa.) 279.

Arrest in Another County. — An insolvent debtor whose application to be discharged is pending in one county cannot make a second application in another county where he has been arrested and given bond. *Caldcleugh v. Carey*, 5 W. & S. (Pa.) 155.

4. *Abbott's Case*, 1 Ashm. (Pa.) 69.

The Only Mode for a Debtor to Adopt, whose petition has been rejected on a hearing on the merits, is to present a special petition reciting the former proceedings and decision, and ask for a rehearing, which the court will grant or refuse in the exercise of a sound legal discretion. *Abbott's Case*, 1 Ashm. (Pa.) 69.

Insufficient Bonds — Second Application.

— An applicant for the benefit of the insolvent laws who is refused a dis-

2. Petition by Partnership. — A petition by a partnership for the benefit of the insolvent laws must aver the individual insolvency of all the partners,¹ and must show the surrender of all the individual property of each member, and not merely of the partnership property.²

3. Petition by Creditors — *a.* IN GENERAL. — A petition by creditors to have their debtor adjudged an insolvent should, in general, conform to the requirements of the statute under which it is drawn.³ It should state fully and clearly the claims of the

charge on the ground that his bonds are insufficient may immediately after such refusal surrender himself to the sheriff, give new bonds, and make another application for his discharge. *Race v. Dehart*, 24 N. J. L. 37.

1. *Hanson v. Paige*, 3 Gray (Mass.) 239; *Dearborn v. Keith*, 5 Cush. (Mass.) 224.

Sufficient Averment of Insolvency. — A petition in behalf of a partnership, for the benefit of the insolvent laws, which states that "they are indebted" to the amount of two hundred dollars, "which they are unable to pay in full," sufficiently states the insolvency of the partnership and of the partners individually. *Hanson v. Paige*, 3 Gray (Mass.) 239.

Including Persons Not Partners. — Proceedings in insolvency against a partnership are not rendered invalid as to the actual partners by the including of persons who are not partners. But, on the application of a person thus wrongly included, the Supreme Judicial Court will vacate the proceedings, so far as they relate to him. *Hanson v. Paige*, 3 Gray (Mass.) 239.

Need Not Allege Partnership. — A petition in voluntary insolvency is not defective because not containing a direct allegation that the petitioners are partners, if that fact fairly appears, taking the petition as a whole. *In re Ramazina*, 110 Cal. 488.

2. *Meyer v. Kohlman*, 8 Cal. 44.

Petition, After Dissolution, by One Partner. — One partner, after the dissolution of the partnership, may commence proceedings in insolvency under Stat. 1838, c. 163, § 21, by his sole petition, so as not only to affect his own property and the property of the firm, but also the separate property of his late partners. *Thompson v. Thompson*, 4 Cush. (Mass.) 127.

Reference to Master. — Where proceedings in insolvency, instituted against a partnership on the petition of one part-

ner without previous notice to his co-partners, are suspended by the court, on the application of a partner not so notified, the case will be referred to a master to inquire and report as to the truth of the statements upon which the proceedings were commenced, before making a final decision. *Thompson v. Thompson*, 4 Cush. (Mass.) 127.

3. California — *Sufficient Petition.* — A petition by creditors under the California Insolvent Act of 1880 is sufficient if it shows that all the petitioners are residents of the state of California, that the demands are due and accrued in that state, the nature and amount of their several demands, and the other facts required by section 8 of that Act. *In re Close*, 106 Cal. 574.

For a form of a petition by creditors adjudged sufficient under the California Insolvent Act of 1880, see *Campbell v. Judd*, (Cal. 1885) 7 Pac. Rep. 804.

Should Show Petition by Five Creditors.

— A petition by creditors under the California Insolvent Act of 1880, § 8, should show that at least five of the petitioners are creditors of the alleged insolvent. *In re Russell*, 70 Cal. 132.

To Declare Partnership Insolvent. — An averment in a petition by creditors, under the California Insolvent Act of 1880, to have a partnership declared insolvent, that the parties "doing business under the firm name of A & B * * * are indebted," etc., sufficiently shows that the creditors were creditors of the partnership rather than of the individual members. *Wright v. Cohn*, 88 Cal. 328.

Partnership as Petitioning Creditor. — In a petition by creditors under the California Insolvent Act of 1880, § 8, if some of the alleged creditors are described therein as firms or copartnerships, the names of the persons comprising the firm need not be given. *In re Russell*, 70 Cal. 132; *In re Denny*, 89 Cal. 101; *Campbell v. Judd*, (Cal.) 7 West Coast Rep. 372.

petitioning creditor or creditors,¹ and should allege the acts of insolvency on which the petition is based.² The doing by a debtor of any of the fraudulent acts enumerated in the statutes is

Need Not File Certificate with Clerk.

— A proceeding in insolvency is not an action as defined by section 22, Cal. Code Civ. Pro., but is in the nature of a special proceeding, and is included within section 23 of that Act. Therefore sections 2436, 2468 of the California Civil Code, providing that partnerships doing business in the state under a designation not showing the names of the partners in such business must file a certificate with the clerk, etc., or shall not be allowed to maintain an action, etc., are not applicable to the signers of a petition in involuntary insolvency. *In re Dennery*, 89 Cal. 101.

Foreign Corporation as Petitioning Creditor. — Where the petitioning creditor is a foreign corporation it is not necessary that the petitioner should allege and exhibit with the petition proof of the fact that it is a legally incorporated body. *Whyte v. Betts Mach. Co.*, 61 Md. 172.

Where Filed. — Under the California Insolvency Act of 1880, § 8, providing that a petition by creditors shall be filed "in the Superior Court of the county, or city and county, in which the debtor resides or has his place of business," it was held that a petition filed against a corporation within a county wherein its mill was located, its operations carried on, its liabilities contracted, and its creditors lived, sufficiently complied with the statute although the residence of the corporation was in another county, and that the creditors might show by parole in what county the corporation had its place of business. *Creditors v. Consumer's Lumber Co.*, 98 Cal. 318.

1. Same as Complaint in Action. — A petition by creditors under the California Insolvent Act of 1880, § 8, should state the facts showing the indebtedness with the same degree of certainty and fullness as in a complaint in an ordinary action to recover the indebtedness. *In re Russell*, 70 Cal. 132.

Sufficient Statement of Claim. — The California Insolvent Act of 1880, § 8, provides that a debtor may be adjudged insolvent upon the petition of five or more creditors whose claims aggregate five hundred dollars or more. A petition under this Act stating that the de-

mand is for a certain sum, and accrued for goods sold and delivered by the creditors to the said respondent "within one year last past, at his request," sufficiently states the claim. *In re Dennery*, 89 Cal. 101.

Need Not Be Described as on Contract or Judgment. — Under the *Connecticut* General Statute, p. 380, § 7, providing that any creditor having a claim of one hundred dollars or more against a non-resident debtor owning property in that state may institute proceedings for the settlement of the same as an insolvent estate, it is not necessary that the claim should be described in the petition as founded on contract or on a judgment. *Ward's Appeal*, 52 Conn. 565.

2. Sufficient Petition — California. — Under the California Insolvent Act of 1880, § 8, prescribing what the creditors' petition must set forth as acts for which a person may be adjudged insolvent, a petition alleging that the debtor made a transfer of his property to one F., with intent to hinder, delay, and defraud his creditors, and that, in contemplation of insolvency, he made a grant, sale, conveyance, and transfer of his property to the said F., with the circumstances of time, place, and general description of the property sold, is sufficient. *In re Patton*, 110 Cal. 33.

Maryland. — Under the Maryland Code, art. 48, § 24, a petition by creditors in involuntary insolvency, which states the facts with sufficient certainty and directness to show the acts of insolvency upon which the petitioning creditors rely for the adjudication, sufficiently complies with the statute. *Whyte v. Betts Mach. Co.*, 61 Md. 172.

A petition in involuntary insolvency which alleges that the defendant, being a merchant and engaged in business, and being then insolvent and indebted to the petitioners in an amount exceeding two hundred and fifty dollars, did, within sixty days before filing the petition, convey to his wife a mortgage which he then held, and other personal property, with intent thereby to delay, hinder, and defraud his creditors, contains every fact necessary to make the case one of involuntary insolvency under the Maryland statute, and a verdict thereon "for the petitioners" is suffi-

ground for proceedings in insolvency against him, without alleging or proving that he is insolvent.¹

Verification. — In *California* a petition by creditors may conclude with the usual form of verification including matters stated on information and belief.²

Signature. — A petition by a creditor should be signed by the creditor or by one duly authorized.³

b. AMENDMENT. — A petition by creditors may be amended so as to allow creditors who were not originally parties to the petition to become parties thereto on leave of the court;⁴ and it

is sufficient to sustain a judgment. *Bowland v. Wilson*, 71 Md. 307.

Massachusetts. — Under the Massachusetts General Statutes, c. 118, § 103, a petition by creditors for a warrant against an insolvent debtor, alleging that the debtor made two mortgages of his personal property to secure the payment of pre-existing debts to the mortgagees, with intent to secure to them a preference and defraud his creditors, the debtor being at the time insolvent and having reasonable cause to believe himself insolvent, is sufficient without alleging that either of the mortgagees knew or had reasonable cause to believe that the debtor was insolvent at the time of making the mortgages to them. *Lothrop v. Highland Foundry Co.*, 128 Mass. 120.

Specifying Person to Whom Transfer Made. — Under the Maryland Act of 1886, c. 298, a petition in involuntary insolvency which specifies the person to whom the debtor has "assigned, given, sold, and transferred" his property, with intent to hinder, delay, and defraud his creditors while insolvent, and in contemplation of insolvency, is sufficient. *Castleberg v. Wheeler*, 68 Md. 266.

Specification of Particular Acts of Insolvency. — A creditor's petition for a warrant in insolvency which alleges that the debtor, within sixty days, and with intent to defraud the petitioner, "has concealed his property, or some part thereof, to prevent its being attached or taken on legal process," is not so defective as to require the proceedings in insolvency to be quashed after the petitioning creditor, by order of the commissioner, has filed a specification of the particular acts of concealment relied on. *O'Neil v. Glover*, 5 Gray (Mass.) 144.

Information and Belief. — An affidavit that the facts stated in a petition for a warrant in insolvency against a debtor

are true, according to the best knowledge and belief of the person making it, is sufficient to justify the issuing of a warrant. *O'Neil v. Glover*, 5 Gray (Mass.) 144. And see *In re Roberts*, 71 Me. 390.

1. *O'Neil v. Glover*, 5 Gray (Mass.) 144.

2. *Wright v. Cohn*, 88 Cal. 328.

Where Corporation a Petitioner. — Under a statute requiring that a petition by creditors to have their debtor adjudged insolvent must be verified by three of the petitioners named therein, if one of the petitioners is a corporation the verification may, under § 446, California Code Civ. Pro., be made by the vice-president thereof, without setting out his appointment to that office. *In re Close*, 106 Cal. 574.

3. **The Want of an Authorized Signature** to the petition of a creditor under the insolvent laws is ground for setting aside the proceedings. *Merriam v. Sewall*, 8 Gray (Mass.) 316.

May Be Signed by Attorney. — A petition for a warrant in insolvency against the estate of a debtor may be signed and sworn to by the attorney of the petitioning creditor. *O'Neil v. Glover*, 5 Gray (Mass.) 144.

4. *In re Roberts*, 71 Me. 390.

Relates Back to Commencement of Proceedings. — An amendment to a creditors' petition in insolvency, by adding other creditors as parties, relates back to the commencement of the proceedings. *In re Roberts*, 71 Me. 390.

Other Creditors Prosecuting Petition. — If, after the filing of a creditor's petition for insolvency proceedings on the ground of a fraudulent preference, it is fraudulently agreed between the petitioning creditor and the debtor, in order to carry out such preference and to enable the debtor to obtain his discharge, that the debt of the petitioning creditor shall be paid and the petition dismissed, other creditors are entitled to come in

may be amended so as to set forth more clearly the creditors' claim.¹

c. **DISMISSAL.** — The court may, on motion of the insolvent debtor, dismiss for delay proceedings in insolvency instituted by creditors.²

d. **BOND.** — The creditors and debtor are alone interested in the bond given by the creditors, and a third party cannot, in a collateral proceeding, raise objection to its sufficiency.³

V. SCHEDULE OF DEBTOR — 1. In General. — It is a general requirement of the insolvency laws, in those states where such statutes exist, that the applicant for a discharge shall present to the court in some form a schedule of his assets and liabilities.⁴ However, the statutes in most of the states are so widely variant

and prosecute the petition. *Foster v. Goulding*, 9 Gray (Mass.) 50.

Withdrawal of Petition — Intervention Too Late. — Connecticut General Statutes, § 507, provides for a petition to the Probate Court by a creditor to have a debtor adjudged insolvent. Section 508 provides that while such proceedings are pending creditors may move to be made parties thereto, and thereafter the original creditor is not allowed to discontinue without the consent of the intervening ones. Where a petitioning creditor withdrew his petition, and thereafter other creditors sought to revive the petition and to intervene, it was held that the proceedings were no longer pending, and if the court revived the petition so as to allow the other creditors to intervene, the petitioning creditors and others interested might sue out a writ of prohibition to check further proceedings. *Fayerweather v. Monson*, 61 Conn. 431.

1. *Merriam v. Sewall*, 8 Gray (Mass.) 316.

2. *Kornahrens v. His Creditors*, 64 Cal. 492.

May Be Commenced Anew. — Where, on motion of an insolvent debtor, proceedings instituted by creditors are dismissed for delay, the proceedings may be commenced anew. *Kornahrens v. His Creditors*, 64 Cal. 492.

Consent of Creditors — Notice to Parties. — A petition in insolvency should not be dismissed after an adjudication and the issuing of a warrant, unless with the consent of creditors, and after proper notice to all parties interested. *McIntire v. Robinson*, 81 Me. 583.

Creditors Not Joined. — Under the *Minnesota* Laws of 1881, c. 148, a petition by creditors may be dismissed by the

court without notice to creditors who have not been joined, and who are not known in the proceedings. *In re Stoddard*, 30 Minn. 553.

3. *Mogk v. Peterson*, 75 Cal. 496.

Failure to File such bond does not deprive the court of jurisdiction. *Creditors v. Consumer's Lumber Co.*, 98 Cal. 318.

4. California Insolvent Act of 1880, §§ 2, 3; New York Code Civ. Pro., § 2162; and see statutes of other states.

Maryland. — The failure of an applicant for the benefit of the insolvent law to exhibit with his petition "a schedule of his property, and a list of the debts due from and owing to him, with the names of his debtors and creditors, all verified by affidavit," as required by the Maryland Act of 1854, c. 193, § 1, will debar the applicant from obtaining a release from his debts until he does comply with such requirements. *Teackle v. Crosby*, 14 Md. 14.

Pennsylvania. — A petitioner for relief under the Insolvent Act of April 4, 1798, must exhibit to the court a statement in writing of his losses and the means whereby he became insolvent. *Baker's Case*, 1 Binn. (Pa.) 462.

Property Assigned. — Where a petitioner for the benefit of the insolvent law has recently made a general assignment for the payment of his debts, he must set forth in some shape the property which passed by the assignment. *Woodward's Case*, 1 Ashm. (Pa.) 107.

Statement in Petition Instead of Schedule. — A summary statement of the insolvent's affairs and a list of his losses may be inserted in his petition instead of his schedule. *Wilson v. His Creditors*, 32 Cal. 406.

in their terms and effect that it is difficult to lay down any general rules of practice regarding the debtor's schedule, and the practitioner must, for the most part, be referred to the statutes and the cases collated in the notes.¹

1. Swearing to Schedule.—Under the *California* Insolvent Act of 1852, § 4, the schedule was required to be sworn to "before the judge having jurisdiction;" and where a schedule was sworn to before a notary public it was held that the court had no jurisdiction to decree a discharge. *Baker v. Everhart*, 65 Cal. 27.

Where a debtor applying for the benefit of the Insolvent Debtors' Act omitted to swear to his schedule when filed, it was held that he might, on good cause shown, be permitted to swear to it at the time of his discharge, *nunc pro tunc*. *Brevard v. Wylie*, 1 Rich. L. (S. Car.) 38.

Presenting Schedule in Former Case.—Where a debtor who has been arrested under *ca. sa.*, given bond for the prison rules, filed his schedule, and made application for the benefit of the Insolvent Debtors' Act, is arrested under another *ca. sa.* and gives bond for the prison rules, he need not file a schedule in the second case, but his schedule under the first bond answers for both, and there is no breach of the second bond. *Banks v. Ingram*, 10 Rich. L. (S. Car.) 28.

It is not necessary that the inventory given by a debtor on discharge from custody, together with his bonds, should be dated or sworn to at the time of his discharge; if he deliver an old inventory, made and sworn to upon a previous discharge from custody, it is sufficient. *Race v. Dehart*, 24 N. J. L. 38.

Amendment of Schedule.—Under the *Georgia* Act of 1823 a schedule filed by an insolvent debtor was amendable, provided he showed to the satisfaction of the court, by affidavit or otherwise, that the omission arose from ignorance, inadvertence, mistake, or from inability at the time to make it more perfect. He was required to amend *instantly*, however, and was not permitted, by doing so, to hinder or delay the creditor. *May v. Dawson*, 12 Ga. 118.

In the case of a proceeding under the Insolvent Debtors' Law, the court has authority to permit the schedule to be amended so as to make more certain

the description of the defendant's interest in matters there set forth, at any time before the oath is administered; and if the plaintiff is surprised it is ground for a continuance. *McLeod v. Kirkham*, 11 Ired. L. (N. Car.) 509.

Need Not State on What *Ca. Sa.* Given.—In *Kentucky* the schedule of property surrendered by an insolvent debtor need not state on what *ca. sa.* it was surrendered; it is sufficient if that and the magistrate's certificate be attached to the *ca. sa.* under which the surrender was made, and returned with it. *Sheriff v. Buckner*, 1 Litt. (Ky.) 127.

Under the *Georgia* Act of 1823 it was not necessary that the schedule should state that it was filed under *ca. sa.* issued at the instance of the plaintiff. *Rome v. Dickerson*, 13 Ga. 302.

California—Must Sign Schedule.—The insolvent must sign personally at the foot of the schedule. *Wilson v. His Creditors*, 32 Cal. 406.

Sufficient Signing.—Where an insolvent's schedule consisted of three lists annexed in order to his petition, one of liabilities, one of assets, one of losses, the latter of which lists was signed by him, it was held that this was a sufficient signing of the schedule to protect the proceedings from collateral attack. *Brewster v. Ludekins*, 19 Cal. 162.

On Petition by Creditors' Schedule Need Not Be Verified.—Under the *California* Insolvent Act of 1880, where a debtor has been adjudged insolvent on a petition by creditors, and, in pursuance of an order of the court, files an inventory and schedule, his creditors cannot resist his discharge on the ground that the inventory and schedule are not verified, verification in such case not being required by the statute. *In re Green*, 96 Cal. 162.

Kentucky—Schedule Returned to Clerk's Office.—In *Kentucky* it was held that the schedule of an insolvent debtor who has been taken on *ca. sa.* should be returned to the clerk's office from which the *ca. sa.* issued. *Sheriff v. Buckner*, 1 Litt. (Ky.) 127.

North Carolina—Filing Evidence of Debts.—It is sufficient to file the evi-

It is held in *New York* that where the judge decides that the insolvent has complied with the provision of the statute relative to the schedule the question as to any omission therein is no longer open.¹

2. Account of Creditors. — The statutes generally prescribe that the schedule shall state the names of the insolvent's creditors, if known.² However, it seems that the omission of the names of certain creditors from the schedule is not sufficient to invalidate the discharge, unless done with fraudulent intent.³

3. Creditors' Place of Residence. — The schedule should generally state the place of residence of each creditor, if known, though great particularity in this respect is not required.⁴

dence of the debts set out in the schedule, which are in the possession and control of the debtor, at any time before the oath is administered. *McLeod v. Kirkham*, 11 Ired. L. (N. Car.) 509.

1. *People v. Stryker*, 24 Barb. (N. Y.) 650.

2. Where Creditor Unknown. — In *California*, if the insolvent does not know the name of the owner of notes executed by him, he must state that fact in his schedule. *Judson v. Atwill*, 9 Cal. 477.

Substantial Compliance with Statute. — Where an insolvent's schedule did not contain the name of a creditor who was the assignee of a note imperfectly described in said schedule, nor state affirmatively therein that the insolvent was ignorant of such name, or that the owner of the note was unknown to him, but did state in the petition to which the said schedule was attached, that the schedule of his debts and liabilities annexed to his petition contained the names of his creditors "as near as he can now state them," it was held that this was a substantial compliance with the statute requiring the insolvent to set forth in his schedule the names of his creditors, if known. *Barrett v. Carney*, 33 Cal. 530.

Idem Sonans. — Where a creditor named "Charles Storrs" did not appear in the list of creditors, but the name "Charles Stores" did appear, it was held to be a case of *idem sonans*, and that this was a sufficient designation of the creditor. *People v. Sutherland*, 81 N. Y. 1.

Name Omitted by Advice of Counsel. — The debtor cannot excuse the omission of the creditor's name from his sworn schedules by showing that he omitted it under advice of counsel that he had a good defense to that debt; and in

such case, the objection to the granting of the discharge is not cured by the subsequent insertion of the name. *Starr v. Patterson*, 27 Abb. N. Cas. (N. Y. Supreme Ct.) 19.

3. *Williams v. Coggeshall*, 11 Cush. (Mass.) 442; *American Flask, etc., Co. v. Son*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 333; *Small v. Graves*, 7 Barb. (N. Y.) 577; *Hall v. Robbins*, 61 Barb. (N. Y.) 33; *Ayres v. Scribner*, 17 Wend. (N. Y.) 407; *Clinton v. Hart*, 1 Johns. (N. Y.) 375; *Lester v. Thompson*, 1 Johns. (N. Y.) 300. But see *Starr v. Patterson*, 27 Abb. N. Cas. (N. Y. Supreme Ct.) 19.

A discharge under the Insolvent Law of *Pennsylvania* was held valid though the petitioner failed to mention in the list of creditors returned to the court the name of the plaintiff at whose suit he was imprisoned, provided he gave the creditor the notice prescribed by the court. *Com. v. Cornman*, 4 S. & R. (Pa.) 2.

Omission Question for Jury. — A question as to whether a name in the list of creditors, variant from that of the plaintiff, was intended to designate him, or whether his name was omitted, and whether the omission was fraudulent, is properly submitted to the jury. *Soule v. Chase*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 48.

4. Residence of Creditor. — Under N. Y. Code Civ. Pro., § 2162, requiring the schedule filed with the debtor's petition to state the place of residence of each creditor, schedules containing the street numbers, but failing to state the city, town, or village of the creditors' place of residence, are fatally defective and give the court no jurisdiction to proceed. *Matter of Cohen*, 16 Daly (N. Y.) 69, 18 Civ. Pro. Rep. (N. Y.) 156.

4. Statement of Liabilities. — The schedule accompanying an insolvent's petition should contain a statement of his liabilities and describe the same.¹ However, there is no special reason for much exactness of detail in the enumeration of debts and losses,² and want of particularity is no ground for dismissing the proceedings.³

Cause and Consideration of Indebtedness. — The insolvent's schedule should specify the true cause and consideration of his indebtedness to each creditor.⁴

Failure to Designate State. — The schedule accompanying a debtor's petition in insolvency showed that some of the creditors resided at "Eureka" and others at "San Francisco." It was held that the better practice would be to indicate in the schedule the state as well as the locality within the state of each creditor's residence, but that judicial notice would be taken that both "Eureka" and "San Francisco" were incorporated cities in the state of California. *In re Choze*, 112 Cal. 630.

Failure to State Residence Will Not Avoid Discharge. — In *Massachusetts* it is held that a failure to state the residence of schedule creditors, if not done wilfully and fraudulently, will not of itself avoid a discharge. *Williams v. Coggeshall*, 11 Cush. (Mass.) 442.

1. Amount Due Each Creditor. — The schedule annexed to the insolvent's petition, naming his creditors, should state the amount owing to each creditor named therein, in order to confer a jurisdiction on the officer. Where the schedule was in blank as to the sum owing to one of the creditors named therein, it was held that the defect was jurisdictional, rendering the discharge void. *Stanton v. Ellis*, 12 N. Y. 575.

An Unintentional Misstatement of the amount due any creditor will not of itself avoid a discharge. *Small v. Graves*, 7 Barb. (N. Y.) 576; *Williams v. Coggeshall*, 11 Cush. (Mass.) 442.

Sufficient Statement of Losses. — Where the schedule of losses, after specifying certain bad debts, states that the petitioner "has lost large amounts of other bad debts, as well as by the depressed condition of business, high rates of interest, and heavy expenses, as mentioned in petition herewith filed," it was held that the schedule was not fatally defective as not giving a list of losses. *Brewster v. Ludekins*, 19 Cal. 162.

Schedule Presumed Correct. — It will be

presumed that a schedule presented by an insolvent states a just account of his debts and credits. *Hewlett v. Hewlett*, 4 Edw. Ch. (N. Y.) 7.

2. Wilson v. His Creditors, 32 Cal. 406.

Sufficient Description. — Where the description of an insolvent's debts is but imperfectly made in his schedule, but is sufficient to enable the creditor to indemnify his own judgments against the insolvent, it is a sufficient compliance with the statute to effect a discharge from such debts. *Barrett v. Carney*, 33 Cal. 530.

Mistake as to Nature of Debt Not Material. — Where an insolvent's schedule described a debt as a note of a certain tenor in suit in a certain court, when in fact the debt had passed into judgment a short time before the filing of the insolvent's petition, it was held that the variance was not fatal; that a mistake as to the condition of the insolvent's indebtedness — as whether reduced to judgment or not — is not material if the indebtedness be so described as to enable the holder readily to identify it. *Brewster v. Ludekins*, 19 Cal. 162.

Debts Not Described, or Imperfectly Described. — If the insolvent desires to be discharged from debts not described, or imperfectly described, in his schedule, he must so state in his petition. *Wilson v. His Creditors*, 32 Cal. 406.

3. Bennett v. His Creditors, 22 Cal. 38.

4. Slidell v. McCrea, 1 Wend. (N. Y.) 156; *McNair v. Gilbert*, 3 Wend. (N. Y.) 344.

Sufficient Statement of Cause and Consideration. — If the specification of the cause and consideration of the debts due and owing by an insolvent debtor, set forth in his inventory, pursuant to the Act of February 28, 1817 (Sess. 40, c. 55), fairly apprises the creditors of the general ground of indebtedness, so as to give them a clew to inquiry, it

5. Statement of Assets. — It is a general rule that the petitioner's schedule must contain a full and true account of all his property.¹

Summons to Garnishees. — In some jurisdictions, where the petitioner's schedule shows that debts are owing to him, the persons owing such debts may be summoned to appear before the court and answer on oath concerning such indebtedness.²

is sufficient. *Taylor v. Williams*, 20 Johns. (N. Y.) 21.

A judgment was rendered against a debtor for money loaned and an open account for beer sold and delivered. After the recovery of the judgment the debtor applied for a discharge in insolvency, and in the schedule of his debts accompanying the petition the debt of the plaintiff and the amount thereof were entered, and the cause and consideration thereof were stated as follows: "Notes and open account for money loaned and interest thereon." This was held to be a sufficient statement of the true cause and consideration of the indebtedness to confer jurisdiction, and to entitle the debtor to a perpetual stay of proceedings on the judgment. *Schaeffer v. Soule*, 23 Hun (N. Y.) 583.

Failure to State Consideration. — In *Massachusetts* it is held that a failure to state the consideration for scheduled debts, if not done wilfully and fraudulently, will not of itself avoid a discharge. *Williams v. Coggeshall*, 11 Cush. (Mass.) 442.

Matter for Judge's Determination. — Where it appears from the papers that the true cause and consideration of the alleged indebtedness of an insolvent debtor to the creditor are not set forth in the schedule annexed to the petition as the statute requires, this is a matter proper for the consideration and determination of the judge who hears the petition. *People v. Stryker*, 24 Barb. (N. Y.) 649.

1. Joint Property of Partnership. — Under the *California* Insolvent Act of 1852, where partners petitioned in their joint name for a discharge in insolvency it was held that a schedule attached to the petition showing the surrender of all the joint property of the partners was not a compliance with the act which required a surrender of all the property of the insolvent. *Meyer v. Kohlman*, 8 Cal. 44.

Omission of Notes and Securities. — Where, on application by a debtor for a discharge in insolvency, it appeared

that he held certain notes and securities which he had not stated in the account of his property, it was held that the application must be denied until he should make a proper statement. *Billing's Case*, 10 Abb. Pr. (N. Y. Supreme Ct.) 258.

Fraudulent Concealment. — Where an insolvent debtor omitted to insert in the inventory of debts due to him a claim on the United States for services during the war, for which claim he received a compensation after his discharge, it was held that the concealment was fraudulent, and his discharge void. *Duncan v. Dubois*, 3 Johns. Cas. (N. Y.) 125.

Omission from Mistake or Misapprehension. — Where the petitioner omits to return a debt due to him, from plain mistake or misapprehension, or an honest conviction that the worthlessness of the claim rendered its return useless, the mere fact of omission, under such circumstances, will not defeat the petition. *Oliver's Case*, 1 Ashm. (Pa.) 112.

Property Exempt from Execution. — A petition by a debtor for a discharge under the *Michigan* Comp. Laws, c. 168, which professes to set forth in the schedule only such property as is not exempt from execution, is erroneous. *Young v. Stephens*, 9 Mich. 500.

Georgia — Sufficient Statement. — If the creditors are so apprised by the schedule as to the nature of the assets as to be enabled to hunt them up, it is sufficient. *Rome v. Dickerson*, 13 Ga. 302.

A schedule with the oath of the insolvent debtor appended that he had no property or effects of any kind whatever, except as excepted in the oath prescribed by law for insolvent debtors, was held to be sufficient under the *Georgia* Act of 1823. *Lindsey v. Hunter*, 18 Ga. 50.

2. Sufficient Summons. — A summons of a garnishee named in an insolvent's schedule, requiring him to appear on a certain day before the court and answer on oath as to whether he is indebted as in the schedule alleged, is

VI. NOTICE — 1. To Creditors — a. NECESSITY FOR. — It is a general requisite of all insolvency acts, that the creditors of the applicant shall be in some way notified of the institution of the proceedings, so that they may be afforded an opportunity for opposing the discharge.¹

b. SUFFICIENCY OF NOTICE — (1) In General. — The requirements of the insolvency acts in the different states, regarding the notice to be given to creditors in insolvency proceedings, are so widely variant that no general rules of practice can be laid down in relation thereto, and the practitioner can only be referred to the statutes and the decided cases in the notes.² The notice

sufficiently certain. *Sheriff v. Buckner*, 1 Litt. (Ky.) 127.

To Answer Whom. — Where an insolvent claims in his schedule a debt due to himself, the summons against the debtor should not be to answer any particular creditor of the insolvent. *M'Coun v. Sheriff*, 1 A. K. Marsh. (Ky.) 362.

Issuable in Sheriff's Name. — Where an insolvent debtor files his schedule, summonses issued thereon to garnishees named in the schedule are properly issuable in the name of the sheriff of the county wherein the garnishees reside. *Sheriff v. Buckner*, 1 Litt. (Ky.) 127.

1. New York Code Civ. Pro., §§ 2164, 2165; California Insolvent Act of 1880, §§ 6, 7. And see the statutes of the different states. *Starr v. Scott*, 8 Conn. 480; *Ullman v. Lion*, 8 Minn. 381; *Jay v. Slack*, 4 N. J. L. 86; *In re Remington*, 3 Phila. (Pa.) 435; *Ex p. Cantey*, 11 Rich. L. (S. Car.) 520. See also *Cavan v. Dunlap*, Cheves L. (S. Car.) 241; *Matter of Sessions*, 6 R. I. 17.

In Stanton v. Ellis, 16 Barb. (N. Y.) 319, it was held that in proceedings by an insolvent debtor, in pursuance of the statute relating to "voluntary assignments made pursuant to the application of an insolvent and his creditors," a due publication of notice of the hearing and legal proof thereof was necessary to give the officer jurisdiction, and to authorize the granting of a discharge which should bar the claims of creditors.

Discharge Operates Only Against Notified Creditors. — Under the *North Carolina Insolvent Debtors' Law* of 1822, Rev. Stat., c. 58, § 10, the discharge of a debtor arrested on a *ca. sa.* at the instance of a creditor operated only against those creditors who had been duly notified under the provisions of

that act. *Williams v. Floyd*, 5 Ired. L. (N. Car.) 649.

Accidental Omission to Give Notice. — A debtor in insolvency proceedings will not lose his right to a discharge by an accidental omission to give the required notice to one or more creditors. *Hogan v. Hutton*, 20 N. J. L. 82; *Weeks v. Buderus*, 39 N. J. L. 448.

Fraudulent Omission, however, of any one or more of the creditors is fatal to the jurisdiction. *Berry v. Arthur*, 13 N. J. L. 308.

Continuance to Give Notice. — Where notice to creditors had not been published the case was continued until the next term, with leave to the petitioner to publish the notice required by the Pa. Act of April 5, 1855. *In re Remington*, 3 Phila. (Pa.) 435.

Objection Too Late. — After exceptions have been filed to the schedule of an insolvent debtor, and he has been put on his trial, the plaintiff has no right to object that legal notice has not been given that the defendant would apply for his discharge. *Rice v. Sims*, 3 Hill L. (S. Car.) 5.

Tennessee — Notice to Attorney-General. — Under the Tennessee Act of 1812, c. 25, § 4, where a defendant has been fined in a state cause and is ordered into custody until the fine and costs are paid, he is not entitled to take the oath of an insolvent debtor without giving ten days' notice to the attorney-general. *Rogers v. State*, 5 Yerg. (Tenn.) 368.

2. Georgia — Sufficient Notice. — Where notice was given by an insolvent debtor to his creditors that he would apply at the next term of the Superior Court for an order appointing a time to hear his application for a discharge, and at that term he moved to take the oath, and the creditor was present by counsel and made no com-

should, of course, be in compliance with the statute under which the applicant seeks relief, in order to confer jurisdiction on the court or officer.¹

plaint that he was surprised by the form of the notice, it was held that the notice was sufficient. *Taylor v. Hughes*, 27 Ga. 224.

Maine — *Sufficient Notice*. — Under the Maine Statute of 1878, c. 74, § 15, it is sufficient notice to the debtor if an attested copy of the creditors' application and the warrant of the judge are left at his last and usual place of abode. *In re Roberts*, 71 Me. 390.

Maryland — *Sufficient Notice*. — A knowledge that a party is negotiating or compromising with his creditors, accompanied by the actual information that he was generally considered insolvent in his neighborhood, is, in contemplation of the Maryland Act of 1834, c. 293, notice of insolvency. *Brooks v. Thomas*, 8 Md. 367.

Massachusetts — *Twenty-four Hours' Notice*. — A citation issued under Stat. 1844, c. 154, to a creditor, to attend the examination of a debtor arrested on mesne process at his suit, and desirous to take the poor debtors' oath, must be served on the creditor at least twenty-four hours before the time appointed for the examination, adding one hour for travel for each mile from the place of service to the place appointed for the examination. *Park v. Johnston*, 7 Cush. (Mass.) 265.

North Carolina — *Ten Days' Notice*. — When a person has been arrested on a *ca. sa.*, and given bond for his appearance at court to take the insolvent debtors' oath, and the case is continued till the next term of the court, a notice served on his creditors ten days before the term to which the case is continued is a sufficient notice under the act for the relief of insolvent debtors. *Watson v. Willis*, 2 Ired. L. (N. Car.) 17.

South Carolina — *Three Months' Notice*. — Under the South Carolina Insolvent Law three months' advertisement in a newspaper is sufficient notice to suing creditors generally of an application for the benefit of the act. *Cavan v. Dunlap*, Cheves L. (S. Car.) 241. See also *Ex p. Cantey*, 11 Rich. L. (S. Car.) 520.

Mistake in Date. — In *Briggs v. Hobson*, 3 Ala. 404, a notice published in a newspaper that the debtor would appear at a place designated "on Saturday, the 28th July next," and render

a schedule of his property as an insolvent debtor, when in fact the 28th of July was Friday, was held sufficient.

Error Corrected by Record. — Where the petition of an insolvent was indorsed, "Filed this twenty-sixth day of May, 1879," and the order for creditors to show cause was dated February 27, 1879, it was held that the error was of such a character that it might be corrected by the record, which showed unmistakably that the order was not made until after the petition was filed. *Smith v. His Creditors*, 59 Cal. 267.

1. Not Served in Prescribed Manner. — Where, in an action on a debt which the debtor claimed to be barred by his discharge in insolvency, it appeared from the record that notice had not been served on the creditors in the manner prescribed by statute, it was held that the court did not acquire jurisdiction, and could not allow the debtor to show that notice had in reality been properly served. *Billinge v. Pickert*, 39 Hun (N. Y.) 504.

An Unsigned Notice of an order made by a judge who was not the officer before whom the proceeding was pending, requiring the creditors to show cause, etc., is not a compliance with the statute, and the defect is not cured by the discharge. *People v. Gray*, 10 Abb. Pr. (N. Y. Supreme Ct.) 468.

Publication in Newspaper. — The fact that a petitioning debtor omitted to give personal notice of the proceedings to a creditor who impeaches the discharge does not invalidate the discharge where notice was duly published in a newspaper, which is all that the statute requires. *American Flask, etc., Co. v. Son*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 333.

Act of Legislature Need Not Be Designated. — In the published notice to creditors to show cause, the particular act of the legislature under which the applicant seeks relief need not be designated. *Soule v. Chase*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 48.

Failure to Name Street or Number. — The fact that notice to a creditor was directed to him without naming the street or number, does not render the notice insufficient if it appears that the debtor did not know the street or

(2) *Notice by Publication.*—Some of the statutes prescribe that the judge shall issue an order directing the creditors to show cause, which order shall be published for a certain period in a newspaper.¹ Where the statute directs that such notice shall be published for a certain number of successive weeks the publication must be made once in each week,² and the period between

number. *People v. Sutherland*, 81 N. Y. 1.

Errors Merely Clerical, and such as would not mislead or prejudice a creditor, in the notice and papers served on him under § 14, N. Y. Act of 1831, do not affect the jurisdiction of the judge to whom the petition is presented. *People v. Behrman, Hill & D. Supp.* (N. Y.) 81.

Creditor Residing Without the State.—Where creditors objected to an insolvent's discharge on the ground that notice had not been served on the creditor residing without the state, the court held that a person out of the state was to be considered, as to the purpose of a service under the Insolvents' Act, as not to be found. *In re Williams*, Col. & C. Cas. (N. Y.) 114.

California — Need Not Run in Name of State.—The notice to be given creditors, under the California Insolvent Act of 1852, on filing a petition in insolvency, is not *process*; and even if it were process, the fact that it does not run in the name of the people of the state of California is not a fatal error going to the jurisdiction. *Brewster v. Ludekins*, 19 Cal. 162.

1. California Insolvent Act of 1880, §§ 6, 7; New York Code Civ. Pro., §§ 25, 26; and see the statutes of other states.

California — Thirty Days' Publication.—Under the California Insolvent Act of 1852, as amended in 1860, the notice to creditors in insolvency proceedings was required to be published for the first time at least thirty days before the day fixed for the creditors to appear and show cause why the prayer of the alleged insolvent should not be granted; and if not so published a judgment of discharge rendered by default was void. *McDonald v. Katz*, 31 Cal. 167.

Sufficient Notice.—On the petition in insolvency by a debtor, the court made an order "that the clerk of this court make publication of this notice in the Union Advocate, a newspaper published in said county, for a meeting of the

creditors on the 29th day of November, 1862, at my office in Auburn, to contest said discharge as prayed for, and that said publication be made for at least thirty days preceding said date." It was held that this order complied substantially with section 5 of the California Insolvent Act of 1852, requiring the court to order a meeting of the creditors. *Langenour v. French*, 34 Cal. 92.

Judge Need Not Designate Paper.—Under the California Insolvent Act of 1852, where the order for the meeting of creditors directed notice to be published in the Woodland Democrat, and the notice was published in the Woodland Daily Democrat, it was held that the publication was sufficient, as the statute did not direct the judge to name the paper in which the notice was to be published. *Steele v. His Creditors*, 58 Cal. 244.

The Date of Publication of notice to creditors, under the California Insolvent Act of 1852, was the first day on which the notice was published. *Clarke v. Ray*, 6 Cal. 600.

Omission of "Junior" from Debtor's Name.—The Court of Common Pleas refused to discharge a petitioner for the benefit of the insolvent laws, because of the omission, in the advertisement of his application, of the word "Junior" after his name. It was held that there was no remedy for the petitioner but to make his application *de novo*. *Blanchard's Case*, 15 N. J. L. 478.

2. *Ullman v. Lion*, 8 Minn. 381, wherein it was held that where the notice required was to be given by publication in two designated newspapers once in each week for ten successive weeks, an affidavit of publication for ten weeks, without stating that it was once in each week, was insufficient.

Not More than Seven Days Apart.—Under the California Insolvent Act, requiring publication of notice "at least once a week for four successive weeks," it was held that the publications should be not more than seven days apart, and therefore where the publication began on October 31, 1878,

the first publication and the day set for hearing must extend over that number of full weeks.¹

c. **PROOF OF NOTICE.** — Due notice to creditors to show cause may be proved by affidavit,² and the affidavit of the proprietor of the newspaper in which the notice was printed is competent evidence for that purpose.³ It is held that proof of publication

and ended on December 5, 1878, it was insufficient. *Hernandez v. His Creditors*, 57 Cal. 333.

New York — *Duration of Individual Publication.* — Under 2 Birdseye's N. Y. Rev. Stat., p. 1584, ¶ 17, no length of time is prescribed for the duration of each individual publication of the notice. The statute only prescribes the number of publications, namely, ten publications, each of which is to be successively within one of ten successive weeks, and fixes no definite period of publication. *Soule v. Chase*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 48.

1. Anonymous, 1 Wend. (N. Y.) 90.

Sixty-eight Days Not Ten Weeks. — Where the statute requires the notice to creditors to be published for ten successive weeks, the period of publication must extend over ten full weeks; and where the time between the first publication and the day appointed to show cause was only sixty-eight days, it was held that the court acquired no jurisdiction. *People v. Gray*, 19 How. Pr. (N. Y. Supreme Ct.) 238, 10 Abb. Pr. (N. Y.) 468.

California — *Sufficient Publication.* — Under the California Statute of 1863, p. 750, amending the Insolvent Act of 1852, the county judge, on the filing of the insolvent petition, was required to order the clerk to issue notice calling the creditors to appear on a specified day, not less than thirty days from the first publication of the notice. Where the first publication was on December 7, 1878, and the return day on January 6, 1879, it was held that the order of the judge and the publication thereunder was a sufficient notice to the creditors. *Dean v. Grimes*, 72 Cal. 442.

Under the California Insolvent Act of 1852, p. 69, providing that the judge shall direct the clerk of the court to issue the notice calling the creditors of the insolvent to appear upon a specified day, not less than thirty days from the first publication of such notice, where the clerk issued the proper notice to the creditors to appear on the first day of December, and the first publication was made on November 1, it was held

to be sufficient. *Wilson v. His Creditors*, 55 Cal. 476.

2. Under the *California Insolvent Act of 1852*, proof of the publication of the notice to creditors in insolvency proceedings may be made by affidavit. *Schloss v. His Creditors*, 31 Cal. 201.

Affidavit Sworn before Wrong Officer. — Where the statute provides before whom affidavits of the publication of a notice for creditors to appear and show cause, when an application is made by the insolvent debtor for his discharge, shall be sworn to, an affidavit sworn before an officer not mentioned in the statute is of no force or validity. *Stanton v. Ellis*, 16 Barb. (N. Y.) 319.

Affidavit of Service by Mail. — An affidavit presented in insolvency proceedings as proof of notice to creditors averred that the printed notice was served "on each of the following named persons, on the days and in the manner next herein specified;" then followed a list of names of persons under the heading, "Names of creditors," and in a column parallel with the list, and on the same line with each name, a statement of the city or town of residence. After the list was the averment: "By depositing, 1860, April 9th, in the post-office, in the city of Brooklyn, a letter envelope directed to each of the foregoing creditors at the place of residence hereinbefore designated, and in each envelope was a printed notice, of which the following is a true copy, and on each envelope so directed was placed a post-office stamp to pay the legal postage of each letter to its place of destination." It was held that these averments were sufficient to show due service by mail. *People v. Sutherland*, 81 N. Y. 1.

3. *Barrett v. Carney*, 33 Cal. 530.

Proof Not Limited to Printer's Affidavit. — Proof of publication of notice to creditors to show cause is not limited by statute to an affidavit of the printer, or the clerk or foreman of the printer, although it enables the insolvent to perpetuate the evidence by taking their affidavit. *Soule v. Chase*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 48.

is not a jurisdictional fact.¹ In *Massachusetts* service of notice may be proved by the officer's return.²

2. Notice to Debtor. — Where proceedings are instituted against a debtor to have him adjudged insolvent, notice thereof must be served upon him in the manner prescribed by statute.³

Proceedings Against Partnership. — On the institution of proceedings to adjudge a partnership insolvent, all the partners are entitled to notice.⁴

1. *Soule v. Chase*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 48, wherein it is held that where a discharge recites due publication, and that due proof thereof was presented, defects in the notice, in its publication, or in the proof thereof on file will not render the discharge void.

Proof of Publication Not Part of Record. — On appeal from a judgment in favor of an assignee in involuntary insolvency, the recitals of an order appointing an assignee in insolvency are sufficient proof of the publication of the notice to creditors, there being no provision of the *California* Insolvent Act of 1880 making the proof of publication a part of the record. *Ohleyer v. Bunce*, 65 Cal. 544.

2. *Smith v. Randall*, 1 Allen (Mass.) 456, wherein it is held that an officer's return which sets forth a service of a notice to a creditor of a debtor's application to take the poor debtor's oath, at a magistrate's office, by leaving a copy thereof at the creditor's last and usual place of abode known to the officer, on the day of the examination and "before" one hour previous to the time appointed therefor, without stating how long before, is sufficient, under Mass. Stat. 1857, c. 141, § 4, to give the magistrate jurisdiction to administer the oath.

Insufficient Proof. — An officer's return stating that a citation to attend at the examination of a debtor was served on the creditor on a certain day, without specifying the hour, when in fact the notice was sufficient if served before, but not if served after, a certain hour on that day, is not sufficient evidence that the citation was duly served. *Park v. Johnston*, 7 Cush. (Mass.) 265.

3. *Whyte v. Betts Mach. Co.*, 61 Md. 172; *Buck v. Sayles*, 9 Met. (Mass.) 459; *Thompson v. Snow*, 4 Cush. (Mass.) 121; *Com. v. Martin*, 130 Mass. 465.

Formerly, in Massachusetts, notice to the debtor was not requisite. *Kimball*

v. Morris, 2 Met. (Mass.) 573; *Wheelock v. Hastings*, 4 Met. (Mass.) 504.

Actual Knowledge Not Sufficient. — The *Massachusetts* General Statutes, c. 118, § 104, provide that on a petition by a creditor there shall be "notice of the petition given to the debtor by a copy thereof served upon him personally, or left at his last and usual place of abode." Where the debtor has not been served in such a manner, actual knowledge of the filing of the petition in insolvency against him is not sufficient to support an indictment against him, on section 106, for secreting a portion of his estate after "notice" of filing. *Com. v. Martin*, 130 Mass. 465.

Debtor Appearing Without Required Notice. — Where, after an order of adjudication made without the required statutory notice to the debtor, he appeared to the proceedings, it was held on appeal that while the court would reverse the order of adjudication, it would remand the case in order that the debtor might have an opportunity to show cause against the adjudication prayed for, and to have the benefit of trial as provided for by statute. *Whyte v. Betts Mach. Co.*, 61 Md. 172.

4. Where a warrant in insolvency is issued against partners on the petition of a creditor, without previous notice to them, a formal waiver of notice, filed by one of the partners with the commissioner, does not make the proceedings good as against his copartner. *Thompson v. Snow*, 4 Cush. (Mass.) 121.

Petition by Member of Firm. — Under the *Maine* Rev. Stat., c. 70, § 57, providing that on the petition in insolvency by one partner, notice shall be served on the remaining partners, it was held that where one of two members of a partnership, by the direction of the other, filed a petition signed in the name of the firm, official notice to the latter was not necessary. *Engel v. Bailey*, 82 Me. 118.

Before the issuing of a warrant in

VII. BOND BY DEBTOR. — Where a debtor gives a bond to apply for a discharge in insolvency he is bound to keep in motion the proceedings which are to result in the discharge, and if he fails to do so the condition of the bond is forfeited.¹ If the debtor fails to file his petition at the specified time the court cannot grant relief against the forfeiture of the bond.²

VIII. EXAMINATION — 1. Of Insolvent. — There is generally a provision in the insolvency statutes allowing creditors to examine the insolvent debtor on oath concerning his assets and liabilities.³

insolvency against a partnership on the petition of one partner, notice to the other partners, though not prescribed by law, may be required by the commissioner in his discretion, and any partner not so notified may apply to the Supreme Court, under Stat. 1838, c. 163, § 18, to suspend and vacate the proceedings, on showing that the partnership is not insolvent, and that there was no foundation for the allegation of insolvency on which the proceedings were instituted. *Thompson v. Thompson*, 4 Cush. (Mass.) 127.

1. *Bartholomew v. Bartholomew*, 50 Pa. St. 194; *Com. v. Grimes*, 116 Pa. St. 450; *McDonough's Case*, 37 Pa. St. 275.

In *Haviland v. Hayward*, 35 Pa. St. 459, it was held that a bond given under the Pa. Act of July 12, 1842, § 11, is forfeited by the omission to apply by petition for the benefit of the insolvent laws within thirty days from the date thereof; it is not enough that the application be made at the next term of the Court of Common Pleas.

Sufficient Compliance. — Where a petitioning debtor came into court after the hour of adjournment on the day fixed for the hearing of the petition, and finding the court adjourned immediately surrendered himself to the keeper of the county prison, it was held that the condition of the bond was complied with, and there could be no recovery thereon against the surety. *Greenwaldt v. Kraus*, 148 Pa. St. 517.

Any Objection to a Bond given by an insolvent debtor arrested under a *ca. sa.* must be made at the court to which the bond is returnable, and before judgment is rendered upon it. *Watts v. Boyle*, 4 Ired. L. (N. Car.) 331.

2. No Power to Relieve Surety. — Where the bond has become forfeited by the failure on the part of the debtor to file his petition in time to be heard at the general period fixed for the term, the court has no power to relieve the

surety by allowing the petition to be filed and heard at a later day. *Claxton's Case*, 1 Ashm. (Pa.) 102.

Execution Against Debtor. — Where a bond is forfeited by the failure on the part of the debtor to file his petition in time to be heard at the general period fixed for the term, execution may be issued against him the moment it can be legally ascertained that he has not complied with the terms of the law. *Simmons v. Hoopes*, 1 Ashm. (Pa.) 35.

Will Not Hear Objection to Judgment. — If, upon a *ca. sa.* from a justice of the peace, returnable to the County Court instead of being returnable before a justice out of court within three months, the person arrested gives bond to appear at the County Court to take the benefit of the Insolvent Debtors' Law, and he fails to appear at the time appointed, and the court renders judgment against him and his sureties, it cannot hear any objection, even at the same term of the County Court, against such judgment. *Dobbin v. Gaster*, 4 Ired. L. (N. Car.) 71.

3. On Application of Receiver. — In *California*, the Superior Court has jurisdiction to make an order requiring a debtor to appear and be examined touching the affairs of his estate, upon the application of a receiver. *Goodday v. Superior Ct.*, 65 Cal. 580.

Examination at Any Time Before Discharge. — Under *Massachusetts* Stat. 1838, c. 163, § 23, a judge of probate may issue a warrant to arrest and imprison a debtor for refusing to obey his order that the debtor appear at a third meeting of his creditors, and produce a schedule of his debts, and submit to an examination on oath concerning his estate. It seems that the judge may, at any time before granting the debtor a certificate of discharge, require him to submit to an examination on oath. *Kimball v. Morris*, 2 Met. (Mass.) 573.

Supplementary Proceedings — After Discharge. — An order to a discharged in-

2. Of Persons Charged with Concealing Property. — Under some statutes, one who is duly charged with having fraudulently received and concealed property belonging to the estate of an insolvent debtor may be examined on oath touching the same and required to disclose all such matters as may not tend to criminate him.¹

IX. OPPOSING DEBTOR'S DISCHARGE — 1. In General. — When a debtor applies to be discharged from his debts, his creditors may appear in the proceedings and oppose the discharge.² It is held

solvent to appear for examination in supplementary proceedings, founded upon a judgment barred by the discharge, will not, on motion of the insolvent, be vacated. *Smith v. Paul*, 20 How. Pr. (N. Y. Supreme Ct.) 97.

Refusal of Officer to Examine. — The refusal of a commissioner of insolvency to permit a creditor to examine an insolvent debtor will not avoid a discharge. The remedy, if any, is by an application to the Supreme Court under Mass. Stat. 1838, c. 163, § 18. *Blanchard v. Young*, 11 Cush. (Mass.) 341.

An Oath Administered to a Petitioner that he shall make true answers to all such questions touching his application for a discharge in the matter pending as shall be put to him, is sufficient in form. *People v. Behrman*, Hill & D. Supp. (N. Y.) 81.

Charges Made in Terms of Statute. — In a petition under the *Minnesota Insolvent Law*, § 10, as amended by the Laws of 1889, c. 30, § 7, asking an order that the insolvent remain within the jurisdiction of the court, and appear for examination, the charges may be made in the general terms of the statute as found in said amended section. *Matter of Harrison*, 46 Minn. 331.

Extent of Examination. — Where insolvent debtors produced at the meeting of the creditors the affidavit required by *Maine Rev. Stat.*, c. 70, § 62, and at the same time produced an agreement signed by a majority of their creditors, as required by said section, and the affidavit and agreement were duly filed in the court of insolvency, it was held that creditors who were not parties to the agreement could not afterwards examine the debtors generally upon all matters relating to their insolvency, but that the debtors could be examined only as to whether the required proportion of creditors had signed the agreement, and whether the agreed percentage had been paid or

secured to the creditors. *Messer v. Storer*, 79 Me. 512.

All Legal and Pertinent Interrogatories. — Opposing creditors or their counsel may propound interrogatories to the debtor in respect of his giving an inventory to the officer who arrested him; and it is the duty of the court to allow all interrogatories that are legal and pertinent. *Bond v. Cox*, 30 N. J. L. 381.

1. Sawin v. Martin, 11 Allen (Mass.) 439.

Wife of Insolvent. — If the wife of an insolvent debtor is duly charged with having fraudulently concealed property which belonged to her husband previous to his insolvency, it is the duty of the judge of insolvency, under Mass. Gen. Stat., c. 118, § 107, to examine her on oath touching the same. *Church v. Choate*, 9 Allen (Mass.) 573.

2. Any Creditor May Oppose. — Under the *California Insolvent Act* of 1852, any creditor of an insolvent debtor had a right to be made a party to the proceedings for the purpose of opposing a discharge or obtaining his proportion of the estate, whether he was named in the assignment or not. *Lambert v. Slade*, 4 Cal. 337.

Need Not Be Judgment Creditor. — Under the *California Insolvent Act* of 1852, a creditor was not required to be a judgment creditor in order to oppose the discharge of the insolvent. *Davenport v. His Creditors*, 62 Cal. 29.

Assignee, as Schedule Creditor, May Oppose. — Under the *California Insolvent Act* of 1852, on a petition for discharge by an insolvent debtor, the assignee, being a schedule creditor, might, like any other creditor, oppose the insolvent's discharge on the ground of fraud. *Hinkel v. His Creditors*, 63 Cal. 328.

In Illinois Any Person Interested may appear and object to the discharge of a debtor or to his right to schedule. *Kitson v. Farwell*, 132 Ill. 327.

that the opposing creditor must state, in his specification of the grounds of his opposition, facts which if denied will raise material issues, and if admitted or established will constitute valid grounds of opposition to the discharge.¹

Vacating Proceedings. — In *Massachusetts* the Supreme Judicial Court is given a supervisory jurisdiction over insolvency cases, and will, for sufficient cause, vacate proceedings for a discharge.²

California — Debtor's Answer Must Be Verified. — Where insolvency proceedings were commenced under the California Insolvent Act of 1852, which did not require the answer of a petitioner to the opposition of a creditor to be verified, but prior to the filing of the answer the legislature had passed the Insolvent Act of 1880, which requires verification of the pleadings, it was held that the Act of 1880 governed pleadings filed after its passage, and therefore the answer must be verified. *Struven v. His Creditors*, 62 Cal. 45.

Proceedings Not Removed under Suggestion. — Where a creditor opposes the discharge of a debtor in insolvency, the proceedings cannot be removed, under a suggestion, to an adjoining county. *Michael v. Schroeder*, 4 Har. & J. (Md.) 227; *Trayhern v. Hamill*, 53 Md. 91.

Failure to File Specifications. — Where, upon the appearance of an insolvent at the County Court, a suggestion of fraud was made, but no specifications were filed in that court, it was held that the case was not in a state to be carried to the Superior Court by appeal, certiorari, or otherwise. *McLaughlin v. McLaughlin*, 2 Jones L. (N. Car.) 319.

1. *Dyer v. Bradley*, 89 Cal. 557; *Dyer v. Martin*, (Cal. 1891) 26 Pac. Rep. 1105.

Charge of Fraud. — If, in the opinion of the creditors, the schedule of the insolvent is defective, they should reach the defect by making a charge of fraud, and on the trial examine the insolvent on oath, and in that way, not by demurrer, elicit information as to his affairs. *Wilson v. His Creditors*, 32 Cal. 406.

Allegation Amounting to Charge of Fraud. — An allegation in an opposition to an insolvent's discharge that he has collected debts due him since he filed his petition, and has failed to account for the money and pay it over to his assignee, amounts to a charge of fraud. The allegation ought to state from whom the money was received; but if not objected to on that ground,

the objection is waived. *Grow v. His Creditors*, 31 Cal. 328.

No Assignee Appointed. — On opposition by creditors to the discharge of an insolvent on the ground that no assignee had been appointed, it was held that the appointment of an assignee rested with the court and creditors, and the creditors having failed to appear at the time fixed for the appointment of an assignee, the discharge of the insolvent could not be denied on that ground. *In re Harris*, 81 Cal. 350.

2. Mass. Pub. Stat., c. 157, § 15; *Gross v. Potter*, 15 Gray (Mass.) 556; *Lee v. Wells*, 15 Gray (Mass.) 459; *Cheshire Iron Works v. Gay*, 3 Gray (Mass.) 531; *Hanson v. Paige*, 3 Gray (Mass.) 239.

As to the jurisdiction of this court in insolvency cases, see *supra*, II. 2. *b. Supervisory Jurisdiction in Supreme Court.*

Decree Conclusive on Subsequent Application. — A decree of the Supreme Judicial Court in equity, affirming the validity of the proceedings in insolvency upon a petition of the debtor to set them aside, is conclusive against any subsequent application by a creditor to set aside the proceedings on the same and other grounds, even if this creditor had no notice of the first petition to the Supreme Court. *Merriam v. Sewall*, 8 Gray (Mass.) 316.

Lack of Jurisdiction. — Proceedings in insolvency commenced before a judge who has no jurisdiction will be set aside on a bill in equity filed under the Stat. of 1838, c. 163, § 18, more than a year after. *Grafton Bank v. Bickford*, 13 Gray (Mass.) 564.

Record Need Not Be Annexed. — To a bill in equity to set aside proceedings in insolvency there need not be annexed a copy of the record of the proceedings. *Cheshire Iron Works v. Gay*, 3 Gray (Mass.) 531.

A Judge of a Court of Insolvency Is Not a Proper Party defendant to a bill in equity in the Supreme Court to vacate

2. Time of Entering Opposition. — The time for entering opposition to a debtor's discharge is regulated by statutes in the various states.¹

3. Waiver of Opposition. — If creditors who have been notified of the proceedings fail to oppose the discharge at the proper time, they thereby waive their objections except as to matters which the statute declares shall avoid the discharge.²

4. Issues of Fraud — *a.* **JURY TRIAL.** — Where creditors, opposing a debtor's discharge in insolvency, allege fraud on the part of the debtor, issue taken thereon by the debtor raises a question of fact which should be submitted to a jury.³

proceedings in insolvency. *Winchester v. Thayer*, 129 Mass. 129.

1. An application for a discharge in insolvency is a special proceeding in the nature of an action. The petition, schedule, and affidavit are the pleadings on the part of the petitioner, who is the plaintiff; and if they are sufficient to entitle him to a discharge, any irregularity or defect in form must be taken advantage of before judgment, by his creditors, who are defendants in the proceeding. *Kohlman v. Wright*, 6 Cal. 230.

Under the *Georgia* Act of 1823, when an insolvent debtor filed his schedule at the first term of the court after his arrest, the creditor who desired to traverse the schedule so filed, and to suggest fraud or concealment of any property not embraced in said schedule, was required to do so at the first term of the court after his arrest, and was not allowed to do so at any subsequent term thereafter, unless for sufficient and good cause shown to the court. *Coleman v. Dickerson*, 10 Ga. 551.

Under the *Maine* Rev. Stat., c. 70, § 44, the appearance of the opposing creditor must be entered on the day appointed for the hearing, and where a creditor enters his appearance and files objections on a subsequent day, the objections should be dismissed as irregular. *Dow v. Young*, (Me. 1887) 9 Atl. Rep. 893.

Under *Massachusetts* Stat. 1844, c. 178, § 4, the dissent of a majority in value of the creditors of an insolvent debtor, who have proved their claims, must be filed within six months after the assignment in order to defeat his discharge. *Crocker v. Stone*, 7 Cush. (Mass.) 341.

2. *People v. Stryker*, 24 Barb. (N. Y.)

650; *Matter of Bradstreet*, 13 Johns. (N. Y.) 385.

Stay of Execution. — Where a judgment creditor appeared to oppose an insolvent's discharge, and after examining the defendant and hearing his explanations withdrew, without making any further opposition, but afterwards took out execution on his judgment, it was held that on motion of the insolvent the court would order a perpetual stay of execution against the plaintiff. *Field v. Howland*, 17 Johns. (N. Y.) 85.

3. *Davenport v. His Creditors*, 62 Cal. 29; *Purvis v. Robinson*, 4 Jones L. (N. Car.) 96; *In re Mabbett*, 73 Wis. 351. And see *Adams v. Beaman*, 3 Jones L. (N. Car.) 140.

Joining All Creditors in One Issue. — Where a debtor is arrested under different *ca. sa.*'s, at the instance of several creditors, he has a right, under the *North Carolina* Act of 1836, Rev. Stat., c. 58, § 20, if he applies for his discharge as an insolvent debtor and fraud is suggested in answer to his application, to require that all the creditors he may notify shall join in the trial of one issue, and the court will so direct. But this is for the case of the debtor, and he may waive the privilege of joining issue with each creditor, and then a verdict in his favor in one case will not discharge him from responsibility in the case of another creditor. *Williams v. Floyd*, 5 Ired. L. (N. Car.) 649.

Fraudulent Transfer. — Where, to a schedule filed by an insolvent debtor, a creditor alleged in his specifications that two notes had been fraudulently transferred to secure a feigned debt, and the jury found these allegations to be true, whereupon the debtor filed a new schedule, admitting that the debt secured was feigned, but to acquit himself of the fraud alleged that the

Objection to Ca. Sa. — After the debtor has joined in the issue tendered by the plaintiff upon a suggestion of fraud, it is too late for him to object to the writ of *ca. sa.* under which he was arrested.¹

The Burden of Proving the Charges is on the opposing creditors.²

b. INSOLVENT'S DEFENSE. — The insolvent may demur to a charge of fraud, or he may plead guilty or not guilty.³

5. Withdrawing Opposition. — It seems that an opposing creditor may withdraw his opposition at pleasure, without the consent of the other creditors.⁴

X. DISCHARGE — 1. When Granted. — Before the court can discharge an insolvent debtor from his debts he must comply with the requirements of the statute under which he seeks relief.⁵

trustee had run away with the funds and he surrendered all his claim upon the trustee, it was held that the creditor was entitled to make suggestions of fraud, and to have an issue as to all the matters set out in the new schedule concerning the fraudulent transfer of these notes. *Farrar v. Redwine*, 6 Jones L. (N. Car.) 143.

1. *Nixon v. Nunnery*, 9 Ired. L. (N. Car.) 28; *Freeman v. Lisk*, 8 Ired. L. (N. Car.) 211.

2. The statement exhibited under oath by a petitioner for the benefit of the insolvent laws is taken to be *prima facie* correct; and the burden of proving it to be erroneous lies upon the opposing creditors, who can show it from the examination of the petitioner himself, by other evidence, or in both modes, they having the right to examine the petitioner in the first instance, and then to exhibit other testimony to contradict him. *Hassinger's Case*, 2 Ashm. (Pa.) 287.

Showing Lack of Jurisdiction. — In a proceeding for a discharge in insolvency, although enough may be made out to show a *prima facie* case of jurisdiction in the first instance, yet if the party opposing the application, at the proper stage of the proceedings, shows that the supposed jurisdiction is founded upon a misstatement or misapprehension of the facts, the judge or officer should dismiss the application and proceed no further in the case. *Matter of Wrigley*, 8 Wend. (N. Y.) 134.

3. *Wilson v. His Creditors*, 32 Cal. 406.

Objection Equivalent to Demurrer. — Where a creditor opposes the discharge of an insolvent upon the ground of fraud, an objection by the insolvent that the matters charged as fraud in the

creditor's written opposition do not amount to fraud is equivalent to a demurrer, and will be overruled if any of the charges are sufficient. *Grow v. His Creditors*, 31 Cal. 328.

Right to Call for Affidavits. — Before requiring a defendant who applies for his discharge under the Insolvent Debtors' Act to join in an issue to try the fairness of his schedule, there ought to be some showing by affidavits; but if the plaintiff, without affidavit, makes the charge by suggestion, and the defendant pleads, he waives his right to call for affidavits; he admits by his plea that there is something to be tried by a jury. *Baker v. Bushnell*, 1 McMull. L. (S. Car.) 66.

4. *Brangon v. His Creditors*, 64 Cal. 394.

In *Massachusetts*, however, a dissent to the discharge of an insolvent debtor, filed by one of his creditors within six months after the assignment, pursuant to Stat. 1844, c. 178, § 4, cannot be withdrawn by the creditor without the judicial consent of the master in chancery, obtained upon the creditor's written application, after notice to other creditors interested. *Beverly Bank v. Wilkinson*, 2 Gray (Mass.) 519.

5. New York — Delivery of Property to Assignee. — Before an order can be made discharging an insolvent debtor from arrest, evidence must be given that he has actually delivered to the assignee the property directed to be assigned. *Borthwick v. Howe*, 27 Hun (N. Y.) 505; *Kennedy v. Boggs*, 5 Har. & J. (Md.) 403.

Massachusetts — Taking Oath at Second Meeting of Creditors. — A discharge of an insolvent debtor under Stat. 1838, c. 163, is invalid if the debtor does not, at the second meeting of his creditors,

Mandamus to Compel Discharge. — It has been held that where justices refused to grant an insolvent's application for a discharge, mandamus would lie to compel them.¹

2. Effect of Discharge — a. IN GENERAL. — A final discharge in insolvency releases the debtor from all such debts as are contemplated by the statute,² and if further proceedings are brought against him on such debts, he may plead his discharge as a defense thereto.³ On motion, the court will grant a perpetual stay of execution on a judgment barred by the discharge.⁴

b. AS EVIDENCE. — It is held that the recitals of a discharge are conclusive evidence of all the facts recited therein except the jurisdictional facts.⁵ Of the latter facts they are only *prima facie* evidence.⁶

take and subscribe the oath required by section 7 of that statute. *Cox v. Austin*, 11 Cush. (Mass.) 32.

Third Meeting Within Six Months of Assignment. — No discharge in insolvency is valid, even as against a creditor who proves his claim and is himself the assignee, unless the third meeting of the creditors is held within six months from the time of the assignee's appointment. *Crocker v. Stone*, 7 Cush. (Mass.) 341.

Under Mass. Stat. 1848, c. 304, § 9, it was held that a discharge might be granted within less than six months from the date of the assignment. *Williams v. Coggeshall*, 11 Cush. (Mass.) 443.

California. — *Discharge by Judgment of Court.* — Under the California Insolvent Act of 1852, an insolvent's discharge must be by the judgment of the court, and in the same county in which the proceeding was instituted. *Turner v. McIlhany*, 6 Cal. 287.

1. Harrison v. Emmerson 2 Leigh (Va.) 764. But see *State v. Passaic C. P.*, 38 N. J. L. 182, wherein it is held that mandamus will not be allowed to require the Court of Common Pleas to discharge an insolvent debtor because a dissatisfied creditor fails to pay the weekly sum for his support. The proper remedy to review an order refusing the discharge is a writ of certiorari. See also *Blanchard's Case*, 15 N. J. L. 478.

2. As to what debts are barred by the discharge, see Am. and Eng. Encyc. of Law, title *Insolvency*.

3. See infra, XII. Discharge as a Defense.

4. Parkinson v. Scoville, 19 Wend. (N. Y.) 150; *Baker v. Taylor*, 1 Cow.

(N. Y.) 165; *Baker v. Ulster C. P.*, 4 Johns. (N. Y.) 191.

Notice to Owner of Judgment. — After a discharge in insolvency, the insolvent cannot have a judgment against him canceled and discharged without notice to the owner of said judgment, and an order canceling the judgment on such motion will be vacated on motion of the owner of the judgment. *Wheeler v. Emmeluth*, 121 N. Y. 241.

Discharge from Arrest. — Where a discharged insolvent is arrested on *ca. sa.* on a judgment barred by the discharge, his remedy is to apply to the court from which the process issues to be discharged from arrest. *Dorr v. McClintock*, 2 Miles (Pa.) 190; *State v. Walsh*, 2 Gill & J. (Md.) 406.

New York — Failure to File Petition. — The New York Laws of 1866, p. 235, c. 116, provide that within three months after the granting of a discharge in insolvency the petitions on which the discharge is granted must be filed and recorded, or the discharge shall be inoperative until they are duly filed and recorded. Under this Act a failure to file the papers within three months leaves the discharge inoperative until they are filed, and a levy made meanwhile is valid and is not affected by the subsequent filing of the petition; but if subsequently filed, the discharge is made operative from the time of filing upon debts which were due at or before the granting of a discharge. *Barnes v. Gill*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 169.

5. Stanton v. Ellis, 12 N. Y. 575.

6. Morrow v. Freeman, 61 N. Y. 515; *Hale v. Sweet*, 40 N. Y. 97; *Stanton v. Ellis*, 12 N. Y. 575.

Need Not Produce Record. — Where the

XI. IMPEACHING DISCHARGE — 1. In General. — It is a general rule, that after a debtor has been discharged in insolvency, a creditor may, for sufficient reason, attack and set aside the discharge.¹ The attacking creditor should use reasonable diligence in impeaching the discharge.²

discharge recites all the facts necessary to confer jurisdiction, it is not necessary to produce the record in evidence. *O'Connell v. Sutherland*, 16 Abb. Pr. (N. Y. Super. Ct.) 460, note; *Barber v. Winslow*, 12 Wend. (N. Y.) 102; *Jenks v. Stebbins*, 11 Johns. (N. Y.) 224.

Not Evidence of Oath. — The recital in the certificate of discharge that the debtor has "in all things conformed himself to the directions" of the insolvent law is not *prima facie* evidence that he made and subscribed the oath required of him by that law. *Cox v. Austin*, 11 Cush. (Mass.) 32.

Fiduciary Debts. — A certificate of a discharge under the insolvent laws of this commonwealth need not contain a statement of an exemption of the fiduciary debts of the debtor under Mass. Stat. 1844, c. 178, § 3, if no such debts existed. *Williams v. Coggeshall*, 11 Cush. (Mass.) 442.

Proof of Notice. — Where an insolvent's discharge stated that "the said insolvent has conformed in all things to those matters required of him by the said statute," it was held sufficient in form without setting forth that due proof was furnished of the notice having been given personally or by mail, twenty or forty days before the day of showing cause, etc. *Pratt v. Chase*, 19 Abb. Pr. (N. Y. Supreme Ct.) 150.

1. One Who Is Not a Creditor of the insolvent and has no interest which has been or can be affected by his discharge cannot sue out a certiorari for the purpose of having the discharge vacated. *People v. Stryker*, 24 Barb. (N. Y.) 650.

Without Joining Other Creditors. — One creditor may prosecute a certiorari to review and set aside an insolvent's discharge, without naming the other creditors in the writ as plaintiffs in certiorari. *Browning v. Cooper*, 18 N. J. L. 196.

After Opposing Discharge. — Although a creditor appears in insolvency proceedings and opposes the discharge of the debtor, this fact will not preclude him from afterwards objecting to the validity of the discharge on the ground of want of jurisdiction in the officer to

grant it. *Small v. Wheaton*, 4 E. D. Smith (N. Y.) 306.

Cannot Claim Share in Funds. — Creditors of an insolvent will not be permitted to come into court and claim a share in the funds arising from the sale of the insolvent's property, and, at the same time, impeach the adjudication by which he was adjudged insolvent. *Gottschalk v. Smith*, 74 Md. 560.

Defect Cured by Discharge. — The fact that the petitioning creditors do not represent two-thirds of the aggregate of the insolvent's debts is sufficient to prevent his being discharged; but after a discharge has been granted it cannot be avoided for that mere fact, if there was no actual fraudulent act or intent of the insolvent originating that defect in the proceedings. *Emberson's Case*, 16 Abb. Pr. (N. Y. Super. Ct.) 457.

In *Wheeler v. Emmeluth*, 58 Hun (N. Y.) 369, the court said: "Not every omission or error will make insolvent proceedings void. If honestly prosecuted, the inclination and duty of the court will be to disregard errors that have not caused injury."

A Court of Equity Has No Jurisdiction to set aside an adjudication in insolvency or dismiss such a proceeding upon allegations of fraud therein. If the debtor has no right to apply for a discharge from the claims of his creditors, they will have an opportunity of showing them and preventing his discharge in the insolvency proceedings. *Pehrson v. Hewitt*, 79 Cal. 594.

Compliance with Statute Question for Court. — Whether one claiming a discharge under an insolvent act has strictly complied with its provisions, is a question of law for the court, and not one of fact for the jury. *Schloss v. His Creditors*, 31 Cal. 201.

2. Delaying Too Long. — Where creditors have manifested no interest in the insolvency proceedings, and have expressed themselves as expecting an adjustment of matters outside of court, an erroneous decree in insolvency will not be corrected at their instance when they have delayed some months, during which the decree has been acted upon, money disbursed, and other interests,

2. How Impeached — *a. DIRECT PROCEEDINGS* — (1) *Petition to Annul.* — In *Maryland* it is provided that a creditor may, within two years after the insolvent's discharge, file allegations of fraud and have issues made thereon and tried by a jury; and such issues being found against the insolvent, his discharge shall be rescinded.¹

(2) *Certiorari.* — Objections to a discharge in insolvency which are formal in their nature, and not relating to the jurisdiction, should be taken advantage of by certiorari to the discharging court.² Such objections cannot be raised in collateral proceedings.³

b. COLLATERAL ATTACK — (1) *In Action* — **Jurisdictional Defects** — The recitals of a discharge in insolvency are not conclusive proof of the facts necessary to confer jurisdiction on the court, and, where a defendant pleads his discharge in bar of an action,

including those of attached creditors, have intervened. *Clafin v. Lowe*, 157 Mass. 252.

Delay Caused by Debtor. — Where, after an application by an insolvent for discharge, a stipulation was entered into to take the matter off of the calendar, to be reinstated upon stipulation or by notice by the attorney for the petitioner, and afterwards, without giving such notice, the plaintiff procured his discharge, it was held that the creditors could attack the discharge although the time for filing had expired, for, at the time of entering into the stipulation, such time had not expired. *In re Wolfe*, 81 Cal. 652.

1. *Maryland Code*, art. 47, § 21.

Allegations of Fraud. — A petition under this statute to annul an order of discharge should allege especially the fraudulent acts relied on, and that such fraudulent acts were unknown to the petitioner prior to the final order of discharge. *Goodwin v. Selby*, 77 Md. 444.

The Jurisdiction of the court to dispose of a case in insolvency, upon a petition by creditors to rescind and annul a discharge, attaches immediately upon the filing of the petition within the time prescribed. *Jaeger v. Requardt*, 25 Md. 231.

Jury Trial. — The filing of a petition to rescind and annul a discharge in insolvency is a preliminary proceeding, and secures to the party alleging himself to be a creditor the right to have issues made upon the material facts set out in his petition, to be tried by jury. *Jaeger v. Requardt*, 25 Md. 231; *Goodwin v. Selby*, 77 Md. 444.

The Duty of the Court, when a petition

to annul and rescind a discharge is filed, is to direct the framing of issues, and to determine whether the facts presented therein, if found by the jury, would convict the insolvent of having acted in derogation of the provisions of art. 47, Md. Code, and if the issues be found against the insolvent, to annul and rescind his discharge. *Jaeger v. Requardt*, 25 Md. 231.

2. *Rusher v. Sherman*, 28 Barb. (N. Y.) 416; *Pratt v. Chase*, 19 Abb. Pr. (N. Y. Supreme Ct.) 150.

3. *Friedlander v. Loucks*, 34 Cal. 18; *Luhrs v. Kelly*, 67 Cal. 289; *State v. Culler*, 18 Md. 419; *Pratt v. Chase*, 19 Abb. Pr. (N. Y. Supreme Ct.) 150; *Rusher v. Sherman*, 28 Barb. (N. Y.) 416. And see *People v. Stryker*, 24 Barb. (N. Y.) 649; *Langenour v. French*, 34 Cal. 92.

Immaterial Defect. — The omission in the affidavit of service of the notice to creditors to insert the deponent's name in the commencement of the caption is not a defect for which a discharge can be avoided collaterally. *O'Connell v. Sutherland*, 16 Abb. Pr. (N. Y. Super. Ct.) 460, note.

Discharge Reciting Necessary Facts. — Where a final judgment of discharge in an insolvency proceeding recites that "the requirements of the act for the relief of insolvent debtors and protection of creditors, and all orders of the court herein, have, in every respect, been fully complied with and performed by said petitioner," this sufficiently shows the existence of all the facts necessary to uphold the judgment when collaterally attacked. *Langenour v. French*, 34 Cal. 92.

the plaintiff may avoid it by showing that the court in reality had no jurisdiction.¹

Formal Objections to the discharge, not relating to the jurisdiction, cannot be raised in collateral proceedings; the proper remedy is by certiorari.²

(2) *On Motion*. — Formerly, in *New York*, it was held that on a motion by a discharged insolvent for a stay of execution, or a discharge from custody, the validity of his discharge would not be tried on affidavits.³ But it is now expressly provided in the Code of Civil Procedure that the validity of the discharge may be attacked on such motion.⁴

XII. DISCHARGE AS A DEFENSE — 1. **How Set Up** — *a*. **GENERALLY**. — It is the general rule, that where an action is brought against a debtor on a cause of action which he claims to be barred by a discharge in insolvency, he must, if he has an opportunity to do so, plead his discharge,⁵ and if he fails to plead it the

1. *Small v. Wheaton*, 2 Abb. Pr. (N. Y. C. Pl.) 175; *People v. Gray*, 10 Abb. Pr. (N. Y. Supreme Ct.) 468; *Rusher v. Sherman*, 28 Barb. (N. Y.) 416; *Stanton v. Ellis*, 12 N. Y. 575; *Hale v. Sweet*, 40 N. Y. 97; *Morrow v. Freeman*, 61 N. Y. 515. And see *infra*, XII. 3. *Reply*.

Insufficient Disproof of Recitals. — Where a discharge recites all the requisite jurisdictional facts and proceedings, the county clerk's certificate that certain papers, technically insufficient to show jurisdiction, are all that have been filed with him in the proceedings is not of itself sufficient to disprove the recitals. *Soule v. Chase*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 48.

2. See *supra*, XI. 2. *a*. (2) *Certiorari*.

3. *Read v. Gordon*, 1 Cow. (N. Y.) 50; *Noble v. Johnson*, 9 Johns. (N. Y.) 259; *Billings v. Skutt*, 1 Johns. Cas. (N. Y.) 105; *Russell v. Packard*, 9 Wend. (N. Y.) 431; *Cramer v. —*, 3 Sandf. (N. Y.) 700; *Dresser v. Shufeldt*, 7 How. Pr. (N. Y. Supreme Ct.) 85; *Smith v. Paul*, 20 How. Pr. (N. Y. Supreme Ct.) 97; *Rich v. Salinger*, 11 Abb. Pr. (N. Y. C. Pl.) 344; *Stuart v. Salhinger*, 14 Abb. Pr. (N. Y. C. Pl.) 291; *Manhattan Oil Co. v. Thorn*, 14 Abb. Pr. (N. Y. Supreme Ct.) 291, note; *Wall v. Thorn*, 14 Abb. Pr. (N. Y. Supreme Ct.) 292, note. But see *American Flask, etc., Co. v. Son*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 333.

In Order to Test the Validity of the discharge the creditor was required to bring an action where, upon the defendant's pleading his discharge in bar,

the plaintiff might impeach it. *Noble v. Johnson*, 9 Johns. (N. Y.) 259; *Smith v. Paul*, 20 How. Pr. (N. Y. Supreme Ct.) 97; *Rich v. Salinger*, 11 Abb. Pr. (N. Y. C. Pl.) 344.

Retaining Levy. — Although the court would not try the validity of the discharge on a motion for stay of execution, yet it was proper to retain the lien of the levy and order issues to be framed, that the question might be tried by a jury. *Cramer v. —*, 3 Sandf. (N. Y.) 700; *Stuart v. Salhinger*, 14 Abb. Pr. (N. Y. C. Pl.) 291. But see *Dresser v. Shufeldt*, 7 How. Pr. (N. Y. Supreme Ct.) 85.

4. *New York Code Civ. Pro.*, § 2187.

5. *California*. — *Anderson v. Goff*, 72 Cal. 65.

Maryland. — *Katz v. Moore*, 13 Md. 566.

New Jersey. — *Mills v. Sleght*, 5 N. J. L. 651; *Ackerman v. Van Houten*, 10 N. J. L. 332; *Lloyd v. Ford*, 12 N. J. L. 151.

New York. — *Lee v. Phillips*, 6 Hill (N. Y.) 246; *Valkenburgh v. Dederick*, 1 Johns. Cas. (N. Y.) 133; *Mechanics' Bank v. Hazard*, 9 Johns. (N. Y.) 392; *Cable v. Cooper*, 15 Johns. (N. Y.) 152; *Post v. Riley*, 18 Johns. (N. Y.) 54; *Spencer v. Beebe*, 17 Wend. (N. Y.) 557; *Cross v. Hobson*, 2 Cai. (N. Y.) 102; *Rudge v. Rundle*, 1 Thomp. & C. (N. Y.) 649; *Price v. Peters*, 15 Abb. Pr. (N. Y. C. Pl.) 197; *Cornell v. Dakin*, 38 N. Y. 253.

And see *Jenks v. Opp*, 43 Ind. 108; *Park v. Goodwin*, 1 Mich. 35; *State Bank v. Franciscus*, 15 Mo. 303.

defense is deemed waived,¹ and the court will not afterwards afford him relief on that ground.²

Discharge Pendente Lite. — In an action brought against an insolvent debtor the court may grant a continuance in order to allow the defendant to obtain his discharge in insolvency,³ and, having obtained it, the defendant may plead it *nunc pro tunc*.⁴ But if he neglects to plead it and allows judgment to be perfected against him, the discharge will not avail him as a defense.⁵

In *Spencer v. Beebe*, 17 Wend. (N. Y.) 557, it was held that an insolvent discharge under the New York Act of 1813 could not be given in evidence in bar of an action commenced since the Revised Statutes went into operation, unless it was pleaded specially, or notice thereof was given with the general issue.

Bail May Plead Debtor's Discharge. — The bail of a judgment debtor may, in an action upon the recognizance, plead the discharge of his principal under a state insolvent law. *Beers v. Haughton*, 1 McLean (U. S.) 226.

1. *Anderson v. Goff*, 72 Cal. 65; *Cable v. Cooper*, 15 Johns. (N. Y.) 152.

2. **No Relief on Motion.** — Where a defendant has an opportunity to plead his discharge and fails to do so, the court will not give effect to it on motion. *Lee v. Phillips*, 6 Hill (N. Y.) 246; *Post v. Riley*, 18 Johns. (N. Y.) 54; *Price v. Peters*, 15 Abb. Pr. (N. Y. C. Pl.) 197.

Failure to Plead through Mistake of Law. — If a defendant neglects to plead his discharge under the Insolvent Act, in an action for a debt contracted previous to his discharge, and suffers the regular time for pleading the same to elapse, under a mistaken idea of the law, the court will not permit him afterwards to withdraw a *relicta* given by him at the circuit, in order to plead his discharge. *Ackerman v. Van Houten*, 10 N. J. L. 332.

Appellate Court Will Not Relieve on Summary Application. — Where a defendant omits to plead his discharge in insolvency at the trial the appellate court will not afford him relief on his summary application. *Cross v. Hobson*, 2 Cai. (N. Y.) 102.

A Court of Equity Will Not Interfere to Restrain Execution of a judgment at law upon the ground that the defendant had been discharged under an insolvent act, prior to its rendition, and that it was not entered subject to such discharge, where the insolvent failed to plead his

discharge at the trial. *Katz v. Moore*, 13 Md. 566.

3. **Continuance in Discretion of Court.** — It is within the discretion of the court in which an action is pending to grant a continuance of an action, so as to allow the defendant to obtain and plead a discharge in insolvency. *Sullings v. Ginn*, 131 Mass. 479.

Vermont — Motion for Continuance. — Under the Vermont Revised Laws, § 1797, providing that a suit instituted against an insolvent debtor after the filing of his petition shall, on application of the debtor, be stayed to wait the determination of the Court of Insolvency upon the question of the discharge, a formal application in the nature of a motion for continuance must be made to the court; and a plea in bar merely setting up the insolvency proceedings will not be treated as such a motion. *Rusbits v. Hilliard*, 57 Vt. 60.

4. *Morgan v. Dyer*, 9 Johns. (N. Y.) 255; *Desobry v. Morange*, 18 Johns. (N. Y.) 336. And see *Mechanics' Bank v. Hazard*, 9 Johns. (N. Y.) 392.

On Scire Facias to Revive Judgment. — Where a debtor obtained a discharge in insolvency on the same day that a judgment by default was rendered against him, it was held that, on scire facias to revive the judgment, he could plead his discharge specially, as he had no opportunity to plead it in the original action *puis darrein continuance*. *Lloyd v. Ford*, 12 N. J. L. 151.

5. *Mechanics' Bank v. Hazard*, 9 Johns. (N. Y.) 392; *Valkenburgh v. Dederick*, 1 Johns. Cas. (N. Y.) 133.

In *Desobry v. Morange*, 18 Johns. (N. Y.) 336, it was held that where a defendant obtained his discharge under an insolvent act after a declaration in a suit against him had been filed, he ought to plead his discharge at or before the next term, or where no default for want of a plea had been entered until after the next term, at least before entry of a default; and if he neglected to

b. WHEN NO OPPORTUNITY FOR PLEADING. — Where the defendant is unable to obtain his discharge in season to plead it, the court will allow him the benefit of it, by motion or otherwise, according to the nature of the measure taken against him, or the proceeding from which he seeks relief.¹

c. PROOF OF DISCHARGE. — Where a defendant sets up a discharge in insolvency as a defense, he may prove it by the production of the discharge without producing the whole record, if the discharge recites the jurisdictional facts.²

2. Form of Plea. — It is the general rule of the common law, that in pleading an adjudication of a court or officer of special jurisdiction, the facts conferring jurisdiction must be stated. Therefore when a defendant pleads a discharge in insolvency he should, in the absence of any statute to the contrary,³ distinctly state all the facts necessary to give the discharging officer

do so he would not be allowed, after judgment had been perfected, to plead his discharge *nunc pro tunc*.

1. Lloyd v. Ford, 12 N. J. L. 151; Palmer v. Hutchins, 1 Cow. (N. Y.) 42. And see Cornell v. Dakin, 38 N. Y. 253; World Co. v. Brooks, 7 Abb. Pr. N. S. (N. Y. C. Pl.) 212.

Discharge After Judgment Rendered. — Where, after judgment in an action, the defendant procures a discharge in insolvency, as he has in such case no opportunity to plead the discharge he will be relieved on motion, and a perpetual stay of proceedings of the judgment given him will be granted. Parkinson v. Scoville, 19 Wend. (N. Y.) 150; Baker v. Taylor, 1 Cow. (N. Y.) 165.

Discharge on Same Day Judgment Rendered. — Where the defendant obtains his discharge under an insolvent act, on the same day that judgment is rendered against him, the court will discharge him on motion. Baker v. Ulster C. P., 4 Johns. (N. Y.) 191.

2. O'Connell v. Sutherland, 16 Abb. Pr. (N. Y. Super. Ct.) 460, note.

Discharge Not Conclusive of Jurisdictional Facts. — A discharge in insolvency is conclusive evidence of the statutory proceedings and facts therein recited, except those necessary to confer jurisdiction upon the officer granting it. The discharge is not conclusive evidence of the latter facts. Stanton v. Ellis, 12 N. Y. 575. Compare Jenks v. Stebbins, 11 Johns. (N. Y.) 224.

The Burden of Proving that all the proceedings in insolvency under which a defendant claims a discharge were regular and conformable to the statute

is upon the defendant throughout the case, but the certificate of his discharge is *prima facie* evidence of such regularity. Blanchard v. Young, 11 Cush. (Mass.) 341.

Failure to Recite Jurisdictional Facts. — Where the order of discharge fails to recite, as required by the New York Code Civ. Pro., § 2203, that the petition was "in writing," "signed by the party," with a "schedule annexed," proof of those facts on the trial in which the discharge is pleaded is sufficient to show that the court had jurisdiction. Schaffer v. Riseley, 44 Hun (N. Y.) 6.

3. Present New York Doctrine. — Under the New York Code Civ. Pro., § 532, it is not necessary in pleading a discharge in insolvency to state the facts conferring jurisdiction on the officer who granted it. It is sufficient to state that such discharge was duly granted. Livingston v. Oaksmith, 13 Abb. Pr. (N. Y. Supreme Ct.) 183.

California. — Under the California Code Civ. Pro., § 456, it is sufficient, in pleading a discharge in insolvency, to allege that the judgment was duly given or made. Hanscom v. Tower, 17 Cal. 518.

In Barrett v. Carney, 33 Cal. 530, it is held that where the defendant pleads a discharge obtained in the County Court in bar of an action it will be presumed that the County Court had jurisdiction of the parties and subject-matter, upon production of the retord of the proceedings alleging such jurisdiction, without other proof of the essential jurisdictional facts; this is because County Courts are courts of record.

jurisdiction of the proceedings.¹ The want of proper averments in the plea to give jurisdiction cannot be supplied by recitals in the discharge.² In order to serve as a bar to the

1. *Salters v. Tobias*, 3 Paige (N. Y.) 338; *Service v. Heermance*, 1 Johns. (N. Y.) 91; *Frary v. Dakin*, 7 Johns. (N. Y.) 75; *Morgan v. Dyer*, 10 Johns. (N. Y.) 161; *Hines v. Ballard*, 11 Johns. (N. Y.) 491; *Roosevelt v. Kellogg*, 20 Johns. (N. Y.) 208; *Sackett v. Andross*, 5 Hill (N. Y.) 327; *Spencer v. Beebe*, 17 Wend. (N. Y.) 557.

Sufficient Plea.—In a plea of a discharge under the Insolvent Act it is sufficient, after stating enough to give jurisdiction to the judge or officer granting the discharge, to say that such proceedings were thereupon had, etc., that the judge or officer granted the discharge, and to set forth the same *verbatim*. *Roosevelt v. Kellogg*, 20 Johns. (N. Y.) 208. And see *Service v. Heermance*, 1 Johns. (N. Y.) 91.

Should Set Out Discharge.—Where a discharge in insolvency is pleaded in bar of an action, the plea should set forth a copy of the discharge. *Jordan v. Pulsifer*, 84 Me. 137; *Cruger v. Cropsey*, 3 Johns. (N. Y.) 242; *White v. McCaughey*, (R. I. 1897) 36 Atl. Rep. 840.

Waiver of Objection.—Where a plea failed to set forth such copy, but it was introduced in evidence without objection from the plaintiff, it was held that the objection was waived. *Jordan v. Pulsifer*, 84 Me. 137.

Should Show Conformity with Statute.—If an insolvent who has obtained his discharge under the Insolvent Act undertakes to plead specially, and to state all the proceedings in relation to his discharge, he must state a conformity, in every respect, to the directions of the act; and if he does not state the facts correctly, and especially if he omits to state that at least three-fourths of his creditors in amount subscribed to his petition, etc., so as to give the judge jurisdiction, the plea is bad. *Frary v. Dakin*, 7 Johns. (N. Y.) 75.

Where the statute provides that the debtor shall be indebted to the petitioning creditor in not less than a specified sum, a plea of discharge which does not expressly aver that the insolvent was indebted to the creditor on whose application the proceedings were had, in a sum not less than the specified sum, is bad on general demurrer. *Wheeler*

v. Townsend, 3 Wend. (N. Y.) 247.

Should Show Residence.—Where, by statute, residence for a certain period in the county wherein the discharge is obtained is essential and confers jurisdiction on the court or officer, a plea of a discharge in insolvency must allege such residence. *Morgan v. Dyer*, 10 Johns. (N. Y.) 161; *Otis v. Hitchcock*, 6 Wend. (N. Y.) 433; *Wyman v. Mitchell*, 1 Cow. (N. Y.) 316. And see *Smith v. Bennett*, 17 Wend. (N. Y.) 479.

Sufficient Showing of Residence.—If the plea states that the insolvent was a resident of the county in which the application was made by him, it is tantamount to saying that he was an inhabitant of that place. *Roosevelt v. Kellogg*, 20 Johns. (N. Y.) 208.

An averment in a plea of a discharge in insolvency that the defendant was "of the county" to a judge of which he presented his petition for a discharge is sufficient to give the judge jurisdiction. *Porter v. Miller*, 3 Wend. (N. Y.) 329.

In *California*, however, it is held that when the judgment discharging an insolvent is presented in a collateral proceeding, it will be presumed that the court was informed of the fact of residence in some proper mode, before taking jurisdiction, although it is not stated in the petition. *Barrett v. Carney*, 33 Cal. 530.

Notice to Plea of General Issue.—A notice subjoined to a plea of the general issue that the defendant will give in evidence a discharge in insolvency need not state the proceedings previous to the discharge, that the defendant was imprisoned or impleaded, and a resident, etc., but those facts, although not stated in the notice, may be proved by the proceedings on file. *Hines v. Ballard*, 11 Johns. (N. Y.) 491.

A notice subjoined to a plea of the general issue that the defendant will give in evidence a discharge in insolvency is sufficient if it states that the defendant has been discharged, the commissioner's name, and the date of discharge. *Hines v. Ballard*, 11 Johns. (N. Y.) 491.

2. *Wyman v. Mitchell*, 1 Cow. (N. Y.) 316; *Wheeler v. Townsend*, 3 Wend. (N. Y.) 247.

action, the plea must answer the declaration.¹

Verification by Record. — Where a discharge in insolvency is a matter of record, if pleaded in bar of an action, the plea should conclude with a *prout patet per recordum*.²

3. Reply. — To the defendant's plea of a discharge in insolvency the plaintiff may reply facts showing that the discharge is void for want of jurisdiction in the discharging court.³ The plaintiff should specify the particular grounds upon which he seeks to avoid the discharge.⁴

4. Discontinuance by Plaintiff Without Costs. — Where, after the

1. Where an action was brought against a discharged insolvent on a judgment rendered against him before his discharge in insolvency, he pleaded his discharge, alleging that "claims on which this suit was brought were all of them claims founded on contract, and existing at the time of the assignment." It was held that the plea was not an answer to the declaration, inasmuch as the costs of the suit, equally with the original debt, entered into the judgment. *Waterman v. Curtis*, 30 Conn. 135.

2. *Murphy v. Richards*, 5 W. & S. (Pa.) 279.

3. Jurisdictional Defects in the discharge may be taken advantage of in collateral actions. See *supra*, XI. 2. *b. (1) In Action.*

Formal Defects not relating to the jurisdiction are not open to collateral attack; advantage can be taken of them only in direct proceedings. See *supra*, XI. 2. *a. (2) Certiorari.*

Noncompliance with Statute. — If a discharge in insolvency is pleaded in defense to an action upon a promissory note, the plaintiff may reply that the defendant's estate paid less than fifty cents on the dollar upon the debts proved, and that a majority in number of his creditors who had proved their claims did not assent to the granting of the certificate of discharge. *Kelman v. Sheen*, 11 Allen (Mass.) 566.

Omission of Property from Schedule. — Where a defendant pleaded, in an action on a promissory note, a discharge in insolvency, it was held that the court should allow the plaintiff to show in answer to the plea that the defendant had intentionally omitted from the schedule annexed to his petition certain property owned by him. *Dean v. Baker*, 64 Cal. 232.

Duplicity in Replication. — To a plea of a discharge under the Insolvent Act the plaintiff replied that the defendant

had procured a creditor to sign his petition and make affidavit for a larger sum than was due to him; and that he had concealed a debt due to him which he did not insert in his inventory, and also that he had been guilty of perjury. On a demurrer the replication was held bad as containing three distinct and independent grounds for avoiding the discharge, which would require several distinct points to be put in issue. *Cooper v. Heermance*, 3 Johns. (N. Y.) 315.

Admission of Jurisdiction. — A replication that a discharge in insolvency pleaded in bar to a recovery was obtained *per fraudem* admits the jurisdiction of the officer who granted the discharge, and estops the plaintiff from showing that two-thirds of the creditors did not unite in the petition for the discharge. *Ayres v. Scribner*, 17 Wend. (N. Y.) 407.

Objection Cured by Verdict. — Under Massachusetts General Statutes, c. 118, § 79, a fiduciary debt is not barred by a discharge in insolvency. Where a defendant pleaded a discharge in bar of an action, and the record did not show that the cause of action was not a fiduciary debt, it was held that after a verdict for the defendant it was too late for the plaintiff to show that the debt was fiduciary, and so not barred by the discharge. *Halpine v. May*, 100 Mass. 498.

4. *Service v. Heermance*, 2 Johns. (N. Y.) 96.

Objections Not Specified or No Avail. — Where a discharge under the insolvent laws is pleaded, and the plaintiff files a specification of the grounds on which he shall seek to avoid the discharge, he cannot be permitted at the trial to take objections to the validity of the discharge not mentioned in his specification. *Williams v. Coggeshall*, 8 Cush. (Mass.) 377.

commencement of an action, the defendant obtains a discharge in insolvency, the plaintiff may be allowed to discontinue without costs,¹ although the defendant stipulates not to avail himself of his discharge as a defense to the action.²

XIII. DECLARING ON NEW PROMISE. — In declaring in an action brought upon a new promise to pay a debt barred by a discharge in insolvency, the plaintiff may set forth the original cause of action, and in his replication aver the new promise.³

XIV. SUITS BY ASSIGNEE, TRUSTEE, OR RECEIVER — **Authority to Sue.** — In a suit by an assignee, trustee, or receiver of an insolvent, claiming in his fiduciary character, the plaintiff must show that he is clothed with such character and is authorized to bring the suit.⁴

1. *Merritt v. Arden*, 1 Wend. (N. Y.) 91; *Ashworth v. Wrigley*, 1 Hall (N. Y.) 145; *Case v. Belknap*, 5 Cow. (N. Y.) 422; *Honeywell v. Burns*, 8 Cow. (N. Y.) 121; *Merchants' Bank v. Moore*, 2 Johns. (N. Y.) 294; *Ludlow v. Hackett*, 18 Johns. (N. Y.) 252; *Hellman v. Licher*, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 288.

Action Sounding in Tort. — A plaintiff may discontinue without costs if the defendant obtains an insolvent discharge after suit commenced, though the action be trespass. *Merritt v. Arden*, 1 Wend. (N. Y.) 91.

Defendant Must Have Obtained Discharge. — Though the defendant be insolvent, the plaintiff will not be allowed to discontinue his suit without costs unless the defendant has obtained his discharge under the Insolvent Act. *Collins v. Evans*, 6 Johns. (N. Y.) 333.

If the Plaintiff Proceeds in the Cause, although aware of the defendant's discharge in insolvency, he must, if he afterwards discontinues, pay the costs accruing since the discharge. *Ludlow v. Hackett*, 18 Johns. (N. Y.) 252.

When the Plaintiff Takes Issue upon a plea of an insolvent's discharge, and the issue is found for the defendant, the plaintiff is subject to the costs of the trial. *Conklin v. Lupton*, 1 Wend. (N. Y.) 30.

2. *Honeywell v. Burns*, 8 Cow. (N. Y.) 121; *Ashworth v. Wrigley*, 1 Hall (N. Y.) 145.

3. *Depuy v. Swart*, 3 Wend. (N. Y.) 135; *Fitzgerald v. Alexander*, 19 Wend. (N. Y.) 402.

In *Shippey v. Henderson*, 14 Johns. (N. Y.) 178, where the defendant pleaded his discharge in insolvency to a declaration in assumpsit, and the plaintiff replied that subsequently to the defendant's discharge, and before the

commencement of the suit, the defendant assented to, ratified, renewed, and confirmed the promise mentioned in the declaration, it was held that the new promise was sufficiently laid and the replication was not a departure from the declaration.

Conditional Promise. — If the promise to pay a debt barred by a discharge in insolvency be conditional, it must be alleged as a conditional and not as an absolute promise in the replication, or the plaintiff cannot recover. *Wait v. Morris*, 6 Wend. (N. Y.) 394.

Proving New Promise Without Alleging It. — Where a discharge in insolvency is pleaded to an action on a promissory note, if no replication is ordered by the court the plaintiff may prove a new promise without having alleged it. *Cook v. Shearman*, 103 Mass. 21.

4. For a full discussion of such suits, see the articles *ASSIGNMENT FOR BENEFIT OF CREDITORS*, vol. 2, p. 865; also the articles *RECEIVERS*; *TRUSTS AND TRUSTEES*.

Showing Authority of Trustee. — To establish the right of a trustee in insolvency to sue, the plaintiff, under the general issue, must prove everything essential to the showing himself clothed with the character and authority of a trustee, which cannot be done by the production of the certificate of the commissioners of insolvent debtors and the final discharge of the insolvent, only, but all the proceedings must be exhibited. *Winchester v. Union Bank*, 2 Gill & J. (Md.) 73.

Assignment Conclusive Evidence. — In a suit prosecuted by an assignee of an insolvent debtor, under Mass. Stat. 1838, c. 163, for any debt, right, etc., due or belonging to such debtor, the assignment is conclusive evidence of the plaintiff's authority to sue, although

A plea of the general issue in such suit does not admit the character in which the plaintiff sues.¹

Leave of Court. — Where an assignee is required to obtain leave of the court before bringing suit, a complaint which does not show that he has obtained such leave is defective.²

Foreign Assignee. — It has been held that an assignee in insolvency has no absolute right to bring suit in his own name in another state, although it may be allowed as an act of courtesy if there be no adverse interests to be affected.³

XV. APPEALS — 1. Who May Appeal. — The question as to what

there may have been irregularities and errors in the preliminary proceedings. *Wheelock v. Hastings*, 4 Met. (Mass.) 504.

Sufficient Showing of Character. — In a complaint by the assignee of an insolvent, the averment that the plaintiff was appointed by an order "duly given and made" is a sufficient showing of his appointment; no averment that notice was given to the creditors before the appointment of the assignee, or that they failed to act, or that the plaintiff was competent to be appointed, need be made. *Bull v. Houghton*, 65 Cal. 422.

It was objected to a petition to the Insolvency Court for an order requiring a person to appear for examination that it purported to be brought by two assignees, but was signed and sworn to by only one person, and by him without official addition, so that it did not appear that he was a "person interested in the estate," as required by Massachusetts Pub. Stat., c. 157, § 70. The court held that the person signing the petition, by doing so, impliedly affirmed that he was the person of the same name alleged in the body of the petition to bring it as assignee; and that the words "the above named," used before his name in the affidavit to the petition, identified the person sworn as the person named in the petition. *Clement v. Bullens*, 159 Mass. 193.

Bond. — In a suit in chancery by the permanent trustee of an insolvent debtor it is necessary to show that the complainant gave bond with surety, in that character, before filing his bill. *Stewart v. Stone*, 3 Gill & J. (Md.) 510.

Coming In on Death of Insolvent. — The assignee of an insolvent debtor may be admitted after the death of the debtor to prosecute an action brought by the debtor and still pending in court, al-

though he does not move for leave to come in at the term next after his appointment or next after the debtor's death. *Bacon v. Williams*, 11 Gray (Mass.) 222.

Alleging Debtor's Insolvency. — In an action by an assignee of an insolvent to recover goods sold by the insolvent within thirty days next preceding his adjudication in insolvency, it is a sufficient showing of the vendor's insolvency at the time of the sale if the complaint alleges that "at the time of the attempted sale of his said stock of goods, wares, merchandise, and fixtures above described, as hereinafter stated, and for a long time prior thereto, the said J. G. was, and ever since then he has been, indebted to various persons in large sums of money, and during all said times was and still is unable to pay his debts from his own means as said debts became due, and then was and still is an insolvent debtor." *Fitzgerald v. Neustadt*, 91 Cal. 600.

Suit in Name of Assignee. — A negotiable promissory note, passed lawfully by force of the statute into the hands of the assignee of the promisee, who was an insolvent debtor, was by the assignee sold to the original promisee and sued by the latter in the name of the former. It was held that the action could be maintained in this form. *Pitts v. Holmes*, 10 Cush. (Mass.) 92.

1. *Winchester v. Union Bank*, 2 Gill & J. (Md.) 73.

2. *Jewett v. Perrette*, 127 Ind. 97.

The receiver of an insolvent debtor, under the statute, may maintain an action, without first obtaining leave from the court, to avoid a disposition of property whereby a creditor is preferred. *Moore v. Hayes*, 35 Minn. 205.

3. *Upton v. Hubbard*, 28 Conn. 274; *Brush v. Curtis*, 4 Conn. 312; *Fisk v. Brackett*, 32 Vt. 798.

persons are entitled to appeal from an adjudication in insolvency proceedings is controlled entirely by statute. It may be stated in general that the right to appeal is usually confined to persons aggrieved or injured by such order or judgment.¹

2. When Appeal Lies—*a. IN GENERAL.*—Since proceedings in insolvency are wholly statutory, it follows that no appeal will lie from any order therein unless provided by statute.² There is so little uniformity regarding this subject in the statutes of the different states, that it is impossible to lay down any general rules as to when an appeal will lie. The practitioner can, for the most part, only be referred to the statutes, and the cases cited in the notes.³

1. For a general discussion of appeals by persons aggrieved or injured, see article APPEALS, vol. 2, p. 167 *et seq.*

Attaching Creditor.—Conn. Gen. Stat., § 507, provides for proceedings by creditors to have a debtor adjudged insolvent. Section 523 provides that proceedings in insolvency shall dissolve all attachments of the property of the debtor made within sixty days next preceding. Where, on a petition by a creditor, the Probate Court adjudged a debtor insolvent, it was held that an attaching creditor whose attachment was made within sixty days next preceding the institution of the insolvency proceedings could not appeal from the decree adjudicating the debtor an insolvent, as that was wholly a matter between the petitioner and the debtor. *Commercial Nat. Bank's Appeal*, 59 Conn. 25.

Creditor Not Notified.—Where the statute provides for the appointment of a trustee in insolvency upon notice to the creditors, a creditor who was not notified has a right to appeal from a decree appointing the trustee. *Commercial Nat. Bank's Appeal*, 59 Conn. 25.

Rejection of Claim.—An insolvent's trustee has no right to apply to a court of equity to distribute the funds in his hands. If he does, and the usual notice is given to creditors to exhibit their claims, a person who has a claim may exhibit it, and if it be rejected, he may appeal from the order and have the same reversed, on the ground that the court of equity had no jurisdiction. *Pierson v. Trail*, 1 Md. 142.

When Trustee May Appeal.—A trustee in insolvency may appeal where the decision complained of affects the interests of all the creditors by diminishing the estate out of which they are to

be paid, or where he is defeated in attempts to augment that fund by the recovery of property or money which he thinks belongs to the creditors. *Salmon v. Pierson*, 8 Md. 297.

If a trustee in insolvency has an interest as trustee in reference to his allowance for commissions and expenses, or as a creditor of the insolvent, he has an equal right with others to object to the distribution and to appeal. *Salmon v. Pierson*, 8 Md. 297.

The trustee of an insolvent debtor may appeal from an order erroneously rescinding his appointment, for in such a case he is a "party interested" within the meaning of § 20, c. 193, Maryland Act of 1854. *Teackle v. Crosby*, 14 Md. 14.

2. *White v. Haskins*, 59 Vt. 555.

3. **California.**—The Insolvent Act of 1895, § 71, provides for appeals to the Supreme Court in certain cases. Under this statute that court may review on appeal judgments in insolvent cases. *People v. Shepard*, 28 Cal. 115; *People v. Rosborough*, 29 Cal. 415.

The Proper Mode of Obtaining Relief from an erroneous order of the Insolvency Court is by appeal, and not by application to a court of equity. *Julien v. Riley*, 61 Cal. 242.

Appeal, and Not Certiorari, is the proper method of bringing insolvency proceedings before the Supreme Court. *People v. Shepard*, 28 Cal. 115.

After Making Claim.—A creditor may appeal from an order adjudging a petitioning debtor insolvent, notwithstanding he has made claim and proof of his debt in the Superior Court. *In re Choje*, 112 Cal. 630.

On Questions of Fraud.—Under the California Insolvent Act of 1852, on questions of fraud raised by opposing

b. FINALITY OF ORDER OR JUDGMENT. — It may be laid down as a general rule, that unless there is some statutory pro-

creditors on a petition by an insolvent for a discharge from his debts, the Supreme Court had jurisdiction to hear and determine appeals from the judgment of a County Court. *Fisk v. His Creditors*, 12 Cal. 281.

Order Exempting Property. — On a petition by a debtor to be declared insolvent, an order of the Superior Court, in pursuance of the California Insolvent Act of 1880, § 60, setting aside certain property of the debtor as exempt from execution and ordering the sheriff to release and discharge the personal property from the operation and effect of the execution, is an appealable order and cannot be brought before the Supreme Court by certiorari. *Noble v. Superior Ct.*, 109 Cal. 523.

Maryland. — The Maryland Code, art. 47, § 31, gives the right of appeal from any order of the court in insolvency proceedings within the specified period of thirty days. *Paul v. Locust Point Co.*, 70 Md. 288.

Must Appeal Within Thirty Days. — For any defects or irregularities in the proceedings, a creditor may appeal from the order discharging an insolvent, and if he fails to seek his redress in this method within the specified period of thirty days, he cannot have the order avoided by a petition. *Waters v. Momeny*, 68 Md. 171; *Sparks' Appeal*, 18 Md. 417.

Massachusetts — Allowance of Claim. — The Massachusetts Pub. Stat., c. 157, § 36, provides for an appeal in certain cases from the Insolvent Court to the Superior Court. Under this statute a debtor, if dissatisfied with the allowance of a claim against his estate, has no right to appeal. *Thomson v. Poor*, 163 Mass. 26.

Election of New Assignee. — No appeal lies to the Superior Court from the decision of a judge of insolvency ordering the election of a new assignee of an insolvent estate. *Bassett v. Hutchinson*, 9 Allen (Mass.) 199.

The Supreme Judicial Court has no jurisdiction over an appeal from an order of the Insolvency Court granting an allowance to the debtor. *Kaffenburg v. Assner*, 163 Mass. 295.

As to the supervisory jurisdiction of the Supreme Judicial Court over insolvency proceedings, see *supra*, II. 2. b.

Supervisory Jurisdiction in Supreme Court.

Minnesota — Order Dismissing Petition. — In insolvency proceedings, an order dismissing a petition by a creditor, under section 10 of the Minnesota Insolvent Law, as amended by the Laws of 1889, c. 30, § 7, if made for informality or irregularity is not appealable; but if made on the merits it is appealable, though it gives the creditor leave to file another petition. *Matter of Harrison*, 46 Minn. 331.

Permitting Creditors to Share. — An order permitting creditors of an insolvent to share in his estate without filing releases of their debts, is appealable under the Minn. Gen. Stat. of 1894, § 4247. *Ekberg v. Schloss*, 62 Minn. 427.

Denying Petition to File Claim. — An order denying the petition of a creditor in insolvency proceedings to file his claim for allowance with the assignee after the expiration of the time limited is appealable; but an order granting such petition is not appealable, as it can be reviewed on appeal from the judgment establishing the creditor's claim. *In re Nicolin*, (Minn. 1896) 67 N. W. Rep. 995.

Appointing Receiver. — Under the Minnesota Gen. Stat., c. 86, § 8, an execution creditor may appeal from an order appointing a receiver in insolvency, and directing the sheriff to deliver to him the property levied upon. *In re Jones*, 33 Minn. 405.

Tennessee. — No appeal or writ of error lay from the decision of the court discharging an insolvent debtor under the Tennessee Act of 1811, c. 24, § 4, and the Act of 1824, c. 17. *M'Kenzie v. Hackney*, 3 Yerg. (Tenn.) 417; *Donnelly v. Whitney*, 4 Yerg. (Tenn.) 475.

Taxing Plaintiff with Costs. — It is erroneous for the court, upon discharging an insolvent, to tax the plaintiff with the costs of the proceedings; for this a writ of error will lie. *Donnelly v. Whitney*, 4 Yerg. (Tenn.) 475.

Vermont — Appeal to County Court. — Under the Vermont Stat., § 2156, providing for an appeal from the decision of the Court of Insolvency to the County Court upon the question of the insolvency of a debtor, the judgment of

vision to the contrary, appeals will lie only to final orders or judgments in insolvency proceedings.¹

3. Time of Entering Appeal. — The time for entering appeals in such cases is regulated by statute. If the appeal is not taken within the prescribed time it will generally be dismissed.²

the County Court is conclusive, and no appeal lies to the Supreme Court. *In re Montgomery Spool, etc., Co.*, 68 Vt. 29.

Refusal to Proceed. — A refusal of the Insolvency Court to proceed with an insolvency case which had been dismissed is not a decision of the Insolvency Court upon the question of the debtor's insolvency, and no appeal lies therefrom under Vermont Stat., § 2156. *Baker v. Jones*, 61 Vt. 549.

Priority of Liens. — Under the Vermont Stat., §§ 2143-2145, no appeal lies from the decision of a judge of the Court of Insolvency as to the priority of liens on the insolvent's estate. *White v. Haskins*, 59 Vt. 555.

1. Cravens v. Chambers, 55 Ind. 5; *In re Studdart*, 30 Minn. 553. And see article APPEALS, vol. 2, p. 57.

An Interlocutory Order of a purely administrative nature, made by a District Court in the course of proceedings in insolvency pending before it, does not involve the merits of an action nor does it affect a substantial right. Such an order is not appealable. *Brown v. Minnesota Thresher Mfg. Co.*, 44 Minn. 322.

Supplemental Order. — Under the *California* Insolvent Act of 1880, § 67, no appeal lies to a supplemental order requiring an insolvent to verify his schedule and inventory. *In re Abbott*, 74 Cal. 381.

Exercise of Discretion. — Whether a defendant who, during the pendency of a suit against him, institutes proceedings in insolvency, shall have a delay of the trial of the action on that ground, and for how long a time, are matters resting entirely in the discretion of the judge before whom the action is pending; and to the exercise of such discretion no exception lies. *Barker v. Haskell*, 9 Cush. (Mass.) 218.

The making of an order granting or refusing a petition of a creditor to be permitted to file his claim for allowance with the assignee after the expiration of the time limited is a matter of discretion with the trial court, and the order will not be set aside on appeal unless there was a clear abuse of such

discretion. *In re Nicolin*, (Minn. 1896) 67 N. W. Rep. 995.

Remanding Debtor — Final Order. — Where a debtor was arrested on a *ca. sa.*, and on being brought before a judge of the County Court, demanded to have the question whether he was guilty of fraud or had refused to surrender his estate tried before a jury, and on the trial he was found guilty and remanded to custody, it was held that the order remanding the debtor was not a ministerial but a judicial act, and was for all purposes a final order or judgment from which an appeal lay to the Circuit Court. *Bowden v. Bowden*, 75 Ill. 143.

Reversing Judgment of County Court. — Where an insolvent debtor appealed from the finding of the County Court, it was held that a judgment of the Circuit Court reversing such finding and judgment of the County Court, and remanding the cause with directions to allow the debtor to schedule, etc., was final within the meaning of the statute granting appeals to the Court of Appeals. *Mahler v. Sinsheimer*, 20 Ill. App. 401.

2. An appeal from an order or decision in a case in insolvency, not taken within thirty days as required by the *Maryland* Code, art. 47, § 31, must be dismissed. *Sparks's Appeal*, 18 Md. 417; *Waters v. Momeny*, 68 Md. 171. And see *Paul v. Locust Point Co.*, 70 Md. 288.

Forgetfulness or Mistake. — The appeal authorized by the *Massachusetts* Stat. of 1838, c. 163, § 4, from the decree of the commissioner of insolvency, rejecting or allowing the claims of a supposed creditor, must be entered "in the proper court which shall be first held within and for the county in which the proceedings are had, next after the expiration of fourteen days from the time of claiming the appeal;" and if omitted to be so entered, through forgetfulness or mistake, cannot be entered at a succeeding term. *Palmer v. Dayton*, 4 Cush. (Mass.) 270.

Delay by Consent of Parties. — The consent of parties that an appeal from a decree of the commissioner of insolv-

4. Proceedings on Appeal — a. IN GENERAL — Notice. — On appeal by a creditor from an order adjudging a debtor insolvent, notice need not be given to creditors who have not appeared in the proceedings.¹

Presumptions. — If the evidence upon which the lower court found questions of fact is not brought up on appeal, the appellate court will presume the finding correct.²

b. WHAT CONSIDERED. — On appeal from an adjudication in insolvency proceedings, the appellate court will, in general, consider only such questions as were raised in the lower court.³

ency disallowing a claim against the estate of an insolvent debtor may be entered at a term of the court different from that fixed by law for such entry is not sufficient to give the court jurisdiction of the appeal. *Eddy's Case*, 6 Cush. (Mass.) 28.

Delay through Neglect of Clerk. — The *Maryland* Act of 1842, c. 288, providing that appeals "then pending, or thereafter to be depending," shall not be dismissed by reason of the record not being transmitted in time, if it appear to the court that the delay was occasioned by the neglect of the clerk "and without default of the party," applies to appeals in insolvency cases granted under the Act of 1849, c. 88. *Glenn v. Chesapeake Bank*, 3 Md. 475.

Delay Caused by Fraud — Bill in Equity. — If an insolvent debtor has obtained the requisite assent of his creditors, and done all other acts to entitle him to a discharge, and has thereupon temporarily left the commonwealth, and a groundless claim is thereafter fraudulently presented against his estate at the third meeting and is allowed, which, if genuine, would deprive him of his right to a discharge, and his discharge is therefore not granted, and the time for an appeal has passed before his return or knowledge of the fraud, he may maintain a bill in equity, under Mass. Gen. Stat., c. 118, § 16, to procure the expunction of the claim, so that the discharge may be granted. *Foster v. Lamb*, 6 Allen (Mass.) 560.

1. *In re Chope*, 112 Cal. 630.

No Notice to Temporary Receiver. — On appeal by a creditor from an order adjudging a debtor petitioner an insolvent, notice need not be given to a temporary receiver who is not an "adverse party" under the *California* Insolvent Act of 1880, § 67. *In re Chope*, 112 Cal. 630.

2. Presumption of Sufficient Evidence. — On appeal and certiorari from an order dismissing a debtor's petition for a discharge, the question whether the petitioner was a fraudulent debtor, and for this reason not entitled to his discharge, is a question of fact; and if the evidence is not brought up by the writ, the finding of the court below will be presumed to have been upon sufficient evidence. *Owen's Petition*, 140 Pa. St. 565.

Omission without Fraudulent Intent. — Where, on application for discharge, the court finds that omissions from "the schedule and inventory occurred by mistake and not with intent to defraud creditors," on appeal by the opposing creditors, if it is not claimed that the findings of fact were not justified by the evidence, the appellate court will conclusively presume that the omissions complained of were mere mistakes made without any fraudulent intent. *Demartin v. Demartin*, 85 Cal. 76.

3. Failure of Creditor to Prove Claim. — The objection that an opposing creditor had not proved his claim before filing his opposition comes too late when taken for the first time in the appellate court. *Strueven v. His Creditors*, 62 Cal. 45.

Failure to Aver Service of Notice. — On an appeal by an insolvent, on the ground that it did not appear that the court ever acquired jurisdiction of the insolvent in the insolvency proceedings, for the reason that the complaint contained no averment showing that a copy of the petition filed by the creditors was served upon him, with a copy of the order to show cause, as required by section 10 of the *California* Insolvent Act of 1880, it was held that, the record being silent on the subject, the point could not be raised for the first time in the appellate court. *Stewart v. Dunlap*, (Cal. 1894) 36 Pac. Rep. 2.

Certiorari. — Where the proceedings are brought up on certiorari, the appellate court may not only inquire into the jurisdiction and regularity of the proceedings, but may review decisions upon questions of law.¹

Oath Taken at Wrong Time. — Where the oath required to be taken and subscribed by an insolvent before obtaining a discharge was made eleven months prior to the discharge, it was held that an objection on that account by opposing creditors came too late on appeal, no objection having been made when the oath was offered in evidence. *In re McEachran*, 82 Cal. 219.

Issues Not Submitted to Jury. — In proceedings of involuntary insolvency a verdict was rendered for the petitioners, and the defendant moved in arrest of judgment on the ground that no issues were made up and submitted to the jury. It was held that as it did not appear from the record that no demand was made by either party for issues before the jury was sworn, or any exception taken because they were refused, the above act could not be considered on appeal. *Bowland v. Wilson*, 71 Md. 307.

Certificate from Lower Court. — In Maryland, on appeal in insolvency proceedings, the appellate court can review only such questions as appear by a certificate from the lower court to have been raised there. *Waters v. Momeny*, 68 Md. 171.

Sufficient Certificate. — Under the Maryland Code, art. 5, § 13, providing that, on appeal from proceedings of involuntary insolvency, no question is open for review in the appellate court, except such as may be certified in the manner prescribed by law, a bill of exceptions regularly signed by the judge, taken to any particular ruling made in the course of the trial, is a certificate within the object and purview of the statute. *Castleberg v. Wheeler*, 68 Md. 266.

Appeal from Assignee's Disallowance of Claim. — In an appeal under Minn. Laws of 1881, c. 148, § 8, by a creditor in insolvency proceedings, from the assignee's disallowance of his claim, the matter is to be tried by the court without reference to what proofs may have been offered to the assignee. *Crane v. Wheeler*, 48 Minn. 207.

1. *Morewood v. Hollister*, 6 N. Y. 309.

Will Not Review Merits upon Evidence. — In a certiorari reversing the judgment of the Court of Common Pleas upon the verdict of a jury upon the issue of insolvency, this court will not review the merits of the verdict upon the evidence. *Race v. Dehart*, 24 N. J. L. 38.

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CROSS-REFERENCES.

As to *Instructions in Particular Actions and Criminal Prosecutions*, see specific titles in this work.

Directing Verdict, see article *DIRECTING VERDICT*, vol. 6, p. 667.

Exceptions to Instructions, see article *EXCEPTIONS AND OBJECTIONS*, vol. 8, p. 253.

I. DEFINITION. — An instruction is an exposition of the principles of law applicable to a case, or to some branch or phase of a case, which the jury are bound to apply in order to render the verdict, establishing the rights of the parties in accordance with the facts proved.¹ The essential idea of a charge is that it is authoritative as an exposition of the law which the jury are bound by their oath and by moral obligations to obey.²

II. OFFICE OF INSTRUCTIONS. — The office of an instruction to the jury is, first, to explain the issues;³ second, to notice the positions taken by the parties and suggest, so far as the case may require, the principles of evidence and their application;⁴ third, to declare what rules of law will apply to any state of facts which

1. 1 Bouv. L. Dict. 302; Lehman v. Hawks, 121 Ind. 541; McCallister v. Mount, 73 Ind. 567; Dodd v. Moore, 91 Ind. 523. See also *infra*, VII. *Written Instructions*; 1. b. 2. *What Are Instructions Within the Rule*.

2. 1 Bouv. L. Dict. 302; Dodd v. Moore, 91 Ind. 523.

Instructions proper are instructions in reference to the law of the case. Lawler v. McPheeters, 73 Ind. 577; Stanley v. Sutherland, 54 Ind. 339.

Instruction Not a Decision. — An instruction is not a decision in any sense; much less in the sense in which it is used in section 302 of the *Kansas Code*, declaring how exceptions shall be saved to decisions. McArthur v. Mitchell, 7 Kan. 176.

What Is Not an Instruction. — A direction to a jury to sign their general verdict, or to answer interrogatories, is not an instruction. McCallister v. Mount, 73 Ind. 559. Nor is a casual remark made by the judge in ruling upon the admissibility of evidence. McCormick v. Ketchum, 48 Wis. 643.

3. Souvais v. Leavitt, 50 Mich. 108; Newell v. St. Louis Bolt, etc., Co., 5 Mo. App. 253; Forbes v. Jason, 6 Ill. App. 395.

4. Souvais v. Leavitt, 50 Mich. 108; Lanark First Nat. Bank v. Eitemiller, 14 Ill. App. 22; Keeler v. Stuppe, 86 Ill. 309; Baxter v. People, 8 Ill. 368; Hamilton v. Hunt, 14 Ill. 472; Sawyer v. Sauer, 10 Kan. 466; Pleasant v. State, 15 Ark. 625; Hasbrouck v. Milwaukee, 21 Wis. 219; State v. Levigne, 17 Nev. 435.

The object of a charge is not to teach law to the jurors, but to direct their conduct in the controversy they are called upon to decide. Lendberg v. Brotherton Iron Min. Co., 75 Mich. 84.

Instructions to the jury are not limited to the mere laying down of abstract principles of law; it is proper to direct the minds of the jury to the legal bearings of the facts, and to caution them against giving undue importance to unimportant things. Welch v. Ware, 32 Mich. 77.

may be found on the evidence;¹ fourth, to exclude from the jury questions foreign to the case.²

III. PROVINCE OF COURT AND JURY — 1. Questions of Law for Court. — It is a well-settled principle that, on trials by jury, it is the exclusive province of the court to determine all questions of law arising in the case.³ It is, therefore, proper to refuse an instruction submitting a question of law to the jury,⁴

1. *Souvais v. Leavitt*, 50 Mich. 108.

The purpose of an instruction is to assist the jury in correctly applying the law to the facts, and sometimes a general statement of the rights and obligations of the parties assists to a clearer understanding of the particular obligation claimed to have been violated. *Sawyer v. Sauer*, 10 Kan. 466.

2. *Newell v. St. Louis Bolt, etc., Co.*, 5 Mo. App. 253.

The sole function of an instruction is to give the law applicable to the case in clear and intelligible language, without unnecessary repetition and without argument. *Keeler v. Stuppe*, 86 Ill. 309.

Instruction Concedes Correctness of Pleading. — Where the court is called upon to instruct the jury as to the law arising upon the facts, this impliedly assumes the correctness of the pleading. *Guy v. Tams*, 6 Gill (Md.) 82.

Instructions Necessary to Raise Question of Law. — In actions at law, questions of law can be raised at the trial only by instructions. *Spurgeon v. West*, 23 Mo. App. 42. When a question of law is sought to be raised on the trial, instructions should always be asked so as to enable the Supreme Court to see on what authority the court below decided. *Harrison v. Bartlett*, 51 Mo. 170; *Ford v. Cameron*, 19 Mo. App. 467.

3. *Alabama.* — *Matthews v. State*, 55 Ala. 65; *Washington v. State*, 53 Ala. 29; *Drake v. State*, 60 Ala. 62; *Stewart v. Sonneborn*, 49 Ala. 178; *Shaw v. Wallace*, 2 Stew. & P. (Ala.) 193; *Pistole v. Street*, 5 Port. (Ala.) 64; *Pharr v. Bachelor*, 3 Ala. 237; *Ewing v. Sanford*, 19 Ala. 605; *Stanley v. Mobile Bank*, 23 Ala. 652; *Chamblain v. Masterson*, 26 Ala. 371; *Wright v. Bolling*, 27 Ala. 259; *Felix v. State*, 18 Ala. 720; *Spivey v. State*, 26 Ala. 90; *Thomason v. Odum*, 31 Ala. 108; *Price v. Mazange*, 31 Ala. 701; *Bob v. State*, 32 Ala. 560; *Riley v. Riley*, 36 Ala. 496.

California. — *People v. Ivey*, 49 Cal. 56.

Illinois. — *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Phillips v. People*, 11 Ill. App. 340; *Fairbury v. Rogers*, 98 Ill. 554.

Indiana. — *Riley v. Watson*, 18 Ind. 291.

Maryland. — *Tyson v. Rickard*, 3 Har. & J. (Md.) 109.

Michigan. — *George W. Roby Lumbar Co. v. Gray*, 73 Mich. 356.

Mississippi. — *Myrick v. Wells*, 52 Miss. 149; *Whitney v. Cook*, 53 Miss. 551.

Missouri. — *State v. Mitchell*, 98 Mo. 657; *Albert v. Besel*, 88 Mo. 150; *State v. Forsythe*, 89 Mo. 667.

New York. — *People v. Finnegan*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 147.

Tennessee. — *Brady v. Clark*, 12 Lea (Tenn.) 323; *Roberts v. Alexander*, 5 Lea (Tenn.) 414; *McCorry v. King*, 3 Humph. (Tenn.) 267; *Mills v. Faris*, 12 Heisk. (Tenn.) 451; *Bedford v. Flowers*, 11 Humph. (Tenn.) 242; *Rice v. Crow*, 6 Heisk. (Tenn.) 28; *Ahrens v. Cobb*, 9 Humph. (Tenn.) 645; *Powell v. Finch*, 5 Verg. (Tenn.) 446; *Kendrick v. Cisco*, 13 Lea (Tenn.) 248.

Illustration. — An instruction, "We leave the liability or nonliability of these defendants to be discovered and determined by the jury from all the facts of the case," leaves the jury to determine both the law and the facts, and is therefore erroneous. *Cook v. Mackrell*, 70 Pa. St. 12.

Where Court Is Held by Lay Judge. — It is error to submit a question of law to the jury though the court be held by judges not learned in the law, and in the absence of the law judge. *Richardson v. Stewart*, 2 S. & R. (Pa.) 84; *Cook v. Mackrell*, 70 Pa. St. 12; *Keating v. Orne*, 77 Pa. St. 89.

Blending Questions of Law and Fact. — It is error to blend questions of law and fact and submit the whole to the jury. *Potts v. Wright*, 82 Pa. St. 498.

4. *Ragan v. Gaither*, 11 Gill & J. (Md.) 472; *Caledonian Ins. Co. v. Traub*, 80 Md. 214; *Beidler v. Fish*, 14 Ill. App. 29; *Hudson v. St. Louis, etc.,*

and error to give such an instruction.¹

2. Questions of Fact for Jury. — On the other hand, it is as much the exclusive province of the jury to determine the facts as it is of the judge to determine the law, and an instruction or request which takes away from the jury the determination of the facts is erroneous.² The judge and jury are respectively independent in determining questions of law and fact, and neither can invade the other's province.³ The instruction must state rules of law

R. Co., 53 Mo. 525; *Morgan v. Durfee*, 69 Mo. 469; *Turner v. St. Louis, etc.*, R. Co., 76 Mo. 261; *St. Louis, etc.*, R. Co. *v. Cleary*, 77 Mo. 634; *Kendig v. Chicago, etc.*, R. Co., 79 Mo. 207.

1. *Stewart v. Sonneborn*, 49 Ala. 178; *Drake v. State*, 60 Ala. 62; *American Ins. Co. v. Crawford*, 7 Ill. App. 29; *International Bank v. Bartalott*, 11 Ill. App. 620; *Work v. Maclay*, 2 S. & R. (Pa.) 415; *Hershey v. Hershey*, 8 S. & R. (Pa.) 333; *Huston v. Barstow*, 19 Pa. St. 169; *Hart v. Girard*, 56 Pa. St. 23; *Green v. Hill*, 4 Tex. 465; *Keen v. Monroe*, 75 Va. 424.

2. *Alabama.* — *Clark v. Goddard*, 39 Ala. 164.

Florida. — *Doggett v. Jordan*, 2 Fla. 541; *Baker v. Chatfield*, 23 Fla. 540.

Illinois. — *Farnan v. Childs*, 66 Ill. 544; *Jamison v. Graham*, 57 Ill. 94; *St. Louis, etc.*, R. Co. *v. Manly*, 58 Ill. 300; *Mitchinson v. Cross*, 58 Ill. 366; *Stobie v. Dills*, 62 Ill. 432; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Phillips v. People*, 11 Ill. App. 340; *Swan v. People*, 98 Ill. 610; *Van Duzor v. Allen*, 90 Ill. 499; *Hubner v. Feige*, 90 Ill. 208; *Fairbury v. Rogers*, 98 Ill. 554.

Iowa. — *Frederick v. Gaston*, 1 Greene (Iowa) 401; *Houston v. State*, 4 Greene (Iowa) 437.

Kentucky. — *Salter v. Myers*, 5 B. Mon. (Ky.) 281.

Maryland. — *Benson v. Boteler*, 2 Gill (Md.) 74; *Planters' Bank v. Alexandria Bank*, 10 Gill & J. (Md.) 346; *Burtles v. State*, 4 Md. 273; *Abell v. Harris*, 11 Gill & J. (Md.) 367; *Grove v. Brien*, 1 Md. 438; *Baltimore, etc.*, R. Co. *v. Woodruff*, 4 Md. 242.

Massachusetts. — *Pettingill v. Porter*, 8 Allen (Mass.) 1.

Michigan. — *Williams v. Shelden*, 61 Mich. 311; *Sheahan v. Barry*, 27 Mich. 217.

Mississippi. — *Myrick v. Wells*, 52 Miss. 149.

Missouri. — *Turner v. Loler*, 34 Mo. 461.

New York. — *Borrodale v. Leek*, 9

Barb. (N. Y.) 611; *People v. Finnegan*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 147.

North Carolina. — *White v. White*, 4 Dev. L. (N. Car.) 257.

Pennsylvania. — *West Branch Bank v. Donaldson*, 6 Pa. St. 179; *King v. Kline*, 6 Pa. St. 318; *Steffy v. Carpenter*, 37 Pa. St. 41; *Reel v. Elder*, 62 Pa. St. 308; *Malone v. Dougherty*, 3 W. N. C. (Pa.) 116.

Texas. — *Reynolds v. Williams*, 1 Tex. 311.

Virginia. — *M' Rae v. Scott*, 4 Rand. (Va.) 463.

United States. — *Adams v. Roberts*, 2 How. (U. S.) 486; *Jewell v. Jewell*, 1 How. (U. S.) 219; *Richardson v. Boston*, 19 How. (U. S.) 263; *Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. (U. S.) 541; *Hogan v. Page*, 2 Wall. (U. S.) 605.

Where Evidence Is All on One Side. — Although the evidence be all on one side, the question of fact must be submitted to the jury. *West Branch Bank v. Donaldson*, 6 Pa. St. 179; *King v. Kline*, 6 Pa. St. 318.

Stating Opinion as Question of Law and Submitting as Question of Fact. — The judge is bound to decide a question as a question of law or submit it to the jury. It is not proper for him first to state his opinion on it as a question of law and afterwards submit it to the jury as one of fact. *Vedder v. Fellows*, 20 N. Y. 126.

Separating Questions of Law and Fact. — In instructing the jury as to the law of the case the judge should distinctly separate questions of law from questions of fact, and a charge which determines both without separating them and without submitting the question of fact to the jury is erroneous. *Rogers v. Broadnax*, 24 Tex. 538.

If questions of law and fact are raised by the pleadings the question of law should be eliminated and the question of fact alone, submitted to the jury. *Duren v. Kee*, 41 S. Car. 171.

3. *Mawich v. Elsey*, 47 Mich. 10.

only, leaving to the jury the decision of the fact and the application of the rules of law given by the court.¹

3. Power or Right of Juries to Judge the Law — *a.* IN CIVIL CASES. — With the exception of possibly one decision,² of doubtful authority,³ it has never been seriously contended that juries are in any sense judges of the law in civil cases; on the contrary, the instructions to the jury are the law of the case for them to obey and follow,⁴ and it makes no difference whether they con-

1. *Muldowney v. Illinois Cent. R. Co.*, 32 Iowa 176.

2. *Georgia v. Brailsford*, 3 Dall. (U. S.) 1. In this case the court, in charging, explicitly recognized the rule that on questions of fact it is the province of the jury, and on questions of law the province of the court, to decide; but afterwards in its charge overturned this statement by directing the jury that they had nevertheless the right to take upon themselves to judge of both, and to determine the law as well as the fact in controversy. See also dictum of Mr. Justice Kent in *People v. Croswell*, 3 Johns. Cas. (N. Y.) 376.

3. In *U. S. v. Morris*, 1 Curt. (U. S.) 58, Judge Curtis comments on *Georgia v. Brailsford*, 3 Dall. (U. S.) 1, as follows: "I cannot help feeling much doubt respecting the accuracy of this report; not only because the different parts of the charge are in conflict with each other, but because I can scarcely believe that the chief justice held the opinion that in civil cases, and this was a civil case, the jury had the right to decide the law. Indeed, the whole case is an anomaly. It purports to be a trial by jury, in the Supreme Court of the United States, of certain issues out of chancery. And the chief justice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole court were agreed. If it be correctly reported, I can only say, it is not in accordance with the views of any other court, so far as I know, in this country or in England, and is certainly not in accordance with the course of the Supreme Court for many years."

4. *Alabama*. — *Chamberlain v. Masterson*, 26 Ala. 371.

California. — *Sappenfield v. Main St.*, etc., 3 R. Co., 91 Cal. 48; *Loveland v. Gardner*, 79 Cal. 317; *Lind v. Closs*, 88 Cal. 6; *Emerson v. Santa Clara County*, 40 Cal. 543.

Georgia. — *Thornton v. Lane*, 11 Ga. 459; *Higginbotham v. Campbell*, 85 Ga. 638.

Illinois. — *Wohlford v. People*, 148 Ill. 296; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514.

Iowa. — *Taylor v. Cook*, 14 Iowa 501; *Baird v. Chicago, etc.*, R. Co., 55 Iowa 121; *Stewart v. Smith*, 60 Iowa 275; *Roberts v. Leon Loan, etc.*, Co., 63 Iowa 76; *Bowman v. Brown*, 52 Iowa 437; *Boyer v. Riley*, 41 Iowa 13; *State v. Moore*, 81 Iowa 578; *Fisk v. Chicago, etc.*, R. Co., 83 Iowa 253; *Davis v. Chicago, etc.*, R. Co., 83 Iowa 744; *Reynolds v. Keokuk*, 72 Iowa 371; *Way v. Chicago, etc.*, R. Co., 73 Iowa 463; *Griffith v. Burlington, etc.*, R. Co., 72 Iowa 645; *Morlan v. Russell*, 71 Iowa 214; *Nichols v. Chicago, etc.*, R. Co., 69 Iowa 154; *Caffrey v. Groom*, 10 Iowa 548; *Savery v. Busick*, 11 Iowa 487; *Jewett v. Smart*, 11 Iowa 505; *Farley v. Budd*, 14 Iowa 289; *Porter v. Thomson*, 22 Iowa 391; *Beal v. Stone*, 22 Iowa 447; *Morss v. Johnson*, 38 Iowa 430; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601; *Sullivan v. Otis*, 39 Iowa 328; *Howell v. Snyder*, 39 Iowa 610; *Petersen v. Ochs*, 40 Iowa 530; *Furman v. Chicago, etc.*, R. Co., 57 Iowa 42; *Musser v. Maynard*, 59 Iowa 11; *Griffith v. Parton*, 59 Iowa 31; *Graham v. McGeoch*, 61 Iowa 51; *Browne v. Hickie*, 68 Iowa 330; *Crane v. Chicago, etc.*, R. Co., 74 Iowa 330; *Dutton v. Wabash, etc.*, R. Co., 66 Iowa 352; *Hornish v. Peck*, 53 Iowa 157.

Kansas. — *Ryan v. Tudor*, 31 Kan. 366; *Howell v. Pugh*, 25 Kan. 96; *Irwin v. Thompson*, 27 Kan. 643; *Union Pac. R. Co. v. Hutchinson*, 40 Kan. 51; *Florence, etc.*, R. Co. v. *Pember*, 45 Kan. 625.

Maryland. — *Sowerwein v. Jones*, 7 Gill & J. (Md.) 335.

Massachusetts. — *Merrill v. Nary*, 10 Allen (Mass.) 416.

Michigan. — *Kempsey v. McGinniss*, 21 Mich. 123.

sider them correct or not,¹ or whether, in point of fact, they are correct.²

Disregard of Instructions. — Accordingly, if it appears that the jury have disregarded the instructions of the court, the judgment will be reversed;³ and it has been held that the cause will be reversed although the instructions given are incorrect,⁴ but there are decisions which, with strong reason, maintain the contrary view.⁵

Charging Jury to Regard Instructions. — So it is proper to charge the jury that they are bound to regard the law as stated by the judge to be the law of the case,⁶ and not to attempt to decide the law for themselves;⁷ and, by parity of reasoning, it is error to charge the

New York. — *Dunlop v. Patterson*, 5 Cow. (N. Y.) 243.

Ohio. — *Townsend v. State*, 11 Ohio 427, note; *Montgomery v. State*, 11 Ohio 427.

Oregon. — *Davis v. Mason*, 3 Oregon 154.

Tennessee. — *Wade v. Ordway*, 1 Baxt. (Tenn.) 230; *Fink v. Evans*, 95 Tenn. 418; *East Tennessee, etc., R. Co. v. Fain*, 12 Lea (Tenn.) 35.

Vermont. — *State v. Croteau*, 23 Vt. 14.

United States. — *Mobile, etc., R. Co. v. Wilson*, 76 Fed. Rep. 129.

England. — *Reg. v. Parish*, 8 C. & P. 94, 34 E. C. L. 307; *Levi v. Milne*, 4 Bing. 195, 13 E. C. L. 396; *Baylis v. Lawrence*, 11 Ad. & El. 920, 39 E. C. L. 270; *Townsend's Case*, Plowd. 114.

1. *Lind v. Closs*, 88 Cal. 6.

2. *Boyer v. Riley*, 41 Iowa 13; *State v. Moore*, 81 Iowa 578; *Reynolds v. Keokuk*, 72 Iowa 371; *Loveland v. Gardner*, 79 Cal. 317.

The jury can no more be permitted to look beyond the instructions to ascertain the law than they would be allowed to go outside of the evidence to find the facts of the case. *Emerson v. Santa Clara County*, 40 Cal. 543.

3. *Thornton v. Lane*, 11 Ga. 459; *Union Pac. R. Co. v. Hutchinson*, 40 Kan. 51; *Ryan v. Tudor*, 31 Kan. 366; *Dutton v. Wabash, etc., R. Co.*, 66 Iowa 352; *Nichols v. Chicago, etc., R. Co.*, 69 Iowa 154.

4. *Boyer v. Riley*, 41 Iowa 13; *Caffrey v. Groome*, 10 Iowa 548; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601; *Sullivan v. Otis*, 39 Iowa 328; *Paul v. Casselberry*, 12 Phila. (Pa.) 313; *Dent v. Bryce*, 16 S. Car. 14.

"Jurors are not at liberty to disregard the law in such cases upon an idea that they can thus do justice be-

tween the parties. If courts or juries are at liberty to disregard the law in some cases, what is to prevent them from doing so in all cases when they do not approve of the law? It is evident that such practice would undermine the foundation of remedial justice, and would be substituting the arbitrary will of those who are called upon to administer justice for the settled rules of law upon which every citizen has a right to rely for the protection, not only of his property, but his liberty and his life. It is better that we should sometimes suffer great hardship, whether caused by our own neglect or otherwise, than that we should exchange known rules of law for the arbitrary will of those who undertake to administer the law." *Davis v. Mason*, 3 Oregon 156.

Presumptions on Appeal. — It cannot be presumed in favor of the verdict on appeal that it was rendered upon a theory of the case correct in law, but in conflict with the instructions given. *Mast v. Pearce*, 58 Iowa 579.

5. *Peck v. Land*, 2 Ga. 1; *Wellborn v. Weaver*, 17 Ga. 267; *Armstrong v. Keith*, 3 J. J. Marsh. (Ky.) 153; *Van Vacter v. Brewster*, 1 Smed. & M. (Miss.) 400; *McCall v. Seevers*, 5 Ind. 187; *Clifton v. Shannon*, 4 Ind. 498; *Roberts v. Nodwift*, 8 Ind. 339; *Campbell v. Sproat*, 1 Yeates (Pa.) 327.

6. *Thornton v. Lane*, 11 Ga. 459; *Wade v. Ordway*, 1 Baxt. (Tenn.) 230.

7. *Wade v. Ordway*, 1 Baxt. (Tenn.) 230.

The following instruction has been approved: "Gentlemen of the jury, you have taken a solemn oath to try this cause according to the law and evidence given you in open court, and you have no authority to consider or be controlled by anything else than given you as law by the court, and

jury that they are judges of the law and the fact,¹ or that the jury are the judges of the law applicable to the case.²

b. IN CRIMINAL CASES — (1) In England — (a) Views of Text-writers. — The next question which presents itself is of greater difficulty. While it may be admitted that juries are the judges of the law in the limited sense that they may return a general verdict of not guilty in a criminal case, which verdict cannot be revised or set aside, this is hardly a right which they possess, but merely a power, and in exercising this power against the instructions of the court they are guilty of a violation of duty. The works of early text-writers are often cited as sustaining the position that at common law the jury were judges of the law in the sense that they might disregard the instructions of the court and determine the law for themselves. What has been said by these eminent authors is set out in the notes, in order that the reader may draw his own conclusions.³ The writer of this article is convinced that these statements not only do not sustain this position, but are directly opposed to it.

unless your verdict accords with the law as given you by the court, you are guilty of wilful perjury. It makes no difference what you think the law ought to be, you have no authority to consider or be controlled by anything else as law than given you by the court." *State v. Miller*, 53 Iowa 154.

1. *Higginbotham v. Campbell*, 85 Ga. 638.

2. *Fink v. Evans*, 95 Tenn. 418.

Charge that Jury Are "Sole Judges of the Facts and the Law as Given in Charge by the Court." — The charge that "You are the sole judges of the facts and the law as given in charge by the court," does not convey the impression to the jury that they are the judges of the law as well as the facts. On the contrary, it fairly implies that the jury are to take the law as given them by the court in charge. *East Tennessee, etc., R. Co. v. Fain*, 12 Lea (Tenn.) 41.

3. The statute West. 2, c. 30 (13 Edw. I., A. D. 1285), seems to be the groundwork of the arguments of those who assert the right of juries to determine questions of law. *Rex v. St. Asaph*, 3 T. R. 428, note. See also *Pierce v. State*, 13 N. H. 543; *State v. Croteau*, 23 Vt. 24. This statute provided that "the justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseizin or not, so that they do show the truth of the fact, and require aid of the justices; but if they, of their own accord, are willing to say that it is dis-

seizin or not, their verdict shall be admitted at their own peril."

In Littleton's treatise, which was written between the years 1461 and 1483, it is said, after speaking of the giving of a special verdict in an assize: "In such case, where the inquest may give their verdict at large, if they will take upon themselves the knowledge of the law they may give their verdict generally as is put in their charge; as in the case aforesaid, they may well say the lessor did not disseize the lessee." Littleton's *Tenures*, § 368.

In commenting on Littleton's statement, Lord Coke, who wrote a century and a half later, says: "Although the jurie, if they will take upon them, (as Littleton here saith), the knowledge of the law, may give a generall verdict, yet it is dangerous for them so to doe, for if they doe mistake the law, they runne into the danger of an attainr." Coke's *Littleton*, 228a.

In Blackstone's *Commentaries* it is said: "Such * * * verdict may be either general * * * or special, setting forth all the circumstances of the case and praying the judgment of the court. * * * This is where they [the jury] doubt the matter of law, and therefore choose to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and, if their

(b) **Decisions on the Question.** — So much for the authority of text-writers. The question will now be considered from the standpoint of adjudicated cases. In spite of dicta to the contrary, it is submitted that there is not an English case (except in prosecutions for libel under Fox's Libel Act of 1792) where it has been held that the jury are judges of the law in such sense that they may disregard the instructions of the court and determine the law for themselves. An exhaustive research of the authorities shows an unbroken line of decisions to the contrary (mostly prosecutions for criminal libel), beginning with the year 1554 and ending in 1789, a few years prior to the passage of the Libel Act. The substance of these decisions is set out in the notes, and the decisions are arranged in chronological order.¹ As was said in a

verdict be notoriously wrong, they may be punished, and the verdict set aside by attain at the suit of the king, but not at the suit of the prisoner." 4 Blackstone's Com., p. 361.

In commenting upon Blackstone's statements, Chief Justice Lewis, in his dissenting opinion in *People v. Crosswell*, 3 Johns. Cas. (N. Y.) 405, says: "What? Men to be punished for a breach of their oaths in exercising a right? This would be preposterous. The right here spoken of is nothing more than the right of insisting upon their verdict being received and recorded, though it be general where it ought not to be so. But is this a species of right which shall impose it upon a judge to inform them that they may exercise it though they violate their oaths? Surely not."

What is here said comprises, it is believed, the only statute on the subject prior to the passage of Fox's Libel Bill in 1792, and the only statements of text-writers which might be supposed to give support to the doctrine that juries are the judges of the law; and it is submitted that there is nothing in any of them which in the least tends to show this right. The language of this statute and the statements of text-writers all go to show that if the jurors take upon themselves the decision of questions of law and decide erroneously they will be subject to punishment. It can hardly be believed that a jury is punishable for doing that which it has a legal and moral right to do. If the jury should incur a penalty, the act for doing which the penalty is imposed must be illegal, for a penalty attaching to the performance of an act makes the act itself unlawful. "But

what peril could they incur if, by deciding the law, they simply exercised a right given them by the statute? This phraseology is most singular, if the statute was intended to submit the law to them. The reasonable construction of it is that if the jury will undertake to decide the law, they shall be subject to such penalty as may be imposed upon them for exceeding their jurisdiction." *Pierce v. State*, 13 N. H. 543.

1. 1554. — On a trial for high treason before the chief justice, the jury found the defendant not guilty, against the instructions of the court. For this they were imprisoned, and were released only upon payment of enormous fines. *Throckmorton's Case*, 1 St. Tr. 901, cited in *State v. Croteau*, 23 Vt. 30.

1602. — In *Wharton's Case*, Yelv. 23, the jury in a murder case having found a verdict contrary to the instructions of the court were fined for this breach of duty.

1619. — In *Needler's Case*, Hob. 227, Chief Justice Hobart recognized that the jury are liable to an attain for error in deciding the law involved in their general verdict.

1649. — On the trial of Lieut.-Col. Lilburne for treason (2 Harg. St. Tr. 79, 80), the court refused to permit him to read to the jury from a law book; he became enraged at this and told them that if the jury pleased "they were no more but ciphers to pronounce their verdict." One of the judges sitting declared that this was a "damnable, blasphemous heresy," and the jury were instructed that they were not the judges of the law but only of the facts.

1670. — In 1670 William Penn was

recent decision, "There is not a single respectable English

tried under an indictment for seditious preaching. The court charged that the jury had nothing to do except to find whether the defendant had preached or not; the jurors, however, acquitted the prisoner and were fined for contempt in so doing. One of the jurors sued out a writ of habeas corpus before Chief Justice Vaughan and was discharged. *Bushell's Case*, Vaughan 135.

1678. — In *Hood's Case*, Kelyng 50, which was a trial for murder, Chief Justice Kelyng charged the jury that this was murder, the law implying malice, and that this was matter of law, and that the jury were to observe the direction of the court and that they were only judges of facts.

1683. — On the trial of Algernon Sidney, 3 Harg. St. Tr. 818, the question was not involved, but Judge Jeffreys, in his charge to the jury, told them that it was the duty of the court to declare the law to the jury, and the jury were bound to receive its declaration of law.

1702. — In *Fuller's Case*, 5 Harg. St. Tr. 443, Chief Justice Holt charged the jury as follows: "You hear the witness say he [Fuller] brought these two scandalous books to the press, and that he corrected them; and he owns that he was the publisher of them; and if you believe he did so you are to find him guilty."

1704. — In *Tutchin's Case*, 5 Harg. St. Tr. 542, Chief Justice Holt charged as follows: "You are to consider whether you are satisfied that Mr. Tutchin is guilty of writing, composing, and publishing these libels," and "if you are satisfied that he composed and published these papers, you are to find him guilty."

1727. — In *Rex v. Oneby*, 2 Ld. Raym. 1485, 2 Stra. 766, which was a trial for murder, the jury found a special verdict upon which the case was tried before the twelve judges, and Lord Chief Justice Raymond said: "In cases of this nature the judges are to determine what is malice or what is a reasonable time to cool; and they must do it upon the circumstances of the case; the jury are judges only of the fact, and we must determine whether it be deliberate or not."

1729. — In *King v. Clark*, 1 Barn. 304, it was claimed that the charge of

a malicious, traitorous design was not made out by the evidence. Chief Justice Raymond instructed that the fact of printing and publishing only was to be decided by the jury.

1731. — In *Franklin's Case*, 9 Harg. St. Tr. 275, which was a prosecution for libel, Lord Raymond charged that there are only two things for the consideration of the jury: first, whether the defendant was guilty of publishing it; second, whether the innuendoes were justly stated and applied; and that the third question, whether the publication was libelous, belonged exclusively to the court as a matter of law.

1734. — In *King v. Pool*, Hardw. 28, Lord Raymond said: "The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only, and it is of the greatest consequence to the law of England and to the subject that these powers of the judge and jury be kept distinct; that the judge determines the law and the jury the fact; and if they ever come to be confounded it will prove the confusion and destruction of the law of England."

1752. — In *King v. Owen*, 10 Harg. St. Tr. 196, Lord Chief Justice Lee instructed the jury, on a prosecution for libel, that if they thought the fact of publication fully proved (there being no question as to the meaning of it), they ought to find the defendant guilty.

1756. — In *Nutt's Case*, 1 Barn. 306, tried before Chief Justice Rider, the jury were charged that they could pass only upon the facts and the judges only upon the law.

1756. — In *Shebbeare's Case*, cited in *Rex v. St. Asaph*, 3 T. R. 428, note, Lord Mansfield directed the jury that if they were satisfied with the publication, and that the meaning and innuendoes were as stated, they ought to find the defendant guilty, leaving the question of law upon the record for the judgment of the court.

1764-70. — In *Rex v. Wilkes*, 4 Burr. 2527, the jury found a verdict of guilty for publishing the "North Briton," No. 45, which was recorded generally guilty.

1770. — In *Rex v. Woodfall*, 5 Burr. 2661, and *Miller's Case*, 20 St. Tr.

authority for the doctrine in question." ¹

(2) *In America* — (a) **At Common Law** — *aa.* VIEW THAT JURY MUST FOLLOW INSTRUCTIONS. — In America, in jurisdictions where the question remains unaffected by statutory or organic provisions declaring the jury judges of the law in prosecutions for libel, or in criminal cases generally, the overwhelming weight of authority is to the effect that the jury are not judges of the law in the sense that they may disregard the instructions of the court, but, on the contrary, they are bound to follow such instructions or they will be guilty of a breach of duty; ² and that while the jury have the

1870, 1891), the jury were directed in substance that if they were satisfied with the publication and that the meaning and innuendoes were as stated, they ought to find the defendant guilty, leaving the question of law upon the record for the judgment of the court.

1784. — In *Rex v. St. Asaph*, 3 T. R. 428, note, the rule laid down in *Rex v. Woodfall*, 5 Burr. 2661, is followed.

1789. — In *Rex v. Withers*, 3 T. R. 428, it was held, on the trial of an indictment for libel, that the only questions for the consideration of the jury are the fact of publishing and the truth of the innuendoes; whether the subject is or is not a libel, is a question of law for the court. (*Per Lord Kenyon.*) In *Stockdale's Case*, cited in the dissenting opinion of Lewis, C. J., in *People v. Crosswell*, 3 Johns. Cas. (N. Y.) 408, Lord Kenyon instructed the jury that there were two points for them to attend to — whether the defendant had published the libel, and then whether the sense which the attorney-general, by his innuendoes in the information, had affixed to the different passages was fairly affixed to them.

1. Mitchell, J., in *Com. v. McManus*, 143 Pa. St. 98.

2. *Alabama*. — *Pierson v. State*, 12 Ala. 153; *State v. Jones*, 5 Ala. 666; *Batre v. State*, 18 Ala. 119; *Washington v. State*, 63 Ala. 135.

Arkansas. — *Pleasant v. State*, 13 Ark. 360; *Robinson v. State*, 33 Ark. 184; *Sweeney v. State*, 35 Ark. 601. See also dicta in *Edwards v. State*, 22 Ark. 254; *Winkler v. State*, 32 Ark. 539. *Compare Patterson v. State*, 7 Ark. 60, in which it is said: "In all criminal prosecutions under our constitution and laws, the jury are the judges both of the law and the evidence, and as a necessary consequence should be sworn to decide according to

both. It is perfectly manifest that the swearing in this case is wholly insufficient, as they are notsworn to well and truly try and a true deliverance make between the state of Arkansas and the prisoner at the bar, nor to give a true verdict according to the law and evidence."

California. — *People v. Anderson*, 44 Cal. 65.

Delaware. — *State v. Jeandell*, 5 Harr. (Del.) 484.

Florida. — *Lewton v. Hower*, 35 Fla. 58.

Iowa. — *State v. Miller*, 53 Iowa 154.

Kentucky. — *Com. v. Van Tuyl*, 1 Metc. (Ky.) 5; *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 132.

Maine. — *State v. Wright*, 53 Me. 343 [*overruling State v. Snow*, 18 Me. 348]; *State v. Stevens*, 53 Me. 548.

Massachusetts. — *Com. v. Anthes*, 5 Gray (Mass.) 185, *overruling Com. v. Knapp*, 10 Pick. (Mass.) 497.

Michigan. — *Hamilton v. People*, 29 Mich. 174; *People v. Mortimer*, 48 Mich. 37; *People v. Waldvogel*, 49 Mich. 337.

Minnesota. — *State v. Rheams*, 34 Minn. 18.

Mississippi. — *Williams v. State*, 32 Miss. 390.

Missouri. — *Hardy v. State*, 7 Mo. 607. See also *Fugate v. Carter*, 6 Mo. 267; *Newman v. Lawless*, 6 Mo. 279; *Massey v. Tingle*, 29 Mo. 437.

Nebraska. — *Parrish v. State*, 14 Neb. 60.

New Hampshire. — *Pierce v. State*, 13 N. H. 549; *Lord v. State*, 16 N. H. 325.

New York. — *Carpenter v. People*, 8 Barb. (N. Y.) 603; *Duffy v. People*, 26 N. Y. 593. *Compare* the early decision of *People v. Crosswell*, 3 Johns. Cas. (N. Y.) 375, where the court was evenly divided on the question whether in a prosecution for criminal libel the jury were judges of the law.

power to disregard the law as given them by the court, they have neither the legal nor the moral right to do so.¹

The Jury Has No Other Control over questions of law than that arising

Ohio. — *Montgomery v. State*, 11 Ohio 427; *Robbins v. State*, 8 Ohio St. 167; *Adams v. State*, 29 Ohio St. 412, in which it was held that under a statutory provision of that state it is within the legal province of the jury, in all trials for murder, to determine the grade of the crime, but notwithstanding this right it is the right and duty of the court to instruct them upon all questions of law arising in the case, and it is the duty of the jury to receive the law as given to them by the court.

Pennsylvania. — *State v. Bell*, Add. (Pa.) 159; *Nicholson v. Com.*, 96 Pa. St. 503; *Harrison v. Com.*, 123 Pa. St. 508; *Com. v. McManus*, 143 Pa. St. 64. *Contra*, *Kane v. Com.*, 89 Pa. St. 522, in which case the court refused a requested instruction that "the jury are the judges of the law and the fact," and charged as follows: "The law is for the court, and you will be governed by it or you will not, as you have sworn to do, try the case 'by the law and the evidence.' I do not assert that I am infallible. It is human to err, but it is not for you to declare my error. If I err, I am glad to know that I can be corrected, and the defendant protected, in a higher tribunal." The judgment was reversed for a refusal to give the charge as requested, and the reasoning of Chief Justice Sharswood was to the effect that the jury, having the power, have a right to give a verdict contrary to the instructions of the law. No court should give a binding instruction to a jury which it is powerless to enforce by granting a new trial if it should be disregarded. It may present to them the obvious considerations which should induce them to receive and follow their instruction, but beyond this it has no right to go. This decision has been construed (see *Com. v. McManus*, 143 Pa. St. 64) as not meaning that the jury have the right to disregard instructions of the court, but it is not believed that any such meaning can be deduced from it.

South Carolina. — *State v. Drawdy*, 14 Rich. L. (S. Car.) 90. See also *State v. Jones*, 29 S. Car. 201.

Tennessee. — *McGowan v. State*, 9 Yerg. (Tenn.) 195; *Dale v. State*, 10 Yerg. (Tenn.) 555; *Hannan v. State*, 90 Tenn. 647; *Harris v. State*, 7 Lea

(Tenn.) 554. In this case the court says that the statement of the rule in *McGowan v. State*, 9 Yerg. (Tenn.) 195, is *reaffirmed* as correct, and that "such of our subsequent opinions and dicta as seem to countenance the opposite theory" are overruled. Compare *Butler v. State*, 7 Baxt. (Tenn.) 36, where it is said: "It is objected that in telling the jury that they are 'judges of the proof' the judge may have made the impression on them that they are not also judges of the law, from the fact of his omitting to remind them of their right to judge of the law as well as the facts. If the defendant's counsel had requested the court to charge the jury as to their right to judge of the law, and he had refused or neglected to do so, it might have misled the jury as to their rights, and, therefore, been erroneous. But we must presume that all jurors are apprised of their constitutional rights in this regard, and if they did not exercise it, we are to presume it was because they were content with the law as expounded by the court." *Hannah v. State*, 11 Lea (Tenn.) 201, in which it was held error in the court to refuse to permit counsel, in the argument of a case before the jury, to read the law to the jury.

Texas. — *Nels v. State*, 2 Tex. 280; *Johnson v. State*, 5 Tex. App. 423. It is now provided by statute in Texas that the jury are the exclusive judges of the facts in every criminal case, but not of the law in any case. They are bound to receive the law from the court and to be governed thereby. *Texas Code Crim. Pro.*, art. 676.

Virginia. — *Brown v. Com.*, 86 Va. 466, adopting the views of Judge Story in *U. S. v. Battiste*, 2 Sumn. (U. S.) 240, and disapproving dicta to the contrary in *Doss v. Com.*, 1 Gratt. (Va.) 557.

United States. — *U. S. v. Battiste*, 2 Sumn. (U. S.) 240; *Stettinius v. U. S.*, 5 Cranch (C. C.) 573; *U. S. v. Morris*, 1 Curt. (U. S.) 60; *U. S. v. Shive*, 1 Baldw. (U. S.) 510; *U. S. v. Great-house*, 4 Sawy. (U. S.) 464; *U. S. v. Taylor*, 11 Fed. Rep. 472; *U. S. v. Keller*, 19 Fed. Rep. 633. *Contra*, *U. S. v. Wilson*, 1 Baldw. (U. S.) 78.

1. *Parrish v. State*, 14 Neb. 60; *Hamilton v. People*, 29 Mich. 174.

ing out of the right to return a general verdict of not guilty,¹ which necessarily covers both the law and the fact and embodies a decision based upon and growing out of both.²

Charging Jury to Regard or Disregard Instructions. — It follows, then, that a charge which assumes that the jury may disregard the instructions of the court may properly be refused,³ and on the other hand the court may properly instruct that the jury must receive the law from the court.⁴

1. *Pierson v. State*, 12 Ala. 153.

"It has been a familiar saying among the profession in this country, and an opinion entertained by highly respectable judges, that the jury are judges of the law as well as of the facts.

* * * In some sense I believe it to be true, for they are the sole judges of the application of the law to the particular case. In this sense, theirs is the duty to pass on the law — a most important and often difficult duty, which, when discharged, makes the difference between a general and a special verdict." *U. S. v. Morris*, 1 Curt. (U. S.) 61.

2. *U. S. v. Taylor*, 11 Fed. Rep. 472.

"In a certain limited sense, therefore, it may be said that the jury have a power and a legal right to pass upon both the law and the fact. And this is sufficient to account for many and most of the dicta in which the proposition is stated. But it would be more accurate to state that it is the right of the jury to return a general verdict; this draws after it, as a necessary consequence, that they incidentally pass upon the law. But here again is the question, what is intended by 'passing upon the law'? I think it is by embracing it in their verdict and thus bringing it upon the record, with their finding of the facts. But does it follow that they may rightfully, and by authority of the common law, by which all are conscientiously bound to govern their conduct, proceed upon the same grounds and principles in the one case as the other? What the jury have a right to do, and what are the grounds and principles upon which they are in duty and conscience bound to act and govern themselves in the exercise of that right, are two very distinct questions." *Com. v. Anthes*, 5 Gray (Mass.) 208.

The Jury Take the Instructions of the Court as evidence of the law, and they turn to the witnesses for evidence of the facts, and judging in this sense of the law and the facts a general verdict is

rendered. *State v. Drawdy*, 14 Rich. L. (S. Car.) 90.

Their right to judge of the law is a right to be exercised only under the direction of the court, and if they go aside from that direction and determine the law incorrectly they depart from their duty. *Montgomery v. State*, 11 Ohio 427.

A Speculative Question. — One of our courts has well said: "The question, as one of speculation and of declamation, is not new in our courts; it is as old as the courts are; but as a legal principle it has been repudiated and turned out of court as often as it has been presented." *State v. Jeandell*, 5 Harr. (Del.) 484.

3. *Batre v. State*, 18 Ala. 119, in which case the court refused to charge that the jury had the right to judge of the law as well as of the facts of the case, and that whether, in the exercise of this right, they would distrust the court, or whether they would receive the law from the court, must be left to their own discretion under the sanction of their oath. To the same effect see *U. S. v. Riley*, 5 Blatchf. (U. S.) 205.

4. *Sweeney v. State*, 35 Ark. 586. To the same effect see *Robbins v. State*, 8 Ohio St. 167, where the following charge was approved: "It is the duty of the jury to receive the law as it is given to them by the court; it is the exclusive province of the court to determine what the law is; and the jury have no right to hold the law to be otherwise in any particular than as given to them by the court;" *State v. Miller*, 53 Iowa 156, where the reviewing court approved this instruction: "You have taken a solemn oath to try this cause according to the law and evidence given you in open court, and you have no authority to consider or be controlled by anything else than given you as law by the court, and unless your verdict accords with the law as given you by the court, you are guilty of wilful perjury."

bb. VIEW THAT JURY MAY DISREGARD INSTRUCTIONS. — In *Vermont* alone, of all states in the Union, is it held (in the absence of express constitutional or statutory provisions authorizing it) that it is the right of the jury to determine the law as well as the facts, independently of the court's instructions.¹ "There is no qualification of the right of the jury in a criminal cause to disregard the law as given them by the court, and adopt their own theory."²

(b) Under Organic and Statutory Provisions Declaring Juries Judges of the Law in Criminal Cases — *aa.* SUBSTANCE OF THE PROVISIONS. — In a number of jurisdictions an attempt has been made to settle this question by organic or statutory provisions.³ But the courts give a widely

1. *State v. Croteau*, 23 Vt. 14 (by divided court); *State v. Meyer*, 58 Vt. 463. See also *State v. Wilkinson*, 2 Vt. 488. But see *State v. McDonnell*, 32 Vt. 523, in which the doctrine that the jury are the judges of the law was pronounced by the trial judge "most nonsensical and absurd." The reviewing court said: "We see no objection, where the interference of a jury is directly invoked in a criminal case, to the judge stating to the jury, in his own way, that this rule is not intended for ordinary criminal cases; that it is a matter of favor to the defendant, and should not be acted upon by the jury except after the most thorough conviction of its necessity and propriety; that any departure by the jury from the law laid down by the court must be taken solely upon their own responsibility; and that the safer, and better, and fairer way, in ordinary criminal cases, is to take the law from the court, and that they are always justified in doing so. This is substantially what was done by the court below, and we see no just ground of exception to the mode in which it was done."

2. *State v. Meyer*, 58 Vt. 457, in which it was held that an instruction that the jury could adopt their own theory of the law, except that they could not adopt a rule of law more prejudicial to the defendant than that laid down by the court, was more favorable to the prisoner than the law warranted, and that he had no just ground of complaint.

3. *Connecticut*. — "The court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict." Gen. Stat. Conn. 1888, § 1630.

Georgia. — "The jury, in all criminal cases, shall be the judges of the law and the facts." Const. Ga., art. 1, § 2, par. 1; Code Ga. 1882, § 5018.

Illinois. — "Juries, in all criminal cases, shall be judges of the law and the fact." Starr & Curt. Annot. Stat. Ill. 1896, p. 1403, par. 616.

Indiana. — "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Indiana Const., art. 1, § 64. "In charging the jury he [the judge] must state to them all matters of law which are necessary for their information in giving their verdict. If he present the facts of the case, he must inform the jury that they are the exclusive judges of all questions of fact, and that they have a right also to determine the law." Rev. Stat. Ind. 1896, § 1823.

Louisiana. — "The jury in all criminal cases shall be judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge." La. Const., art. 168.

"The jury is always at liberty to give a general verdict by pronouncing on the law and on the fact in the case submitted to them. Therefore, the law permitting either party to submit specially the facts in the case to the jury, and so depriving them of the right of giving a general verdict in the suit, is abrogated." Garland's Rev. Code Prac. 1894, § 520.

Maryland. — "In the trial of all criminal cases the jury shall be the judges of law, as well as of fact." Md. Const., art. 15, § 5.

Massachusetts. — "The jury shall try, according to established forms and principles of law, all criminal causes committed to them, and, after having received the instructions of the court, shall decide, in their discretion, by a

varying construction of these provisions, although some of them are very similar.

bb. RULE IN INDIANA, MARYLAND, ILLINOIS, AND CONNECTICUT — View that Jury May Disregard Instructions. — In *Illinois*, *Indiana*, and *Maryland* the provisions, with a slight difference in wording, are to the effect that in all criminal cases the jury shall be the judges of the law and the facts.¹ In construing these provisions, the courts of these states are all agreed that the instructions given are merely advisory, and that the jury has the right to disregard them;² that the instruction when given goes to the jury simply as a means of enlightenment, and not as a positive and binding rule for their government;³ and that they are bound to give only such weight to the instructions as in their judgment they see proper.⁴ On the other hand, it is considered that the instructions of the court are at least entitled to a respectful consideration,⁵ and that the jury should not disregard such instructions, except for some sufficient reason addressing itself to their judgment.⁶

How Jury Instructed Where This View Prevails. — In accordance with the views stated in the preceding section, it is, of course, proper to instruct the jury that they are the judges of the law and the facts, and that they are not bound by the instructions;⁷ and error to refuse an instruction to that effect.⁸ So it is erroneous to instruct that if the court instructs the jury truly and fully as to the law, the jurors must be governed by the instructions,⁹ or that it is the jury's duty to believe the law as charged by the court.¹⁰ On the other hand, it is proper to charge that the jury should give a respectful consideration to the instructions of the court,¹¹

general verdict, both the fact and the law involved in the issue, or may at their election find a special verdict. The court shall superintend the course of the trials, decide upon the admission and rejection of evidence upon all questions of law raised during the trials, and upon all collateral and incidental proceedings, and shall also charge the jury." Mass. Pub. Stat. 1882, c. 214, § 17.

1. See preceding note.

2. *Illinois*. — Mullinix v. People, 76 Ill. 211; Davison v. People, 90 Ill. 221; Spies v. People, 122 Ill. 1; Fisher v. People, 23 Ill. 283; Schnier v. People, 23 Ill. 17.

Indiana. — McCarthy v. State, 56 Ind. 203; Williams v. State, 10 Ind. 503; Rubright v. State, 11 Ind. 540; McDonald v. State, 63 Ind. 544; Walker v. State, 136 Ind. 663; Bissot v. State, 53 Ind. 408; Nuzum v. State, 88 Ind. 599; Hudelson v. State, 94 Ind. 429; Powers v. State, 87 Ind. 156; Keiser v. State, 83 Ind. 236; Bird v. State, 107 Ind. 154; Fowler v. State, 85 Ind. 538.

Maryland. — Beard v. State, 71 Md. 275; Forwood v. State, 49 Md. 531; Broll v. State, 45 Md. 356; Wheeler v. State, 42 Md. 563.

3. Beard v. State, 71 Md. 275; Hudelson v. State, 94 Ind. 429; Bissot v. State, 53 Ind. 408; Walker v. State, 136 Ind. 663.

4. Forwood v. State, 49 Md. 531.

5. Bird v. State, 107 Ind. 154; McDonald v. State, 63 Ind. 544; Keiser v. State, 83 Ind. 236.

6. McDonald v. State, 63 Ind. 544; Blaker v. State, 130 Ind. 203; Spies v. People, 122 Ill. 1; Mullinix v. People, 76 Ill. 211; Davison v. People, 90 Ill. 221.

7. Fowler v. State, 85 Ind. 538; Bird v. State, 107 Ind. 154; Hudelson v. State, 94 Ind. 429; Powers v. State, 87 Ind. 156; Bissot v. State, 53 Ind. 408; Walker v. State, 136 Ind. 663.

8. McCarthy v. State, 56 Ind. 203; Schnier v. People, 23 Ill. 17.

9. McDonald v. State, 63 Ind. 544

10. Williams v. State, 10 Ind. 503.

11. Bird v. State, 107 Ind. 154. In

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or weigh them as they weigh the evidence, and disregard neither without proper reason;¹ and in a number of decisions it has been held proper, after instructing that the jury are the sole judges of the law and the facts, further to charge that the jury should accept and act upon the law as laid down by the court unless they can say on oath that they are better judges of the law than the court, in which case they are at liberty so to act.²

Necessity for Charging Where This View Prevails. — In *Maryland* it is held that the constitutional provision does not prohibit the court from instructing the jury on the law when they unanimously request it,³ but it seems to be settled that the court need not instruct whether requested or not — that this is a matter entirely within its discretion, and that a refusal to do so is not reviewable.⁴ In *Indiana* a different view prevails. It is there held that the accused has a right to insist that the court shall instruct the jury on the law applicable to the case, and that it is the duty of the court to do so.⁵

this case the court charged as follows: "If, however, you have no well-defined opinion or convictions as to what the law is relating to any particular matter or matters at issue in the case, then, in determining what it is, you should give the instructions of the court respectful consideration."

1. *Blaker v. State*, 130 Ind. 203.

2. *Mullinix v. People*, 76 Ill. 211; *Davison v. People*, 90 Ill. 221. See also *Spies v. People*, 122 Ill. 252, in which it was held proper to instruct that if the jury disregard the instructions of the court, they must be prepared to say upon their oaths that they know the law better than the court, but that before doing so "it is their duty to reflect whether from their study and experience they are better qualified" than the court to judge of the law.

3. *Beard v. State*, 71 Md. 275.

4. *Broll v. State*, 45 Md. 356. See also dicta to the same effect in *Forwood v. State*, 49 Md. 531; *Swann v. State*, 64 Md. 423; *Franklin v. State*, 12 Md. 246.

"No court in this state can be required by the counsel or jury to give instructions either upon the law or the legal effect of the evidence given at the trial. This seems to have been the opinion of this court, held in the case of *Franklin v. State*, 12 Md. 249. The court may in its discretion advise the jury as to the law and legal effect of the evidence, but it is not bound to do so, and being a matter entirely within its discretion, its refusal to do so cannot be reviewed by this court, even if this

case is now properly before us upon this appeal. It seems to have been supposed that the Act of 1872, c. 316, which authorizes exceptions to be taken in criminal cases, also authorizes exceptions such as the one presented in this record. That act can only apply to such rulings as the court may be called upon to make with regard to the admissibility of evidence during the trial. It is impossible that the legislature contemplated giving the right to parties in criminal cases to have instructions upon the law and the legal effect of the evidence, and exceptions to such rulings, in the face of the constitutional provision under which juries are at liberty to treat such instructions with utter disregard, and to find their verdict in direct opposition to them." *Broll v. State*, 45 Md. 356.

5. *Parker v. State*, 136 Ind. 284.

"It is true that in this state the jury is the judge of both the law and the evidence, but it is nevertheless the duty of the court to instruct it as to the law. If the jury, in the exercise of its right to judge the law, should erroneously acquit the accused, there is no remedy for such error, for he cannot be twice placed upon trial for the same offense; but if the jury, in the exercise of its right to judge the law, erroneously convicts one charged with crime, in open disregard of the instructions of the court, the error is at once corrected. Such is the every-day practice. To the end that the jury may be correctly informed as to the law applicable to his case, and

Effect of Erroneous Instructions. — Notwithstanding the power of the jury to judge the law, and the fact that they are not bound to follow the instructions, the giving of an erroneous instruction will nevertheless be a ground of reversal if it appears that the jury have followed the instruction to the injury of the accused,¹ or that the jury might have rendered a different verdict.²

Limitation of Jury's Right to Judge the Law. — Under these provisions it has been held in *Maryland* that the jury have no right to judge of the constitutionality of a statute,³ but the *Indiana* court has taken the opposite view.⁴ It would seem that the jury have no right to determine that an indictment is not sufficient in form, or that it was not properly found and returned.⁵ But the jury have the right to determine the sufficiency of an indictment to this extent, that they may judge whether the facts therein stated are or are not sufficient to constitute an offense;⁶ and it has been held that the decisions of the Supreme Court are not binding upon the jury, and that they may disregard them and determine for themselves what the law is.⁷

In *Connecticut* it is hard to deduce any rule from the decisions construing the statute. It would seem, though, that the jury have the power to declare a statute unconstitutional.⁸

that he may not be erroneously convicted, a defendant on trial, charged with crime, has the right to insist that the court shall instruct the jury on all legal questions necessary to enable them to reach a true verdict." *Parker v. State*, 136 Ind. 284.

1. *Swann v. State*, 64 Md. 423. See also *State v. Rice*, 56 Iowa 431.

2. *Clem v. State*, 42 Ind. 420.

3. *Franklin v. State*, 12 Md. 236.

4. *Lynch v. State*, 9 Ind. 541.

5. *Hudelson v. State*, 94 Ind. 426; *Daily v. State*, 10 Ind. 536.

6. *Hudelson v. State*, 94 Ind. 426. In this case the court said: "If this be not so, then the jury will be compelled to convict in all cases where the facts stated in the indictment are proved, although they may think that the facts so proved do not constitute a public offense. This would be, practically, to take from the jury the right to pass upon the law in all cases. If the proof should not sustain the averments in the indictment, they might acquit for want of sufficient evidence; but in every case where the proof should establish the truth of the facts stated in the indictment, the jury would be compelled to convict, because they would have no right to settle the law for themselves, and say that the facts so proven do not constitute a public offense."

7. *Fowler v. State*, 85 Ind. 541; *Keiser v. State*, 83 Ind. 234.

8. In *State v. Buckley*, 40 Conn. 247, the court charged that the jury are the judges of the law under the same obligations that attach to the judge on the bench; that they are not authorized to say that that is not law which is the law of the state. It further charged that the statute on which the prosecution was based had been decided constitutional by the Supreme Court, and that in the trial judge's opinion it was constitutional; that if the jury decided it to be unconstitutional they would disturb the foundations of the law. But in conclusion the court said: "But, after all, you are the judges of the law; and if on your consciences you can say this section is unconstitutional, then you ought to acquit the accused." The reviewing court refused to advise a new trial.

In *State v. Thomas*, 47 Conn. 546, the court charged that the jury are the judges of the law as well as of the facts, and that if they believed the section on which the prosecution was decided to be unconstitutional, they had a right so to decide; but that they were as much bound by the law as the judge on the bench, and that it was not to be presumed that they would be guilty of such an absurdity as to decide

cc. RULE IN GEORGIA, LOUISIANA, AND MASSACHUSETTS. — In *Georgia* the constitution and statutes contain provisions identical with those of Illinois, Maryland, and Indiana. The *Louisiana* constitutional provision is also in the same language as those mentioned, except that it contains this clause in addition: "Having been charged as to the law applicable to the case by the presiding judge." All the earlier *Georgia* decisions uphold the right of the jury to determine the law to be contrary to what was stated in the instructions,¹ and this was the uniform ruling until after the civil war.² Subsequent to that period, without expressly overruling those decisions, the rulings of the court have been to the contrary.³ In 1877 the statute on that subject became a part of the organic law,⁴ and it has been uniformly held since then that the jury are bound to take the instructions of the court as the law of the case,⁵ the view being taken that the jury are judges of the law only in the sense that they are to apply the law given them in charge by the court to the facts, and give a general verdict of guilty or not guilty.⁶

In *Louisiana* the earlier decisions hold that the jury are not

that the statute was not valid when the Supreme Court had held otherwise. The objection to the charge was its reference to a supposed opinion of the Supreme Court deciding that the statute was constitutional. The reviewing court held that there was no error, and said: "It can really have made little difference whether the court had actually made such a decision, so long as the judge was right in his view of the law and this court was prepared to sustain him in that view. The most that can be said is that the jury were misled into taking the only view of the law that they could correctly have taken. The defendant lost a possible chance of the jury's erroneously deciding the law in his favor. This ground for a new trial does not commend itself to our sense of justice. But we need not decide whether, if that were the precise state of the case, it would be a sufficient ground for granting a new trial. This court had in fact decided the question as to the validity of the statute."

1. *Holder v. State*, 5 Ga. 441; *McGuffie v. State*, 17 Ga. 497; *McDaniel v. State*, 30 Ga. 853; *Dickens v. State*, 30 Ga. 383; *Keener v. State*, 18 Ga. 194; *McPherson v. State*, 22 Ga. 478.

In *McGuffie v. State*, 17 Ga. 497, it was held that the jury are judges of the law in criminal cases in this: that they have the legal right to acquit the

prisoner, though the judge may charge them that if certain facts be proven, he is guilty according to law; and although they may find those facts to be proven.

In *McDaniel v. State*, 30 Ga. 853, it was held that if the jury cannot conscientiously adopt the law as given them in charge by the court, it is not only their right, but their duty, to render a verdict according to the opinion of the law which they entertain; that if they render a verdict otherwise they are guilty of perjury, and that they should be so instructed by the court when requested to do so.

2. See *Ridenhour v. State*, 75 Ga. 382.

3. *Ridenhour v. State*, 75 Ga. 382; *Anderson v. State*, 42 Ga. 9; *Brown v. State*, 40 Ga. 689.

4. See *Hill v. State*, 64 Ga. 454.

5. *Hill v. State*, 64 Ga. 454; *Ridenhour v. State*, 75 Ga. 382; *Hunt v. State*, 81 Ga. 140; *Danforth v. State*, 75 Ga. 614; *Robinson v. State*, 66 Ga. 517; *Malone v. State*, 66 Ga. 539; *McMath v. State*, 55 Ga. 308.

What Instructions Proper Under This View. — The court may properly instruct that although the jury are judges of the law as well as of the facts, under the constitution of the state they should take the law from the court, which is responsible for its correct exposition. *Danforth v. State*, 75 Ga. 614.

6. *Robinson v. State*, 66 Ga. 517.

bound by the instructions of the court, but may disregard them if they see fit.¹ But after some wavering this court has finally reached the conclusion that the jury are bound to accept and apply the law as laid down by the judge, and that while they have the power to disregard it, yet in so doing they would violate their oaths and their duty.² Notwithstanding this, it is held reversible error to refuse to instruct the jury that they are judges of the law and the fact.³ But, on the other hand, a declaration to the jury that they are the judges of the law must be followed by an explanation of the sense in which they are judges of the law,⁴ or,

1. *State v. Jurche*, 17 La. Ann. 71; *State v. Saliba*, 18 La. Ann. 35; *State v. Tally*, 23 La. Ann. 677; *State v. Scott*, 11 La. Ann. 429; *State v. Ballerio*, 11 La. Ann. 81. See also *State v. Johnson*, 30 La. Ann. 904, in which it was held that it is not a just ground of complaint that the trial judge, in charging the jury that they were judges of the law and the evidence, said that if they thought they knew more of the law than the judge, it was their privilege so to believe.

2. *State v. Tisdale*, 41 La. Ann. 338; *State v. Cole*, 38 La. Ann. 843; *State v. Matthews*, 38 La. Ann. 795; *State v. Desforges*, 47 La. Ann. 1167; *State v. Ford*, 37 La. Ann. 443; *State v. Vinson*, 37 La. Ann. 792. Compare the recent case of *State v. Hannibal*, 37 La. Ann. 619, in which the trial court gave the following charge: "Gentlemen, you are the judges of the facts, also of the law as expounded by me, and which you are to apply to the facts proven. You are not compelled to follow my instructions, because you are at liberty to interpret the law yourselves. But you must not arbitrarily disregard my instructions. However, if you are convinced they are wrong, and that you know the law better than I do, it is your right to follow your own conscientious convictions. It is safe for you to regard my explanation of the law, for if I am mistaken the accused will have his remedy by bills of exception and appeal." The accused objected, to that clause of the instruction beginning, "It is safe," etc. In commenting on this charge the reviewing court said: "The charge as a whole is not amenable to objection by even the most critical, but in truth the sentence that is obnoxious to the defendant is of itself and by itself not ground of complaint. It is not error to tell the jury that it was safe for them to regard the judge's explanation

of the law and the reason of it. He might have gone further and instead have told them that it was their duty to accept the law as expounded by him and to apply it to the facts of the case."

The statute and the organic law intend that "the jury shall heed the law as it is given to them by the court. By that is meant the charge shall have its moral weight with the jury, just as the juror's oath is presumed to exert its influence when he goes into the box. The exposition so often given substantially, that the jury should apply the law as given by the court, and while the jury have the physical power to disregard it, they are morally bound to apply the law as announced by the court, we think is the correct application of the provision of the organic law." *State v. Desforges*, 47 La. Ann. 1167. "If it were otherwise, if the jury were the absolute judges of the law, where would be the necessity of a charge by the presiding judge, as required by the constitution and by the rule of law which defines their powers? If they are legally authorized to disregard the law as expounded by the judge, why should the appellate tribunal be called to reverse the judgment and set aside the verdict on the ground of an erroneous charge by the judge?" *State v. Ford*, 37 La. Ann. 465.

3. *State v. Vinson*, 37 La. Ann. 792.

4. *State v. Tisdale*, 41 La. Ann. 338.

"The relation which the jury bears to enunciations of law delivered to them by the judge is very similar to that which the judge bears to valid and unambiguous statutes. The judge is bound, under his oath, to accept and apply the statutes, but that does not prevent him from being the judge of the law. So the jury is bound to accept and apply the law as declared by the court, but that does not prevent their

in other words, they should be told that they must follow the law as given to them by the court.¹

The *Massachusetts* statute is held not to authorize the jury to determine questions of law contrary to the instructions,² and the jury may properly be instructed to follow the charge in matters of law.³

(c) Under Organic and Statutory Provisions Declaring Juries Judges of the Law in Libel Cases. — For a treatment of this subject, see the article LIBEL AND SLANDER.

c. REASONS WHY JURIES SHOULD NOT HAVE POWER TO JUDGE THE LAW — (1) *Resulting Uncertainty in the Law*. — Probably the strongest argument against the doctrine that juries are the judges of the law is the confusion and uncertainty in the law which its application would entail.⁴ Law, being the rule by

being 'judges of the law.' " *State v. Vinson*, 37 La. Ann. 792.

What Instructions Proper. — Under this head the following instructions have been approved: "The constitution of this state makes jurors the judges of the law as well as of the facts in criminal cases; but while this is so, I charge you that it is your sworn duty to follow the law given to you by the court, and you are not its judges to the extent claimed by counsel. The very moment you feel that the law expounded in this charge is the law of this case, your oaths compel you to apply it to the facts, and though you have the physical power to disregard it you cannot do so without violating your oaths. In taking the law from the court you incur no responsibility; in disregarding it, your error is without remedy. But on the other hand, misstatements of the law by the court to the prejudice of these accused may be excepted to by their counsel, and its correctness passed upon by a higher tribunal. Your oath binds you to rest your verdict on the law and the evidence." *State v. Ford*, 37 La. Ann. 465. That under the state constitution they are judges of the law and fact; that they must ascertain the facts from the testimony, apply the law as given by the court, and that they cannot rightfully disregard the instructions of the court on the law. *State v. Desforges*, 47 La. Ann. 1167. On the other hand, it is proper to refuse an instruction that "if the jury cannot conscientiously believe that the court has charged the law correctly, they do not violate their oath in disregarding it." *State v. Matthews*, 38 La. Ann. 795.

1. *State v. Ford*, 37 La. Ann. 444;

State v. Matthews, 38 La. Ann. 795; *State v. Cole*, 38 La. Ann. 843. See also opinion of Manning, C. J., in *State v. Johnson*, 30 La. Ann. 905, in which it is said: "It is not correct to tell a jury that they are the judges of the law without explaining the modified sense in which alone they are so."

2. *Com. v. Marzynski*, 149 Mass. 68; *Com. v. Anthes*, 5 Gray (Mass.) 202; *Com. v. Anthes*, 12 Gray (Mass.) 29; *Com. v. Rock*, 10 Gray (Mass.) 4.

3. *Com. v. Marzynski*, 149 Mass. 68.

In the first case decided since the enactment of the statute mentioned, *Com. v. Anthes*, 5 Gray (Mass.) 185, it was held that if the statute purports to allow the jury in criminal trials the rightful power to determine, against the instructions of the court, questions of law involved in the issue — and on this point the court was equally divided — it is unconstitutional, and that neither before nor since the statute had the jury any rightful power to determine questions of law involved against the instructions of the court.

4. *Rex v. St. Asaph*, 3 T. R. 428, note; *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 132; *Com. v. Anthes*, 5 Gray (Mass.) 185; *Townsend v. State*, 2 Blackf. (Ind.) 151; *State v. Bell*, Add. (Pa.) 156; *Pierce v. State*, 13 N. H. 570; *Duffy v. People*, 26 N. Y. 591; *State v. Drawdy*, 14 Rich. L. (S. Car.) 90; *State v. Wright*, 53 Me. 329; *Harris v. State*, 7 Lea (Tenn.) 538; *Parrish v. State*, 14 Neb. 63; *State v. Jeandell*, 5 Harr. (Del.) 484; *Hamilton v. People*, 29 Mich. 173; *U. S. v. Shive*, 1 Baldw. (U. S.) 512; *U. S. v. Battiste*, 2 Sumn. (U. S.) 240; *U. S. v. Greathouse*, 4 Sawy. (U. S.) 464. *Dissenting opinion*

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which conduct is to be governed, must be certain.¹ *Misera est servitus ubi jus est vagum aut incertum.*² If juries were to

of Bennett, J., in *State v. Croteau*, 23 Vt. 68.

"Upon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of law; they do not know, and are not presumed to know, anything of the matter; they do not understand the language in which it is conceived, or the meaning of the terms; they have no rule to go by but their passions and wishes. * * * Miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law, or (which is the same thing) no certain administration of law, to protect individuals, or to guard the state. Jealousy of leaving the law to the court, as in other cases, is now, in the present state of things, puerile rant and declamation. * * * Under such an administration of law no man could tell, no counsel could advise, whether a paper were or were not punishable. I am glad that I am not bound to subscribe to such an absurdity." *Per* Lord Mansfield, in *Rex v. St. Asaph*, 3 T. R. 428, note.

"No person could know what the criminal law was, for one jury might lawfully convict even the same individual upon a similar state of the fact, and under the same statute, upon which another had acquitted him." *Pierce v. State*, 13 N. H. 570. "If the court is to have no voice [or, we add, only a subordinate one] in laying down these rules, it is obvious that there can be no security whatever, either that the innocent may not be condemned, or that society will have any defense against the guilty. A jury may disregard a statute just as freely as any other rule. A fair trial in time of excitement would be almost impossible. * * * Parties charged with crime need the protection of the law against unjust convictions quite as often as the public needs it against groundless acquittals. Neither can be safe without having the rules of law defined and preserved, and beyond the mere discretion of any one." *Hamilton v. People*, 29 Mich. 173.

If the court had no right to decide on the law, error, confusion, uncertainty, and licentiousness would characterize the criminal trials; and the safety of the accused might be as much endan-

gered as the stability of public justice would certainly be. *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 151.

1. *State v. Wright*, 53 Me. 328.

2. *Broom's Legal Maxims* (8th Am. ed.) 150.

It is Necessary to the Security of Public and Private Rights that there be an authoritative exposition of all laws, as far as possible, declared and known. *Com. v. Anthes*, 5 Gray (Mass.) 197. And the interpretation of the law can have no permanency and uniformity, nor can it become generally known, except through the action of the courts. *Hamilton v. People*, 29 Mich. 173.

"All the mischief of *ex post facto* laws would be done by tribunals and authorities wholly irresponsible, and there would be no method of enforcing with effect many of our most important constitutional and legal safeguards against injustice. Parties charged with crime need the protection of the law against unjust convictions quite as often as the public needs it against groundless acquittals. Neither can be safe without having the rules of law defined and preserved, and beyond the mere discretion of any one. We must construe the jury system, like all other parts of our legal fabric, in the light of history and usage. It came into this country as a part of our common law, and it has been fixed by our constitutions as a known and regular common-law institution. Like many of our best heritages from that source, we know what it is better than how it was devised, or (which is more probable) came into use without devising. We must look to the use as evidence of the law. And looking to that, we find that the judge has always assumed to give the jury instructions upon the law. We find, further, that while there have been severe complaints and stern measures to secure them from his control on the facts, there has never been any attempt to abolish the practice of charging on the law. All the improvements in mitigation of the old system have gone upon the ground that the jury were expected to follow the instructions of the court. The introduction of reserved cases and criminal exceptions, would be little short of an absurdity on any other theory. If there were any grounds of complaint it

determine the law, its stability would be subverted, and every case would be governed, not by any known or established rule, but by a rule made for the occasion,¹ and the result would be that the law itself would be most uncertain in the different views which juries might take of it.² Such decisions would furnish no rules for future guidance; similar cases arising subsequently might be decided in exactly the opposite way;³ and when the determination of the law of the case is left to whims and caprices of jurymen, there is no way of knowing with certainty what they have held it to be.⁴

(2) *Unfitness to Exercise This Power.* — Another strong reason against permitting juries to exercise this function is their want of knowledge and total unfitness to pass on questions of law.⁵

would not be for wrong instructions, but for giving any charge at all. There is much difficulty in dealing with arguments which assume to qualify a system, and yet are not consistent with its uniform history. A jury system without a presiding judge who is something more than a puppet is not the jury system which we have inherited. It would not be profitable to collate or discuss the authorities at length. They differ in terms more than in substantial results. If the charge is proper it can only be so because it is to be respected. If juries disregard it they may be free from personal risk, and in cases of acquittal their verdict is conclusive. But the power to do wrong with impunity does not make wrong right. The same thing cannot be lawful and unlawful when done by different persons." *Hamilton v. People*, 29 Mich. 191.

1. *Duffy v. People*, 26 N. Y. 588.

2. *U. S. v. Battiste*, 2 Sumn. (U. S.) 243.

3. *Pierce v. State*, 13 N. H. 570; *State v. Drawdy*, 14 Rich. L. (S. Car.) 90; *State v. Jeandell*, 5 Harr. (Del.) 484.

4. *Parrish v. State*, 14 Neb. 63; *Stettinius v. U. S.*, 5 Cranch (C. C.) 573. See also *U. S. v. Battiste*, 2 Sumn. (U. S.) 243.

"The jury cannot be legally inquired of what were the rules of law adopted by them; nor, if the judge could be called on in any legal or practicable mode to declare what rules of law he did prescribe for the direction of the jury, could it be made to appear that the jury did follow them." *Com. v. Anthes*, 3 Gray (Mass.) 201.

5. *Rex v. St. Asaph*, 3 T. R. 428,

note; *State v. Wright*, 53 Me. 329; *Pierce v. State*, 13 N. H. 553; *U. S. v. Morris*, 1 Curt. (U. S.) 23; *Townsend v. State*, 2 Blackf. (Ind.) 151; *Com. v. Anthes*, 5 Gray (Mass.) 185; *Duffy v. People*, 26 N. Y. 591.

Unfitness of Juries to Exercise the Function. — "Juries are generally composed of upright men, willing and anxious to discharge their duty to the best of their ability. But they are drawn from non-professional life, and lack the advantage of a legal education. When a cause is finally committed to them they are put under duress of an officer, and are not allowed to separate till their consideration of the case is closed. They are not allowed the use of books, not even the statutes which they may be required to construe. Twelve men thus situated may be admirably qualified to weigh evidence and determine facts, and may be justly entitled to all the encomiums passed upon them in that respect; but it is impossible to believe they constitute a suitable tribunal for the determination of important and intricate questions of law." *State v. Wright*, 53 Me. 339.

"It will hardly be supposed that men drawn each term from other occupations, who make no pretensions to legal knowledge, are to return in a few days to their former pursuits, and who are not responsible, even to impeachment, for their acts, will be more learned, sound, and safe expositors of those principles than judges." *Pierce v. State*, 13 N. H. 570.

Giving the doctrine its broadest application, the jury might determine the meaning of statutes and pass upon their constitutionality. *Pierce v. State*, 13 N. H. 553; *Lynch v. State*, 9 Ind.

Jurors neither have nor are supposed to have a competent knowledge to decide according to any settled principles of law, and it cannot be believed that there is any such inspiration in the jury-box as would enable twelve men to decide, *per saltum*, grave questions which elsewhere require care and thought and patient study, and time for undisturbed reflection.¹

(3) *Absence of Remedy for Erroneous Decision.* — It is also urged as a reason, that if the judge err in misstating a legal principle, the mistake may be remedied by appeal or error; but on the other hand, if the jury act on a misconception of law, there is practically no remedy.²

541; *Com. v. Anthes*, 5 Gray (Mass.) 188; *Com. v. Kneeland*, 20 Pick. (Mass.) 227; *U. S. v. Morris*, 1 Curt. (U. S.) 23.

Can it be contended that the jury, who must necessarily apply to this test such knowledge of the law as they have acquired during the course of the trial, are a proper body to exercise this function? It has been said with obvious truth that law "is a science, requiring a long course of preparatory training, of profound study and active practice," which is to be expected of no one who has not dedicated his life to this pursuit. *Com. v. Anthes*, 5 Gray (Mass.) 236.

The most accurate and complete knowledge both of the written and the unwritten law is required, and, in America, an equally thorough and practical knowledge of constitutional law, as such knowledge is to be derived from records in adjudged cases, ancient and modern, and books of acknowledged authority in which they are embodied, from statutes, and from constitutions of the United States and the state in which the case arises, and adjudications thereon. "Here, then, may arise questions of law of the utmost difficulty and delicacy, and turning upon that abstruse but most necessary duty of judges, the exposition of statutes, involving inquiries respecting the ordinary and technical meaning of the language used, the preamble and other provisions of the same statute, all other statutes and parts of statutes on the same subject, the previous state of the common law, and the mischief intended to be suppressed, in order to ascertain the true intent and meaning of the legislature in the specific enactment in question." *Com. v. Anthes*, 5 Gray (Mass.) 190.

1. *Townsend v. State*, 2 Blackf. (Ind.) 151; *Pierce v. State*, 13 N. H. 553.

2. *State v. Drawdy*, 14 Rich. L. (S. Car.) 90; *State v. Jeandell*, 5 Harr. (Del.) 484; *Stettinius v. U. S.*, 5 Cranch (C. C.) 592; *Pierson v. State*, 12 Ala. 154; *Townsend v. State*, 2 Blackf. (Ind.) 151; *Duffy v. People*, 26 N. Y. 591.

"If the judge err in misstating a legal principle the remedy is easy; by motion for a new trial or other proceeding to review his principles; if the jury act on a misconception of law there is no remedy, unless on our principle, that legal questions in criminal as in civil cases belong to the court, which has the power to correct such mistakes of the jury by granting new trials. This is the greatest protection to the accused; his highest and best security against oppression. For a jury may, under excitement or popular prejudice, convict as well as acquit against law; to whom, then, shall the accused look for protection, if the jury are the judges of the law?" *State v. Jeandell*, 5 Harr. (Del.) 484. "If the jury may decide the law, the court, it is true, may set aside the verdict; but as only two new trials can be granted to the same party, if three successive juries concur in an erroneous verdict the evil is without remedy. The most important controversies might thus be determined, contrary to the plainest principles of law, without a possibility of redress." *Townsend v. State*, 2 Blackf. (Ind.) 151. "If the jury is to decide all the law * * * their decisions of the law can never be reversed, for there are no means of ascertaining their decision upon a question of law so as to bring it into review before this court; but when the judge decides the law a bill of exceptions may be taken, and his judgment, if against the defendant, may be either affirmed or reversed upon a writ of error." *Stettinius v. U. S.*, 5 Cranch (C. C.) 593.

(4) *Contravention of Constitutional Provisions.* — So it has been urged with much force that to invest juries with the power of judging the law is in violation of the constitutional provisions of the United States and of the several states.¹

(5) *Contravention of Fundamental Common-law Maxims.* — In conclusion, it may be stated that this practice is in contravention of the common-law maxim that it is the office of the judge to instruct the jury in points of law, of the jury to decide on matters of fact.²

Reason Why Juries Should Not Be Permitted to Judge the Law. — "If the jury, and not the court, are the proper expounders of the law, there could properly be no revision of a verdict on this ground, either by the judge trying the cause, by awarding a new trial, or by an appellate court upon the ground of misdirection. If they are the judges of what is and what is not law, why call on us, as a court of errors, to revise the action of the Circuit Court upon a point of law?" *Pierson v. State*, 12 Ala. 153.

1. *State v. Wright*, 53 Me. 338, in which it is said: "The Constitution of the United States confers upon the judges of the Supreme Court the power to adjudicate and finally determine all questions of law properly brought before them. To allow juries to revise, and, if they think proper, overrule these adjudications, would deprive them of their final and authoritative character, and thus destroy the constitutional functions of the court. The Supreme Court of the United States and of this state have decided that prohibitory liquor laws, like the one now in force in this state, are constitutional. Is it within the legitimate power of each successive jury impaneled to try a liquor case to reconsider that question, and, if they think proper, overrule those decisions? Is each successive jury impaneled to try a person charged with counterfeiting our national currency to be told that they may rightfully disregard the decisions of the Supreme Court of the United States and the rulings of the presiding judge if they, in the exercise of their own judgment, think them wrong, and acquit the defendant upon the ground that the Act of Congress authorizing our national banks is unconstitutional? Every intelligent mind must perceive that it is impossible to maintain such a doctrine." *Com. v. Anthes*, 5 Gray (Mass.) 236, in which it

is said, *per Shaw*, C. J., a majority of the court concurring, that "the judiciary department was intended to be permanent and coextensive with the other departments of government, and, as far as practicable, independent of them; and therefore it is not competent for the legislature to take the power of deciding the law from this judiciary department, and vest it in other bodies of men, juries, occasionally and temporarily called to attend courts, for the performance of very important duties indeed, but duties very different from those of judges, and requiring different qualifications. If, therefore, the statute of 1855, c. 152, in providing that it shall be the duty of the jury to decide, at their discretion, by a general verdict, both the law and the fact involved in the issue, can be so interpreted as to prescribe that the jury, consistently with their duty, may decide the law, upon their judgment, contrary to the decision and instruction of the court before whom the trial is had, as received and understood by them, such enactment is, in my opinion, beyond the scope of legitimate legislative power, repugnant to the constitution, and, of course, inoperative and void. In all those cases, therefore, in which a different direction has been given by any judge to a jury as the true interpretation of the statute, or affirming its constitutionality, exceptions to such rulings must, in my opinion, be sustained. If the statute will not bear that construction, but was declaratory only, it did not change the pre-existing law; then, for that reason, such instructions as above stated were given without warrant of law, and exceptions to them must, in like manner, be sustained." See also *U. S. v. Morris*, 1 Curt. (U. S.) 53, as sustaining the view that to permit the jury to judge the law would be in violation of the Constitution of the United States.

2. *State v. Wright*, 53 Me. 330, in Volume XI.

4. Construction of Writings—*a. WRITINGS WHICH REQUIRE NO EXPLANATION—*(1) *Statement of Rule.*—Subject to a few exceptions, which will be noticed hereafter, it is the exclusive province and duty of the court to construe written instruments and to instruct the jury as to their meaning and effect.¹ The

which it is said: "It was very early provided that the jury should not entangle themselves with questions of law, but confine themselves simply and exclusively to facts."

As has been well said by one of our greatest jurists: "The true glory and excellence of the trial by jury is this: that the power of deciding fact and law is wisely divided; that the authority to decide questions of law is placed in a body well qualified, by a suitable course of training, to decide all questions of law; and another body, well qualified for the duty, is charged with deciding all questions of fact, definitively; and whilst each within its own sphere performs the duty intrusted to it, such a trial affords the best possible security for a safe administration of justice and the security of public and private rights." Chief Justice Shaw, in *Com. v. Anthes*, 5 Gray (Mass.) 198.

1. Alabama.—*Southern Express Co. v. Crook*, 44 Ala. 468; *Claghorn v. Lingo*, 62 Ala. 230; *Bernstein v. Humes*, 60 Ala. 582; *Martin v. Chapman*, 6 Port. (Ala.) 344; *Price v. Mazange*, 31 Ala. 701; *Taylor v. Kelly*, 31 Ala. 59; *Jones v. Pullen*, 66 Ala. 306; *Doe v. Crane*, 16 Ala. 570; *Kidd v. Cromwell*, 17 Ala. 648; *Long v. Rodgers*, 19 Ala. 321.

Arkansas.—*Estes v. Boothe*, 20 Ark. 583.

California.—*Carpentier v. Thirston*, 24 Cal. 268.

Florida.—*Solary v. Stultz*, 22 Fla. 263.

Georgia.—*Williams v. Waters*, 36 Ga. 454; *Willson v. Whitfield*, 38 Ga. 269.

Illinois.—*Peoria Grape Sugar Co. v. Frazer*, 26 Ill. App. 60; *Keeler v. Herr*, 157 Ill. 57; *Jordan v. Easter*, 2 Ill. App. 73; *Chicago, etc., R. Co. v. Hale*, 2 Ill. App. 150; *Illinois Cent. R. Co. v. Cassell*, 17 Ill. 389; *Streeter v. Streeter*, 43 Ill. 155; *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161; *Graham v. Sadlier*, 165 Ill. 95.

Indiana.—*Robbins v. Spencer*, 121 Ind. 594; *American Ins. Co. v. Butler*, 70 Ind. 1; *Zenor v. Johnson*, 107 Ind. 70; *Conner v. Himes*, 49 Ind. 482;

Symmes v. Brown, 13 Ind. 318; *Levison v. Junction R. Co.*, 7 Ind. 597; *Richmond Trading, etc., Co. v. Farquar*, 8 Blackf. (Ind.) 89; *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 62.

Iowa.—*Merrill v. Packer*, 80 Iowa 542; *Chandler v. Keiler*, 44 Iowa 371; *Eyser v. Weissgerber*, 2 Iowa 463; *Daly v. W. W. Kimball Co.*, 67 Iowa 132; *Fairbanks v. Jacobs*, 69 Iowa 265; *Rohrabacher v. Ware*, 37 Iowa 85; *Andrews v. Tedford*, 37 Iowa 314; *Snyder v. Kurtz*, 61 Iowa 593; *State v. Delong*, 12 Iowa 453; *Lucas v. Snyder*, 2 Greene (Iowa) 499; *Potter v. Wooster*, 10 Iowa 334; *Thorp v. Craig*, 10 Iowa 461; *Kilbourne v. Jennings*, 40 Iowa 473; *Vaughn v. Smith*, 58 Iowa 553; *Durham v. Daniels*, 2 Greene (Iowa) 518; *Hendrick v. Kellogg*, 3 Greene (Iowa) 215; *Pickerell v. Carson*, 8 Iowa 544.

Kansas.—*Slatten v. Konrath*, 1 Kan. App. 636; *Bell v. Keepers*, 37 Kan. 64; *Warner v. Thompson*, 35 Kan. 27.

Kentucky.—*Thomas v. Thomas*, 15 B. Mon. (Ky.) 178.

Maine.—*Cocheco Bank v. Berry*, 52 Me. 293; *Nash v. Drisco*, 51 Me. 417.

Maryland.—*McHenry v. Marr*, 39 Md. 510; *Baltimore, etc., R. Co. v. Resley*, 7 Md. 297; *Osceola Tribe No. 11 v. Rost*, 15 Md. 295; *Williams v. Woods*, 16 Md. 220; *Whiteford v. Munroe*, 17 Md. 135; *Emery v. Owings*, 6 Gill (Md.) 191; *Hatch v. Pendergast*, 15 Md. 251; *Keefer v. Mattingly*, 1 Gill (Md.) 182.

Massachusetts.—*Smith v. Faulkner*, 12 Gray (Mass.) 257.

Michigan.—*Tompkins v. Gardner, etc., Co.*, 69 Mich. 58; *Thompson v. Richards*, 14 Mich. 172; *Curtis v. Martz*, 14 Mich. 506; *Dudgeon v. Haggart*, 17 Mich. 273; *Battershall v. Stephens*, 34 Mich. 68; *Stadden v. Hazard*, 34 Mich. 76; *Paine v. Ringold*, 43 Mich. 341; *McKenzie v. Sykes*, 47 Mich. 294; *Van Buren R. Div. v. Lamphear*, 54 Mich. 575; *Gage v. Meyers*, 59 Mich. 300; *Wagner v. Egleston*, 49 Mich. 218; *Lapeer County Farmers' Mut. F. Ins. Assoc. v. Doyle*, 30 Mich. 159.

Minnesota.—*Van Eman v. Stanchfield*, 8 Minn. 518.

construction of writings is a question of law for the court, and it is error to submit this question to the jury. And a refusal to

Mississippi. — *Benson v. Benson*, 24 Miss. 625; *Randolph v. Govan*, 14 Smed. & M. (Miss.) 9; *Fairly v. Fairly*, 38 Miss. 280.

Missouri. — *Mantz v. Maguire*, 52 Mo. App. 136; *Caldwell v. Dickson*, 26 Mo. 60; *Burress v. Blair*, 61 Mo. 133; *Michael v. St. Louis Mut. F. Ins. Co.*, 17 Mo. App. 23; *State v. Lefavre*, 53 Mo. 470; *Chapman v. Kansas City, etc., R. Co.*, 114 Mo. 542; *Comfort v. Ballingal*, 134 Mo. 288; *Willard v. Sumner*, 7 Mo. App. 577; *Brooks v. Standard F. Ins. Co.*, 11 Mo. App. 349; *Blanke v. Dunnermann*, 67 Mo. App. 591; *James v. Marion Fruit Jar, etc., Co.*, 69 Mo. App. 207.

Nebraska. — *Rosenthal v. Ogden*, 50 Neb. 218.

New Hampshire. — *Drew v. Towle*, 30 N. H. 531.

New Jersey. — *Rogers v. Colt*, 21 N. J. L. 704; *Perth Amboy Mfg. Co. v. Condit*, 21 N. J. L. 659.

New York. — *Agate v. Sands*, 8 Daly (N. Y.) 66; *Arctic F. Ins. Co. v. Austin*, 69 N. Y. 470; *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341; *Brady v. Cassidy*, 104 N. Y. 147; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83; *Gray v. Central R. Co.*, 11 Hun (N. Y.) 70; *Thomas v. Dickinson*, 23 Barb. (N. Y.) 431; *Connolly v. Hamill*, 3 Hun (N. Y.) 399; *Springfield First Nat. Bank v. Dana*, 79 N. Y. 108; *Glacius v. Black*, 67 N. Y. 563.

North Carolina. — *Collins v. Benbury*, 5 Ired. L. (N. Car.) 118; *Brown v. Hatton*, 9 Ired. L. (N. Car.) 319; *Sellers v. Johnson*, 65 N. Car. 104; *Massey v. Belisle*, 2 Ired. L. (N. Car.) 170.

Oregon. — *State v. Moy Looke*, 7 Oregon 54.

Pennsylvania. — *Denison v. Wertz*, 7 S. & R. (Pa.) 372; *Welsh v. Duser*, 3 Binn. (Pa.) 329; *Watson v. Blaine*, 12 S. & R. (Pa.) 135; *Moore v. Miller*, 4 S. & R. (Pa.) 279; *Vincent v. Huff*, 8 S. & R. (Pa.) 381; *Harvey v. Vandegrift*, 89 Pa. St. 346; *Bryant v. Hagerty*, 87 Pa. St. 256; *Esser v. Linderman*, 71 Pa. St. 76; *Corcoran v. Mutual L. Ins. Co.*, 179 Pa. St. 132.

South Carolina. — *Jones v. Swearingen*, 42 S. Car. 58; *Brown v. Moore*, 26 S. Car. 160; *State v. Williams*, 32 S. Car. 123; *Union Bank v. Heyward*, 15 S. Car. 206; *Mowry v. Stogner*, 3 S. Car. 251.

Tennessee. — *Rice v. Crow*, 6 Heisk. (Tenn.) 28; *Bedford v. Flowers*, 11 Humph. (Tenn.) 242; *Ahrens v. Cobb*, 9 Humph. (Tenn.) 645; *Riley v. State*, 9 Humph. (Tenn.) 646; *Powell v. Finch*, 5 Yerg. (Tenn.) 446; *Mills v. Faris*, 12 Heisk. (Tenn.) 451.

Texas. — *Linch v. Paris Lumber, etc., Co.*, (Tex. 1890) 14 S. W. Rep. 701; *Howell v. Hanrick*, (Tex. Civ. App. 1894) 24 S. W. Rep. 823; *Ruby v. Von Valkenberg*, 72 Tex. 459; *McCormick v. Cheveral*, 2 Tex. Unrep. Cas. 146; *Lary v. Young*, (Tex. Civ. App. 1894) 27 S. W. Rep. 908; *Cowan v. Williams*, 49 Tex. 380; *Hibernia Ins. Co. v. Starr*, (Tex. 1890) 13 S. W. Rep. 1017; *Soell v. Hadden*, 85 Tex. 182; *Gulf, etc., R. Co. v. Malone*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1077; *Hunton v. Nichols*, 55 Tex. 217; *Long v. McCauley*, (Tex. 1887) 3 S. W. Rep. 689; *Shepherd v. White*, 11 Tex. 346.

Vermont. — *Wason v. Rowe*, 16 Vt. 525.

Virginia. — *Burke v. Lee*, 76 Va. 386.

Wisconsin. — *Cohn v. Stewart*, 41 Wis. 527; *Martineau v. Steele*, 14 Wis. 273.

United States. — *Levy v. Gadsby*, 3 Cranch (U. S.) 180; *Goddard v. Foster*, 17 Wall. (U. S.) 123; *U. S. v. Hodge*, 6 How. (U. S.) 279; *Bliven v. New England Screw Co.*, 23 How. (U. S.) 420; *Turner v. Yates*, 16 How. (U. S.) 14; *Cahoon v. Ring*, 1 Cliff. (U. S.) 592.

England. — *Neilson v. Harford*, 8 M. & W. 806; *Parker v. Ibbetscn*, 4 C. B. N. S. 346, 93 E. C. L. 346.

It is a well-established rule of law that the true construction of written contracts is to be declared by the court, and not submitted to the finding of the jury. *Emery v. Owings*, 6 Gill (Md.) 199.

When the terms and language of a contract are ascertained it is the duty of the court, and not of the jury, to determine and declare what its meaning and intent is. *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341.

Instrument Written in Foreign Language. — The court may instruct the jury as to the legal effect of a written instrument, though in a foreign language, and without the aid of a translation. *Cowan v. Williams*, 49 Tex. 380.

construe a writing and instruct the jury as to its legal import is erroneous, for a party is entitled to have a writing determining his rights properly construed and its terms and meaning explained to the jury, and he may easily be prejudiced by the court's refusal to do so.¹

Charging on Facts. — An instruction as to the legal effect of a writing is not objectionable as being a charge upon the facts of a case.²

(2) *Reason for Rule.* — Were the jury permitted to construe written instruments, there would be no certain legal significance assignable to any paper, for it would depend upon the peculiar notions of each particular jury under whose supervision it might be brought.³

(3) *Exceptions to Rule.* — Where a writing is not a dispositive instrument, but is put in evidence merely to show an extrinsic fact, it will be for the jury to say what inference of fact is to be drawn therefrom.⁴ When documents are offered in evidence as the foundation of an inference of fact, whether such inference

Execution of Instrument. — Where the evidence is undisputed it is for the court to determine whether a written instrument has been duly executed or not, so as to effect the purposes for which it was intended. *Snyder v. Kurtz*, 61 Iowa 593.

Meaning of Abbreviation. — The meaning of the abbreviation "etc.," in a contract of sale, is a question for the court, and not for the jury. *Gray v. Central R. Co.*, 11 Hun (N. Y.) 70.

1. *Kendrick v. Cisco*, 13 Lea (Tenn.) 247; *Louisville, etc., R. Co. v. McKenna*, 13 Lea (Tenn.) 280.

2. *Lucas v. Snyder*, 2 Greene (Iowa) 499; *San Antonio v. Lewis*, 9 Tex. 69; *Brown v. Moore*, 26 S. Car. 160.

3. *Cook v. Carroll*, 6 Md. 104.

It would be a dangerous principle to establish, where parties have reduced their contracts to writing and defined their meaning by plain and unequivocal language, to subject their interpretation to the arbitrary and capricious judgment of persons unfamiliar with legal principles and settled rules of construction. *Brady v. Cassidy*, 104 N. Y. 155.

It is for the court to interpret the written contracts of parties; for when they have assented to definite terms and stipulations, and incorporated them in formal documents, the meaning of these, it is supposed, can always be discovered on inspection; nothing which is within the purview of the contract is left in doubt, and there is, of

course, nothing to submit to the jury. *McKenzie v. Sykes*, 47 Mich. 295.

There Would Be No Certainty in the Law, for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all effectually. *Neilson v. Harford*, 8 M. & W. 822.

4. *McNichol v. Pacific Express Co.*, 12 Mo. App. 407; *Primm v. Haren*, 27 Mo. 205; *Wilson v. Board of Education*, 63 Mo. 142; *Reynolds v. Richards*, 14 Pa. St. 205; *State v. Patterson*, 68 Me. 473.

"It frequently happens that a writing is introduced merely as a fact or circumstance tending to prove some other fact. In such case it is generally but a link in a chain of evidence, the accompanying evidence being mostly or altogether oral. When that occurs the jury have to pass upon the whole transaction, of which the writing is but a part. The question then is not so much what the document means, but what inference shall be drawn from its meaning, and what effect it shall have towards proving the point at issue. The writing and all the concomitant evidence go to the jury together. Here the duty of the court is comparatively unimportant. It may pronounce what meaning the writing is or is not capable of, and whether it is or is not relevant to the issue; still the value and effect of such evidence is a ques-

can be drawn from them is a question for the jury.¹ The most authentic documents, when offered for such a purpose, become no more than mere letters or a written correspondence, which, when offered in evidence to prove a fact, are always to be interpreted by the jury.²

(4) *To What Writings Rule Applies.* — The duty of the court to construe and explain the effect of written instruments embraces every species of writings.

Contracts are always to be construed by the court.³

Deeds. — The rule has been held by a long line of decisions to apply to deeds.⁴ Where the facts touching the delivery of a deed are undisputed, their legal effect is nothing more than a question of law, upon which the court may be required to pass.⁵

tion of fact for the jury." *State v. Patterson*, 68 Me. 475.

1. *Primm v. Haren*, 27 Mo. 211.

2. *Primm v. Haren*, 27 Mo. 211.

Where the question is not on the interpretation of the writing, but on its effect as evidence of a collateral fact, it is to be submitted to the jury. *Reynolds v. Richards*, 14 Pa. St. 205.

Illustration of This Principle. — Where a written agreement was made for the sale of land, part of which was to be paid in cash and part in work, and a note was given for the latter amount on the payment of which the title was to be made, an order by the vendor to execute the deed is not so conclusive as to the payment of the note as to raise a legal presumption of its payment; it is presumptive evidence of payment which is to be submitted to the jury. *Reynolds v. Richards*, 14 Pa. St. 205.

3. *Kidd v. Cromwell*, 17 Ala. 648; *Sellers v. Johnson*, 65 N. Car. 104; *Spalding v. Taylor*, 1 Mo. App. 34; *Miller v. Dunlap*, 22 Mo. App. 97; *Long v. McCauley*, (Tex. 1887) 3 S. W. Rep. 689.

4. *Alabama.* — *Humes v. Bernstein*, 72 Ala. 546; *M'Cutchen v. M'Cutchen*, 9 Port. (Ala.) 650.

California. — *Seaward v. Malotte*, 15 Cal. 304; *Stark v. Barrett*, 15 Cal. 361.

Illinois. — *Montag v. Linn*, 23 Ill. 551.

Indiana. — *Harris v. Doe*, 4 Blackf. (Ind.) 369; *Symmes v. Brown*, 13 Ind. 318.

Iowa. — *State v. Delong*, 12 Iowa 453.

Kentucky. — *Venable v. McDonald*, 4 Dana (Ky.) 336; *Miller v. Shackelford*, 4 Dana (Ky.) 264.

Maine. — *Bonney v. Morrill*, 52 Me. 252.

Maryland. — *American Exch. Bank v. Inloes*, 7 Md. 380; *Whiteford v. Munroe*, 17 Md. 135; *Friend v. Friend*, 64 Md. 321.

Massachusetts. — *Eddy v. Chace*, 140 Mass. 471.

Missouri. — *Rogers v. Carey*, 47 Mo. 232; *Huth v. Carondelet Marine R., etc., Co.*, 56 Mo. 207; *Whittelsey v. Kellogg*, 28 Mo. 404; *Hancock v. Whybark*, 66 Mo. 672.

New Hampshire. — *Dean v. Erskine*, 18 N. H. 81.

New Jersey. — *Smith v. Clayton*, 29 N. J. L. 357.

New York. — *St. John v. Bumpstead*, 17 Barb. (N. Y.) 100.

North Carolina. — *Hurley v. Morgan*, 1 Dev. & B. L. (N. Car.) 425.

Oregon. — *Johnson v. Shively*, 9 Oregon 333.

Pennsylvania. — *Cox v. Freedley*, 33 Pa. St. 124; *Vincent v. Huff*, 8 S. & R. (Pa.) 381.

Texas. — *Gardner v. Stell*, 34 Tex. 561.

Vermont. — *Hodges v. Strong*, 10 Vt. 247; *Morse v. Weymouth*, 28 Vt. 824; *Stevens v. Hollister*, 18 Vt. 294.

Virginia. — *Addington v. Etheridge*, 12 Gratt. (Va.) 436.

United States. — *Brown v. Huger*, 21 How. (U. S.) 305.

The legal effect of a deed is a matter for the determination of the court; and where there is no such ambiguity as would require parol explanations, the jury has nothing to do with construing it. *Gardner v. Stell*, 34 Tex. 561.

Title to Real Estate. — The court may properly instruct the jury as to who holds title to real estate, as shown by deeds introduced. *State v. Delong*, 12 Iowa 453.

5. *Rogers v. Carey*, 47 Mo. 232.

Mortgages,¹ Leases,² and Bonds³ are also within the rule. The submission to a jury of the sufficiency of a description in a chattel mortgage as a question of fact is error.⁴

Wills are to be construed by the court,⁵ but of course the questions of testamentary capacity and free volition of the testator are for the jury.⁶

Records should also be construed by the court, and the jury charged as to their effect.⁷

Orders of court are likewise to be construed by the court.⁸

1. *U. S. v. Hodge*, 6 How. (U. S.) 279; *St. John v. Bumpstead*, 17 Barb. (N. Y.) 100; *Fairbanks v. Bloomfield*, 2 Duer (N. Y.) 349.

Whether Instrument Is a Mortgage. — Whether an instrument by which the plaintiffs claim is or is not a mortgage is a question of law. *Fairbanks v. Bloomfield*, 2 Duer (N. Y.) 349.

Execution of Mortgage. — Whether a mortgage had been properly executed and acknowledged is a question of law which it is error to leave to the decision of the jury. *Bullock v. Narrott*, 49 Ill. 62.

2. *Dumn v. Rothermel*, 112 Pa. St. 272.

3. *Butler v. State*, 5 Gill & J. (Md.) 511.

4. *Austin v. French*, 36 Mich. 200.

5. *Riley v. Riley*, 36 Ala. 496; *Green v. Collins*, 6 Ired. L. (N. Car.) 139; *Magee v. McNeil*, 41 Miss. 17; *Sartor v. Sartor*, 39 Miss. 760; *Downing v. Bain*, 24 Ga. 372; *Willson v. Whitfield*, 38 Ga. 269; *Sullivan v. Honacker*, 6 Fla. 372; *Roe v. Taylor*, 45 Ill. 485; *Stanley v. Samples*, 2 Tex. Unrep. Cas. 126; *Underhill v. Vandervoort*, 56 N. Y. 242.

Signature and Attestation. — It is the duty of the court to determine what facts are necessary to establish the legal signing and attestation of a will, and a charge referring this to the jury is erroneous. *Riley v. Riley*, 36 Ala. 496; *Roe v. Taylor*, 45 Ill. 485. Compare *Watford v. Forester*, 66 Ga. 738.

Whether Instrument Constitutes Will. — Whether a paper offered in evidence is testamentary in its character, *Magee v. McNeil*, 41 Miss. 17; *Watford v. Forester*, 66 Ga. 738; or whether it is to take effect absolutely or only on condition, is to be determined by proper instructions of the court to the jury. *Magee v. McNeil*, 41 Miss. 17.

If the terms of an instrument show it to be a will, the court should so instruct. *Stanley v. Samples*, 2 Tex. Unrep. Cas. 126.

6. *Watford v. Forester*, 66 Ga. 738.

7. *Adams v. Betz*, 1 Watts (Pa.) 425; *Gallup v. Fox*, 64 Conn. 491.

It is not within the province of a jury "to find" what appears on a record, or what a record discloses. When a record is offered in evidence and laid before the jury, it is the duty of the court to state to the jury what such record proves, and what their duty is in respect to the facts so proved. *Gallup v. Fox*, 64 Conn. 491.

Whether Entry Amounts to Judgment of Nonsuit. — The effect of an entry in the record of a suit in Virginia, that "by consent of the parties it is ordered by the court that this cause be dismissed, and that the defendant pay to the plaintiff his costs by him in this behalf expended," is for the court to determine. *Carter v. Wilson*, 1 Dev. & B. L. (N. Car.) 362.

Oath on Entry of Judgment. — A jury cannot decide whether a judgment was entered of one term or of another, or whether an interlineation on the face of the record was made at the time of the original entry or not. This is a question of law for the court. *Adams v. Betz*, 1 Watts (Pa.) 426.

8. **Order of Allowance to Attorneys.** — In *State v. Corbin*, 16 S. Car. 539, it was held that the circuit judge might construe an order of court in a former cause allowing attorneys a certain per cent. of the fund collected, and submit it to the jury to say what was the amount of the fund then collected.

Order of Sale. — The construction of an order of sale made by the Orphans' Court is a question for the court and not for the jury, and must be determined from an inspection of the record alone, without the aid of evidence aliunde to show its meaning. *Wyatt v. Steele*, 26 Ala. 639.

Order Granting Letters of Administration. — It is the duty of the court to construe an order granting letters of administration, and to instruct the jury

Other Writings for the construction of the court are public records,¹ town plats,² assignments,³ awards,⁴ affidavits,⁵ partnership agreements,⁶ insurance policies,⁷ covenants,⁸ bills of lading,⁹ written correspondence constituting agreement,¹⁰ entries on books

whether it is valid or invalid. *Sims v. Boynton*, 32 Ala. 353.

Decree Relied on as Release. — When the defendant relies on a decree of the Chancery Court to show a release of the plaintiff's cause of action, the court must construe the decree, and determine from its face whether it was intended to operate as a release, and a charge which submits this question to the jury is erroneous. *Shook v. Blount*, 67 Ala. 301.

1. *State v. Anderson*, 30 La. Ann. 557.

Election Returns. — Whether the returns of an election for presidential electors are a public record is a question of law for the jury. *State v. Anderson*, 30 La. Ann. 557.

Record of Road. — It is the province of the court to determine the sufficiency of a record to sustain a road, and an instruction may properly be given that the records and papers offered in evidence are sufficient proof of the establishment of a highway. *State v. Prine*, 25 Iowa 231.

2. *Hanson v. Eastman*, 21 Minn. 509.

3. **Assignment for Benefit of Creditors.**

— The court should pass upon the legal effect of a provision in an assignment for the benefit of creditors alleged to be illegal. *Sheldon v. Dodge*, 4 Den. (N. Y.) 217.

Assignment of Bonds. — The legal effect of a written assignment of bonds, where its terms are unambiguous, is a question for the court, and it should not be left for the jury to determine what was intended by the parties to pass by the assignment. *DeGraff v. Wyckoff*, 13 Daly (N. Y.) 366, 118 N. Y. 1.

4. *Moore v. Miller*, 4 S. & R. (Pa.) 279.

“Where the arbitrators had authority to act in reference to any particular subject-matter, or whether their award conforms to the directions and powers given them by the submission and the proper construction to be given to the award when made, are questions to be decided by the courts; and in construing either the terms of the submission or the language of the award they should be construed with reference to, and in the view of, all the surrounding facts in the case. *Kanouse v. Kanouse*, 36 Ill. 439.” *Squires v. Anderson*, 54 Mo. 197.

5. *Long v. Rodgers*, 19 Ala. 321.

6. *Kingsbury v. Tharp*, 61 Mich. 219.

7. *Lapeer County Farmers' Mut. F. Ins. Assoc. v. Doyle*, 30 Mich. 159; *St. Louis Gas Light Co. v. American F. Ins. Co.*, 33 Mo. App. 348.

The question whether a word written in a policy of insurance introduced in evidence, in a clause stating the number of rods the buildings insured were from any other buildings, was the word “six” or the word “six” is one of law for the court as matter of construction, and it is error to leave it to the jury. *Lapeer County Farmers' Mut. F. Ins. Assoc. v. Doyle*, 30 Mich. 159.

8. *Saunders v. Doake*, 3 Tex. 144.

9. *Armstrong v. Chicago, etc., R. Co.*, 62 Mo. App. 639.

10. *Begg v. Forbes*, 30 Eng. L. & Eq. 508; *Macbeath v. Haldimand*, 1 T. R. 172; *Lea v. Henry*, 56 Iowa 662; *Falls Wire Mfg. Co. v. Broderick*, 12 Mo. App. 378; *Smith v. Faulkner*, 12 Gray (Mass.) 251; *Goddard v. Foster*, 17 Wall. (U. S.) 123; *Luckhart v. Ogden*, 30 Cal. 547; *Van Valkenburg v. Rogers*, 18 Mich. 180; *Russell v. Arthur*, 17 S. Car. 477; *Ranney v. Higby*, 5 Wis. 63.

Contracts are frequently made by correspondence between the parties, and “the construction of written documents is for the judge, whether many or few in number.” *Goddard v. Foster*, 17 Wall. (U. S.) 142.

Where a question in issue depends upon written correspondence put in evidence, the authenticity and bearing of which are undisputed, it is for the court to expound it and instruct the jury directly and distinctly as to its effect upon the issue, and not to leave it to the jury to interpret and construe this evidence. *Battershall v. Stephens*, 34 Mich. 68.

Whether a Written Correspondence Amounts to a Contract is a question of law for the court to decide. *Falls Wire Mfg. Co. v. Broderick*, 12 Mo. App. 378.

But where the contract rests partly in correspondence and partly in oral communications, the question whether there is or is not a contract is for the

of corporations,¹ judicial opinions,² indorsements on negotiable paper,³ summons,⁴ memoranda of contracts,⁵ receipts,⁶ and specifications contained in patents.⁷ So, also, it is the duty of the court to charge the jury upon the legal effect of a record⁸ or other written evidence, and to state its effect.⁹

(5) *Effect of Misconstruction.* — If the court in its charge misconstrues a written agreement, this will, in general, be ground for reversal.¹⁰

(6) *Effect of Submitting Construction to Jury.* — If the construction of a written agreement is submitted to a jury and they construe it wrongly, this will also be ground for reversal,¹¹ but it is otherwise if they put a proper construction on the writing.¹²

b. WRITINGS WHICH REQUIRE PAROL EXPLANATION. — A resort to extrinsic evidence is frequently necessary in order to determine the meaning of a writing, as, for instance, where it

jury. *Bołckow v. Seymour*, 17 C. B. N. S. 107, 112 E. C. L. 107.

Legal Effect of Agreement. — So it is the duty of the court to determine the meaning and legal effect of the correspondence if it amounts to a contract, and it is error to leave the construction thereof to the jury. *Van Valkenburg v. Rogers*, 18 Mich. 181; *Russell v. Arthur*, 17 S. Car. 477; *Ranney v. Higbey*, 5 Wis. 62.

Effect of Doubtful Language Used. — The effect of a written correspondence constituting agreement is for the court; the fact that the language of the letters containing the offer of acceptance is doubtful does not relieve the court of its duty, nor make the question one of fact for the jury. *Goddard v. Foster*, 17 Wall. (U. S.) 123.

1. *Richmond Trading, etc., Co. v. Farquar*, 8 Blackf. (Ind.) 89.

2. *Brady v. Clark*, 12 Lea (Tenn.) 323, where it was held to be the duty of the court, on a new trial after remand, to determine what construction is to be put upon the opinion of the Supreme Court in the case, and not to submit the question to the construction of the jury.

3. *Sweeny v. Easter*, 1 Wall. (U. S.) 166.

Sufficiency of Notice of Dishonor. — The sufficiency, in itself, of a written notice of dishonor is to be determined by the court as matter of law. *Platt v. Drake*, 1 Dougl. (Mich.) 296.

4. *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112.

5. *Williams v. Woods*, 16 Md. 220.

6. *Union Bank v. Heyward*, 15 S. Car. 206.

7. *Neilson v. Harford*, 8 M. & W. 806.

If the meaning of the specification of a patent cannot be ascertained upon its face, the patent is void for ambiguity. *Emerson v. Hogg*, 2 Blatchf. (U. S.) 1.

8. *Turner v. Madison First Nat. Bank*, 78 Ind. 19.

9. *Ivey v. Williams*, 78 Tex. 685; *Beaumont Pasture Co. v. Cleveland*, (Tex. Civ. App. 1894) 26 S. W. Rep. 93; *Branch Bank v. Boykin*, 9 Ala. 320; *Turner v. Madison First Nat. Bank*, 78 Ind. 19.

Where the plaintiff's evidence of title, in an action of trespass to try title, is all in writing, the court should instruct the jury as to the effect of such evidence. *Beaumont Pasture Co. v. Cleveland*, (Tex. Civ. App. 1894) 26 S. W. Rep. 93.

10. *Stroh v. Hess*, 1 W. & S. (Pa.) 147; *American Ins. Co. v. Butler*, 70 Ind. 1.

When Error Will Not Operate to Reverse. — It is a legal duty pertaining exclusively to the court to put its own construction upon contracts in evidence before it, and if in so doing a word is misinterpreted, though it would be error, yet it might not of itself be sufficient ground to set aside the verdict, unless the jury are misled thereby. *Streeter v. Streeter*, 43 Ill. 155.

11. *Brooks v. Standard F. Ins. Co.*, 11 Mo. App. 349.

12. *Martineau v. Steele*, 14 Wis. 273; *Comfort v. Ballingal*, 134 Mo. 289; *Roberts v. Alexander*, 5 Lea (Tenn.) 412; *Kansas City, etc., R. Co. v. Beeler*, 90 Tenn. 548; *Morse v. Weymouth*, 28 Vt. 824; *Woodman v. Chesley*, 39 Me. 45; *Taylor v. Kelly*, 31 Ala. 59; *Jones v. Pullen*, 66 Ala. 306.

contains technical terms of art or science which expert testimony is necessary to explain,¹ or where it contains ambiguous or doubtful words or terms which can only be rendered intelligible by extrinsic, concomitant facts or circumstances.²

Where Parol Testimony Is Admitted to explain the meaning of these words or terms, the determination of their meaning must, of course, be submitted to the jury.³ But does this submission carry with it the construction of the entire writing in question? In other words, are the jury merely to pass upon the meaning of the doubtful words or terms, or shall they determine the meaning and legal effect of the entire writing? The weight of authority as well as of reason answers this question in the negative. Although there are expressions in some opinions from which it might be inferred that the jury were to pass upon the meaning and effect of the instrument in question, it is confidently submitted that none of these decisions actually hold that the jury are invested with this power,⁴ and the true rule may be stated as

If the court improperly submits the construction of a written agreement to the jury, this will not operate to reverse unless one of the parties was prejudiced thereby. *Bluefields Banana Co. v. Wollfe*, (Tex. Civ. App. 1893) 22 S. W. Rep. 269.

1. *Streeter v. Streeter*, 43 Ill. 155; *Silverthorn v. Fowle*, 4 Jones L. (N. Car.) 362; *Van Eman v. Stanchfield*, 8 Minn. 518; *Goddard v. Foster*, 17 Wall. (U. S.) 142.

2. *Humes v. Bernstein*, 72 Ala. 546; *Sewall v. Henry*, 9 Ala. 31; *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 65; *Fairbanks v. Jacobs*, 69 Iowa 265; *Cunningham v. Washburn*, 119 Mass. 224; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *State v. Patterson*, 68 Me. 474; *Powers v. Cary*, 64 Me. 9; *Keefer v. Mattingly*, 1 Gill (Md.) 182; *Daggett v. Hayward*, 95 Mich. 217; *Curtis v. Martz*, 14 Mich. 506; *Niagara F. Ins. Co. v. De Graaf*, 12 Mich. 124; *Shaw v. Davis*, 7 Mich. 318; *Edwards v. Smith*, 63 Mo. 127; *Fruin v. Crystal R. Co.*, 89 Mo. 397; *Mantz v. Maguire*, 52 Mo. App. 146; *Wait v. Agricultural Ins. Co.*, 13 Hun (N. Y.) 371; *Cornish v. Farm Bldgs. F. Ins. Co.*, 10 Hun (N. Y.) 466, 74 N. Y. 295; *Mowry v. Stogner*, 3 S. Car. 251; *Bradford v. South Carolina R. Co.*, 7 Rich. L. (S. Car.) 201; *Long v. McCauley*, (Tex. 1887) 3 S. W. Rep. 692; *West v. Smith*, 101 U. S. 263; *Barreda v. Silsbee*, 21 How. (U. S.) 168; *Etting v. U. S. Bank*, 11 Wheat. (U. S.) 59; *Turner v. Yates*, 16 How. (U. S.) 14; *Miller v.*

Jones, 15 Nat. Bank Reg. 150; *Hutchinson v. Bowker*, 5 M. & W. 540; *Neilson v. Harford*, 8 M. & W. 806.

The court is the proper tribunal to construe and determine the legal effect and construction of instruments in writing; but where deductions are to be drawn from the conduct of the parties in the execution of such instruments, at the time, in the manner, and under the circumstances existing in the case, the jury are the proper forum to make such deductions. *Keefer v. Mattingly*, 1 Gill (Md.) 182.

3. See cases in the preceding note.

4. In *Sidwell v. Evans*, 1 P. & W. (Pa.) 386, the court makes this statement: "An admixture of parol with written evidence draws the whole to the jury." This is a dictum. So, in *Denison v. Wertz*, 7 S. & R. (Pa.) 376, it was said: "There may be cases in which extrinsic circumstances are so connected with a writing as to render it necessary to leave the whole to the jury." The court goes on further and says: "But this was not such a case." In *Watson v. Blaine*, 12 S. & R. (Pa.) 131, it was said that the court is to give the construction of a written instrument except where it cannot be understood without reference to facts *dehors* the writing, and in that case the jury are to judge of the whole together. The judgment, however, was reversed because the court submitted the construction of the writing to the jury. In *Foster v. Berg*, 104 Pa. St. 324, it was said: "The construction of a

follows: "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury."¹

The Court Interprets the Writing, aided by the surrounding facts which the jury find to be proved.²

written instrument is exclusively for the court, except when it cannot be understood without reference to facts not within the writing, and then the jury are to judge of the whole together." In this case it appeared that the pledgee of oil as collateral sold it to pay the note for which it was pledged, and turned over the surplus proceeds to the maker of the note. A third party, claiming that he owned the oil subject to the pledge and was entitled to the surplus proceeds, brought suit against the holder of the note therefor. The evidence of the transaction consisted mainly of telegrams, which the plaintiff claimed affected the defendant with notice of his ownership, and requested the court so to instruct the jury. This the court refused to do, but submitted the writings, together with all the evidence in the case, to the jury, to find whether the defendant has such notice. The reviewing court held that the court should have construed the writings, and have affirmed the plaintiff's point, with instructions as to the effect of extrinsic evidence which might, if believed, vary the written contract. The decision of *Evans v. Negley*, 13 S. & R. (Pa.) 220, also goes to show that it is not the law in Pennsylvania that when extrinsic evidence is admitted to explain the meaning of a doubtful contract, the jury are not to construe the legal effect of the contract. In this case it is said: "The court must, in all cases, decide what the construction of the written contract is on its face, and how far that construction is affected by the facts which the jury shall suppose to be established." In *Jennings v. Sherwood*, 8 Conn. 122, it was said that though the construction of a written document is a matter of pure law where the meaning is to be collected from the document itself, yet where the meaning is to be judged of by extrinsic circumstances, the construction is usually a question of fact for the jury. It was held that where

the defendants, in a case involving their right to fill up a certain creek, introduced parol evidence of an agreement in writing made many years before and since lost, which contained no direct recognition of the right in question, but from which, in connection with a variety of extrinsic circumstances, they sought to make out a recognition of such right, it might properly be left to the jury to determine whether that agreement in any manner recognized such right.

1. *Neilson v. Harford*, 8 M. & W. 822; *Evans v. Negley*, 13 S. & R. (Pa.) 221. Compare *East Hampton v. Vail*, 151 N. Y. 463.

2. *Humes v. Bernstein*, 72 Ala. 557.

The jury "must judge of and determine the concomitant facts which are aids in interpreting the instrument, but the court must construe the instrument." *Humes v. Bernstein*, 72 Ala. 557.

"There is * * * a large class of writings where the meaning of particular words or phrases or characters or abbreviations must be shown by evidence outside the writing, and there may be extrinsic circumstances of one kind or another affecting its interpretation, which may be shown by oral testimony. Here the same rule, virtually applies as before. It is often but inaccurately said, in cases of the kind named, that the writing itself is to be passed upon and construed by the jury. Strictly that is not so. They find what the oral testimony shows, and the court declares what the writing means in the light of the facts found by the jury." *State v. Patterson*, 68 Me. 474.

"This in no wise militates against the rule that the meaning of the parties is to be ascertained from the language used in the writing, and that the interpretation of the instrument is a duty resting upon the court. The court may, however, in a proper case, direct the jury that the instrument may mean one thing or the other, depending upon extraneous circum-

The Jury Should Be Instructed Hypothetically what the construction of the writing shall be according to the facts which may be found by them.¹

Special Verdict. — In jurisdictions where special verdicts are permissible the facts may be found by special verdict, and then the court shall interpret the writing in view of such finding.² To leave the question of construction wholly to the jury as depending upon parol evidence admitted for the purpose of explaining the writing, is such error as will operate to reverse.³

stances to be found by them from the evidence." *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 65.

Mercantile Terms. — In assumpsit for nondelivery of barley, it was proved at the trial that the defendants wrote to the plaintiffs offering them a certain quantity of "good" barley, upon certain terms; to which the plaintiff answered, after quoting the defendants' letter, as follows: "Of such offer we accept, expecting you will give us fine barley and full weight." The defendants, in reply, stated that their letter contained no such expression as "fine" barley, and declined to ship the same. Evidence was given at the trial that the terms "good" and "fine" were terms well known in the trade; and the jury found that there was a distinction in the trade between "good" and "fine" barley. It was held that although it was a question for the jury what was the meaning of those terms in a mercantile sense, yet that, they having found what that meaning was, it was for the court to determine the meaning of the contract; and the court held that there was not a sufficient acceptance. *Hutchison v. Bowker*, 5 M. & W. 535.

Alteration of Terms of Contract. — Where there is some question as to whether an instrument has been altered, this should be submitted to the jury under proper instructions, but it is error to leave the construction and effect of the instrument to the jury. *Zenor v. Johnson*, 107 Ind. 69; *Boyce v. Martin*, 46 Mich. 239.

1. *State v. Patterson*, 68 Me. 473; *Powers v. Cary*, 64 Me. 9; *Long v. McCauley*, (Tex. 1887) 3 S. W. Rep. 689; *Taylor v. McNutt*, 58 Tex. 71; *Curtis v. Martz*, 14 Mich. 512; *Zenor v. Johnson*, 107 Ind. 69; *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 65; *Humes v. Bernstein*, 72 Ala. 546; *Cunningham v. Washburn*, 119 Mass. 227; *Eaton v. Smith*, 20 Pick. (Mass.) 150;

Smith v. Faulkner, 12 Gray (Mass.) 251; *Ganson v. Madigan*, 15 Wis. 144; *Bedard v. Bonville*, 57 Wis. 270; *Overton v. Tracey*, 14 S. & R. (Pa.) 329; *Festerman v. Parker*, 10 Ired. L. (N. Car.) 474; *Hutchison v. Bowker*, 5 M. & W. 535; *Neilson v. Harford*, 8 M. & W. 822.

"If extrinsic circumstances or other testimony have been adduced in order to explain the instrument for the purpose of making certain the subject matter to which its terms apply, the determination of the issues so presented should be left to the jury. But the court should construe the writing, and apply such construction to each phase of the case developed by the testimony upon the special issue so raised." *Long v. McCauley*, (Tex. 1887) 3 S. W. Rep. 692.

Construction of Deed Depending on Parol Evidence as to Limits and Boundaries. — When the construction and operation of a deed as to the limits and boundaries of the lands conveyed depend upon extrinsic parol evidence, its construction and effect should be stated to the jury hypothetically, so that they may pass upon the facts. *Humes v. Bernstein*, 72 Ala. 546.

Contract as Affected by Usage. — When a word is used in a technical or peculiar sense as applicable to any branch of business, or to any particular class of people, evidence of usage is admissible to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court then is to instruct the jury what will be the legal effect of the contract, as they shall find the meaning of the word modified or explained by the usage. *Eaton v. Smith*, 20 Pick. (Mass.) 150.

2. *Hutchison v. Bowker*, 5 M. & W. 535; *State v. Patterson*, 68 Me. 474. See also *Edwards v. Smith*, 63 Mo. 127.

3. *Mowry v. Stogner*, 3 S. Car. 251.

5. Construction of Parol Contracts. — Where an alleged contract rests entirely in parol, it is the province and duty of the jury to determine whether there is a contract, and to ascertain and fix its terms,¹ unless these terms are precise and explicit and admit of one construction only.² But this done, it is equally the

1. *White v. Murtland*, 71 Ill. 250; *Chichester v. Whiteleather*, 51 Ill. 259; *Carl v. Knott*, 16 Iowa 379; *Kingsbury v. Buchanan*, 11 Iowa 387; *Walthelm v. Artz*, 70 Iowa 609; *Herbert v. Ford*, 33 Me. 93; *Copeland v. Hall*, 29 Me. 93; *Houghton v. Houghton*, 37 Me. 72; *Tallon v. Grand Portage Copper Min. Co.*, 55 Mich. 147; *McKenzie v. Sykes*, 47 Mich. 294; *Jenness v. Shaw*, 35 Mich. 20; *Sines v. Superintendents of Poor*, 55 Mich. 383; *Spalding v. Archibald*, 52 Mich. 365; *Hughes v. Tanner*, 96 Mich. 113; *Barton v. Gray*, 57 Mich. 623; *Judge v. Leclair*, 31 Mo. 127; *Belt v. Goode*, 31 Mo. 128; *Workmen's Banking Co. v. Blell*, 57 Mo. App. 413; *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 440; *Murphy v. Bedford*, 18 Mo. App. 279; *Farley v. Pettes*, 5 Mo. App. 262; *Dennis v. Crooks*, 23 Mo. App. 532; *Folsom v. Plumer*, 43 N. H. 469; *Smalley v. Hendrickson*, 29 N. J. L. 373; *Young v. Jeffreys*, 4 Dev. & B. L. (N. Car.) 216; *Massey v. Belisle*, 2 Ired. L. (N. Car.) 170; *Festerman v. Parker*, 10 Ired. L. (N. Car.) 474; *Islay v. Stewart*, 4 Dev. & B. L. (N. Car.) 160; *Coddling v. Wood*, 12 Pa. St. 371; *M'Gregor v. Penn.*, 9 Verg. (Tenn.) 74.

The jury have the right to determine the existence of a parol contract, its extent, and limitations. They are to find not only what language was used, but its purport and meaning. In cases of written contracts, it is the duty of the court to define the meaning of the language used in them, but in verbal contracts this duty is confined to the jury; they are not barely to ascertain the words and forms of expression, but to determine their sense and meaning. *Copeland v. Hall*, 29 Me. 93; *Herbert v. Ford*, 33 Me. 93; *Folsom v. Plumer*, 43 N. H. 469.

Where the terms of a negotiation are left to oral proof, the question of what the parties said and did, and what they intended should be understood thereby, is single and cannot be separated so as to refer one part to the jury and another part to the judge; but in its entirety the question is one of fact. *McKenzie v. Sykes*, 47 Mich. 294.

Instances. — The terms of a contract for the adjustment of differences between copartners in the settlement of their firm business should be ascertained by the jury to whom an issue involving the same is submitted. *Carl v. Knott*, 16 Iowa 379.

In an action for contract of hire the question was whether the period of employment was by the year or by the month. The contract itself stated that the one party agreed to pay the other a specified sum "per year, payable in monthly payments." Payments were in fact made monthly, but in the course of the third year of employment the employee was discharged. Towards the close of the second year he had asked his employer if he was satisfied, and the latter had said that he was. It was held that these facts were for the jury, who were to determine what the understanding of the parties was as to the period of hire. *Tallon v. Grand Portage Copper Min. Co.*, 55 Mich. 147.

It is the province of the jury, under proper directions from the court, to determine what was intended by conversations between parties, introduced in evidence, and the tendency and effect of it as in the nature of admissions. *Murphy v. Bedford*, 18 Mo. App. 279.

Question Not Determinable from Understanding of One Party. — The question as to whether the contract alleged to have been made was made, is a question for the jury, to be determined from the evidence of what the parties said and did, and not from the understanding of one of the parties of what he said or did. *Farley v. Pettes*, 5 Mo. App. 262.

2. *Massey v. Belisle*, 2 Ired. L. (N. Car.) 170, it which it is said that where the terms of a parol contract are precise and explicit, the meaning of those terms is a question of law. "But if the contract be by parol, and the parties dispute about the terms of the agreement, and these are obscure or destitute of precision or to be inferred from the conduct of the parties, the ascertainment of those terms is in the

province and duty of the court to determine its legal effect,¹ and it is error to leave this question to the determination of the jury.²

Meaning of Terms. — Where the contract is by parol its terms are, of course, a matter of fact, and if those terms be obscure or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed.³ But the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written instrument.⁴

6. Construction of Pleadings. — See *infra*, V. 9. *Statement of Issues*.

7. Construction of Laws, Ordinances, etc. — It is the duty of the court to construe statutes, general or special,⁵ treaties,⁶ municipal ordinances,⁷ charters of corporations,⁸ by-laws of associa-

first place necessary, and this is clearly a question of fact." If there be no dispute about the terms, and they be precise and explicit, it is for the court to declare their effect. *Festerman v. Parker*, 10 Ired. L. (N. Car.) 474.

1. *Illinois*. — *White v. Murtland*, 71 Ill. 250.

Missouri. — *Belt v. Goode*, 31 Mo. 128; *Judge v. Leclair*, 31 Mo. 127.

New Hampshire. — *Folsom v. Plumer*, 43 N. H. 469.

New Jersey. — *Smalley v. Hendrickson*, 29 N. J. L. 373.

New York. — *De Ridder v. M'Knight*, 13 Johns. (N. Y.) 294.

North Carolina. — *Festerman v. Parker*, 10 Ired. L. (N. Car.) 474; *Young v. Jeffreys*, 4 Dev. & B. L. (N. Car.) 216; *Rhodes v. Chesson*, Busb. L. (N. Car.) 338.

Pennsylvania. — *Codding v. Wood*, 112 Pa. St. 371; *Warnick v. Grosholz*, 3 Grant's Cas. (Pa.) 235.

Wisconsin. — *Diefenback v. Stark*, 56 Wis. 464.

2. *Diefenback v. Stark*, 56 Wis. 464.

3. *Young v. Jeffreys*, 4 Dev. & B. L. (N. Car.) 220; *Festerman v. Parker*, 10 Ired. L. (N. Car.) 474; *Massey v. Belisle*, 2 Ired. L. (N. Car.) 170; *Folsom v. Plumer*, 43 N. H. 469.

4. *Young v. Jeffreys*, 4 Dev. & B. L. (N. Car.) 220.

5. *Gallatin Turnpike Co. v. State*, 16 Lea (Tenn.) 36; *Brown v. Hamlett*, 8 Lea (Tenn.) 732; *Belt v. Marriott*, 9 Gill (Md.) 334; *Fairbanks v. Woodhouse*, 6 Cal. 433; *Maltus v. Shields*, 2 Metc. (Ky.) 553.

Mining Laws. — Mining laws, when introduced in evidence, are to be con-

strued by the court, and the question whether by virtue of such laws a forfeiture had accrued is a question of law, and cannot be submitted to a jury. *Fairbanks v. Woodhouse*, 6 Cal. 433.

6. *Harris v. Doe*, 4 Blackf. (Ind.) 369.

7. *Platt v. Chicago*, etc., R. Co., 74 Iowa 127; *Ingram v. Chicago*, etc., R. Co., 38 Iowa 669; *Peoria v. Calhoun*, 29 Ill. 317; *Pennsylvania Co. v. Frana*, 13 Ill. App. 91; *Barnes v. Mobile*, 19 Ala. 707.

Applicability of Ordinance to Circumstances. — A valid ordinance of a city stands on the same footing as a statute. An instruction which leaves it to the jury to determine the applicability of an ordinance to the circumstances, and its legal effect, is erroneous. *Pennsylvania Co. v. Frana*, 13 Ill. App. 91.

The Existence of Ordinance. — The instruction given by the court which submitted it to the jury to determine whether there was, at the time of the accident, a valid ordinance in the city of Chicago, requiring, etc., was erroneous in that it not only submitted it to the jury to determine matters of law as well as of fact, but to do so regardless of the evidence. *Chicago, etc., R. Co. v. Jones*, 13 Ill. App. 634; *Roulo v. Valcour*, 58 N. H. 347.

Meaning of Ordinance. — It is the duty of the court, and not of the jury, to construe an ordinance the meaning of which is involved in a pending suit. *Barnes v. Mobile*, 19 Ala. 707; *Platt v. Chicago*, etc., R. Co., 74 Iowa 127.

8. *Selma*, etc., R. Co. v. *Anderson*, 51 Miss. 829.

tions,¹ rules of a board of trade,² and instruct the jury as to their effect and meaning.

Foreign Law. — The existence of a foreign law, unwritten or statute, is to be proved as any other fact, and is a question for the jury,³ unless there are statutes allowing courts to take judicial notice of foreign laws and providing that foreign law-books may be received as evidence thereof.⁴ While this rule, as may be seen, is supported by the weight of authority, there are nevertheless some decisions to the effect that evidence of the existence of a foreign law is to be addressed to the court and not to the jury,⁵ and this doctrine finds support in the views of two of America's most able text-writers.⁶ It has also been held that where evidence is admitted to prove what construction has been given to a foreign statute, it is for the jury to determine what that construction is.⁷

1. *Johnson v. Miller*, 63 Iowa 529; *Osceola Tribe No. 11 v. Rost*, 15 Md. 296.

2. *Wright v. Fonda*, 44 Mo. App. 634; *Higgins v. McCrea*, 116 U. S. 671.

3. *Ely v. James*, 123 Mass. 44; *Hazleton v. Valentine*, 113 Mass. 473; *Bowditch v. Soltyk*, 99 Mass. 136; *Kline v. Baker*, 99 Mass. 253; *Knapp v. Abell*, 10 Allen (Mass.) 485; *Ingraham v. Hart*, 11 Ohio 255; *Niagara County Bank v. Baker*, 15 Ohio St. 83; *Raymond v. Ross*, 40 Ohio St. 343; *Flanigen v. Washington Ins. Co.*, 7 Pa. St. 311; *Cecil Bank v. Barry*, 20 Md. 287; *Charlotte v. Chouteau*, 33 Mo. 194; *Cobb v. Griffith*, etc., *Sand*, etc., *Transp. Co.*, 87 Mo. 90; *Wear v. Sang-er*, 91 Mo. 348; *Moore v. Gwynn*, 5 Ired. L. (N. Car.) 190; *Knight v. Wall*, 2 Dev. & B. L. (N. Car.) 129; *State v. Jackson*, 2 Dev. L. (N. Car.) 563; *Dyer v. Smith*, 12 Conn. 384; *Brackett v. Norton*, 4 Conn. 521; *Godard v. Gray*, L. R. 6 Q. B. 139; *Di Sora v. Phillipps*, 10 H. L. Cas. 624; *Bremer v. Freeman*, 10 Moo. P. C. 306.

4. *Lockwood v. Crawford*, 18 Conn. 361.

5. *Hall v. Costello*, 48 N. H. 179; *Pickard v. Bailey*, 26 N. H. 152; *Ferguson v. Clifford*, 37 N. H. 86; *Wilson v. Carson*, 12 Md. 75. See also *Moore v. Gwynn*, 5 Ired. L. (N. Car.) 191, in which it is said: "We do not mean to say that when a case arises under a statute of a sister state, it is not the province of the court to decide both the existence of the statute and its proper construction. In such a case, the statute being authenticated in the meaning pointed out by the Constitution of the

United States and the Act of Congress, both the fact of its existence and its proper construction are matters for the court."

6. *Story's Conflict of Laws*, § 658; *Greenleaf on Evidence* (14th ed.), § 486.

7. *Holman v. King*, 7 Met. (Mass.) 384. Compare *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, in which it was held that where, on the trial of an issue respecting the law of another state, the decisions of the courts of that state are given in evidence to the jury, it is the province of the jury to determine whether or not such decisions have been made, but it is the duty of the court to construe and deduce from them the rules of law which they establish. The court says: "The first branch of the inquiry concerns the method by which the law of Pennsylvania is to be determined. * * * That it is a fact to be determined by the jury, is, we think, a well-established principle of law. * * * It does not follow from this, however, that where, as in the case at bar, numerous decisions of the several courts of a state are introduced in evidence to a jury as proof of the law of such state, the jury should be required to search through them, elucidate and announce the doctrine they establish; this is often a most difficult and delicate duty for courts and judges of the greatest skill, learning, and experience, to undertake. * * * In such case it becomes the duty of the court, as in the case of any other documentary evidence requiring construction, to construe the decisions." In this case the law to be determined was

Legal Effect of Law. — The existence of the foreign law having been ascertained, it is for the court to determine its legal effect and meaning, and properly instruct the jury thereon.¹

IV. INVADING PROVINCE OF JURY — 1. Charging on the Weight of the Evidence — a. INTRODUCTORY STATEMENT. — In most jurisdictions, as will be shown in subsequent sections of this chapter, it is considered an invasion of the province of the jury for the court to express any opinion as to the weight or sufficiency of the evidence in a cause being tried before it. This, however, is due almost entirely to organic and statutory provisions, expressly or impliedly prohibiting this practice.

b. RULE THAT COURT MAY EXPRESS OPINION AS TO THE WEIGHT OF THE EVIDENCE — (1) Statement of Rule. — In England, and in the United States courts, and in such of those states as have no constitutional or statutory provision against charging as to matters of fact, it is competent for the judge to give his opinion of the weight of any part or the whole of the evidence, provided the ultimate decision of the facts is left to the jury.² But when the judge gives his own views as to the

an unwritten one. In the Massachusetts case the law to be construed was statutory; in both cases judicial decisions were admitted in the evidence; in one to show what the unwritten law was, in the other to show what a statute meant. It is submitted that on principle the jury had no more right in one case than in the other to determine the meaning of these decisions.

1. *Di Sora v. Phillips*, 10 H. L. Cas. 624; *Hooper v. Moore*, 5 Jones L. (N. Car.) 130; *State v. Jackson*, 2 Dev. L. (N. Car.) 563; *Moore v. Gwynn*, 5 Ired. L. (N. Car.) 191; *Charlotte v. Chouteau*, 33 Mo. 194; *Cobb v. Griffith*, etc., Sand, etc., Transp. Co., 87 Mo. 90; *Cecil Bank v. Barry*, 20 Md. 287; *Kline v. Baker*, 99 Mass. 253; *Ely v. James*, 123 Mass. 44; *Inge v. Murphy*, 10 Ala. 897; *Consequa v. Willings*, Pet. (C. C.) 225.

To invest the jury with the function of determining the effect of the law would be hazardous in the extreme; for the court trying the cause would be ignorant whether the verdict was given because the facts were mistaken, or the law misconstrued, and there would be no means of correcting an error if the jury put an improper construction on the law. *Inge v. Murphy*, 10 Ala. 897.

2. *Connecticut*. — First Baptist Church v. Rouse, 21 Conn. 167; *Setchel v. Keigwin*, 57 Conn. 478; *Comstock's*

Appeal, 55 Conn. 223; *Occum Co. v. A. & W. Sprague Mfg. Co.*, 34 Conn. 538; *State v. Taff*, 37 Conn. 400; *Swift v. Stevens*, 8 Conn. 431; *State v. Duffy*, 57 Conn. 525; *Morehouse v. Remson*, 59 Conn. 401; *Cook v. Steinert*, 69 Conn. 91.

Louisiana. — *State v. Green*, 7 La. Ann. 518; *State v. Roger*, 7 La. Ann. 382. See also *State v. Chandler*, 5 La. Ann. 489, rule changed by statute enacted in 1852.

Maine. — *Phillips v. Kingfield*, 19 Me. 375; *Gilbert v. Woodbury*, 22 Me. 246; *Dyer v. Greene*, 23 Me. 464; *Frankfort Bank v. Johnson*, 24 Me. 490; *Stephenson v. Thayer*, 63 Me. 143; *State v. Reed*, 62 Me. 129; *Millay v. Millay*, 18 Me. 387; *Cunningham v. Batchelder*, 32 Me. 316; *Ware v. Ware*, 8 Me. 59; *Hayden v. Bartlett*, 35 Me. 203; *Emery v. Estes*, 31 Me. 155. The practice is now changed by statute.

Massachusetts. — *Com. v. Child*, 10 Pick. (Mass.) 253; *Buckminster v. Perry*, 4 Mass. 594; *Whiton v. Old Colony Ins. Co.*, 2 Met. (Mass.) 1; *Curl v. Lowell*, 19 Pick. (Mass.) 25; *Mansfield v. Corbin*, 4 Cush. (Mass.) 213; *Eddy v. Gray*, 4 Allen (Mass.) 435; *Davis v. Jenney*, 1 Met. (Mass.) 221. The practice is now changed by statute.

Michigan. — *Sheahan v. Barry*, 27 Mich. 227; *Blumeno v. Grand Rapids*, etc., R. Co., 101 Mich. 325; *Elliott v.*

weight and sufficiency of the evidence, it is absolutely essential that the jury should be made distinctly to understand that the

Van Buren, 33 Mich. 58. But see Letts v. Letts, 91 Mich. 596; Wessels v. Beeman, 87 Mich. 481.

Minnesota.—McArthur v. Craigie, 22 Minn. 351; State v. Kieth, 47 Minn. 559; Decorah First Nat. Bank v. Holan, 63 Minn. 525; Ames v. Cannon River Mfg. Co., 27 Minn. 248, *overruling* Caldwell v. Kennison, 4 Minn. 47.

New Jersey.—Smith v. State, 41 N. J. L. 374; Castner v. Sliker, 33 N. J. L. 512; Donnelly v. State, 26 N. J. L. 480; Engle v. State, 50 N. J. L. 272; Bruch v. Carter, 32 N. J. L. 565.

New York.—Hurlburt v. Hurlburt, 128 N. Y. 420; Hager v. Hager, 38 Barb. (N. Y.) 92; Griffith v. Utica, etc., R. Co., 63 Hun (N. Y.) 626, 43 N. Y. St. Rep. 835; Durkee v. Marshall, 7 Wend. (N. Y.) 312; Dows v. Rush, 28 Barb. (N. Y.) 157; Clapp v. Bromagham, 9 Cow. (N. Y.) 530; Dean v. Hewit, 5 Wend. (N. Y.) 257; Gardner v. Pickett, 19 Wend. (N. Y.) 186; Hoffman v. New York Cent., etc., R. Co., 46 N. Y. Super. Ct. 526; Massoth v. Delaware, etc., Canal Co., 64 N. Y. 524; Stephens v. People, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 396, 19 N. Y. 549; Nulton v. Moses, 3 Barb. (N. Y.) 31; Crawford v. Wilson, 4 Barb. (N. Y.) 504; Bruce v. Westervelt, 2 E. D. Smith (N. Y.) 440; Ynguanzo v. Salomon, 3 Daly (N. Y.) 153; New York Firemen Ins. Co. v. Walden, 12 Johns. (N. Y.) 513; People v. Quin, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 340; Bulkley v. Keteltas, 4 Sandf. (N. Y.) 450; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Cheesebrough v. Taylor, 12 Abb. Pr. (N. Y. C. Pl.) 227; Graham v. Cammann, 2 Cai. (N. Y.) 168; Jackson v. Packard, 6 Wend. (N. Y.) 415; Durkee v. Marshall, 7 Wend. (N. Y.) 312; Powell v. Jones, 42 Barb. (N. Y.) 24; Althof v. Wolf, 2 Hilt. (N. Y.) 344; Hunt v. Bennett, 4 E. D. Smith (N. Y.) 647; Sindram v. People, 88 N. Y. 203; Hart v. Ryan, (Supreme Ct.) 6 N. Y. Supp. 921; Fitzgerald v. Fachs, (Super. Ct.) 29 N. Y. St. Rep. 526.

Ohio.—Bossert v. State, Wright (Ohio) 113; Hopkins v. Sickles, Wright (Ohio) 376; Abram v. Will, 6 Ohio 164.

Pennsylvania.—Repsher v. Watson, 17 Pa. St. 365; Burd v. Dansdale, 2 Binn. (Pa.) 80; Porter v. McIlroy, 4 S. & R. (Pa.) 436; Riddle v. Murphy, 7 S.

& R. (Pa.) 230; Porter v. Seiler, 23 Pa. St. 424; Follmer v. McGinley, 146 Pa. St. 517; Didier v. Pennsylvania Co., 146 Pa. St. 582; Fredericks v. Northern Cent. R. Co., 157 Pa. St. 103; Price v. Hamscher, 174 Pa. St. 73; Heydrick v. Hutchinson, 165 Pa. St. 208; Burr v. Sim, 4 Whart. (Pa.) 150; Frick v. Barbour, 64 Pa. St. 120; Leibig v. Steiner, 94 Pa. St. 472; Shovlin v. Com., 106 Pa. St. 369; Williams v. Carr, 1 Rawle (Pa.) 420; Speer v. Rowley, 32 Leg. Int. (Pa.) 100; Hamet v. Dundass, 4 Pa. St. 178; Sample v. Robb, 16 Pa. St. 305; Graham v. Smith, 25 Pa. St. 323; Crum v. Burke, 25 Pa. St. 377; Cathcart v. Com., 37 Pa. St. 108; Thompson v. Franks, 37 Pa. St. 327; Ditmars v. Com., 47 Pa. St. 335; Bitner v. Bitner, 65 Pa. St. 347; Long v. Ramsay, 1 S. & R. (Pa.) 72; Sailor v. Hertzogg, 10 Pa. St. 296; Rosevere v. Osceola Mills, 169 Pa. St. 555; Brittain v. Doylestown Bank, 5 W. & S. (Pa.) 100; Com. v. Orr, 138 Pa. St. 276; Pool v. White, 175 Pa. St. 459; Dimmick v. Sexton, 125 Pa. St. 334; Com. v. Doughty, 139 Pa. St. 383; Com. v. Drass, 146 Pa. St. 55; McClain v. Com., 110 Pa. St. 263; Oswald v. Kennedy, 48 Pa. St. 9; Oyster v. Longnecker, 16 Pa. St. 269; Bonner v. Herrick, 99 Pa. St. 225; Pennsylvania Co. v. Allen, 3 Penny. (Pa.) 170; Holden v. Winslow, 18 Pa. St. 160; Spear v. Philadelphia, etc., R. Co., 119 Pa. St. 61; Central R. Co. v. Green, 86 Pa. St. 421; Pennsylvania R. Co. v. Werner, 89 Pa. St. 59; Graham v. Graham, 1 S. & R. (Pa.) 330; Lilly v. Paschal, 2 S. & R. (Pa.) 394; Renn v. Pennsylvania Hospital, 2 S. & R. (Pa.) 413; Henwood v. Cheesebrough, 3 S. & R. (Pa.) 500; Sampson v. Sampson, 4 S. & R. (Pa.) 329; McIlvaine v. McIlvaine, 6 S. & R. (Pa.) 559; Harper v. Kean, 11 S. & R. (Pa.) 280; Rouvert v. Patton, 12 S. & R. (Pa.) 253; Kerr v. Sharp, 14 S. & R. (Pa.) 399; Robinson v. Justice, 2 P. & W. (Pa.) 19; Baker v. Lewis, 4 Rawle (Pa.) 356; Levers v. Van Buskirk, 4 Pa. St. 309; McDowell v. Oyer, 21 Pa. St. 417.

Rhode Island.—State v. Lynott, 5 R. I. 295.

South Carolina.—State v. Bennett, 2 Treadw. Const. (S. Car.) 692; Devlin v. Kilcrease, 2 McMull. L. (S. Car.) 428; Kirkwood v. Gordon, 7 Rich. L.

instruction was not given as a point of law by which they are to be governed, but as a mere opinion as to the facts, to which they should give no more weight than it is entitled to receive.¹ The charge should not so infringe the province of the jury as to relieve

(S. Car.) 474; *State v. Smith*, 12 Rich. L. (S. Car.) 439. Practice changed by Constitution of 1868.

Utah. — *People v. Lee*, 2 Utah 441.

Vermont. — Rowell *v. Fuller*, 59 Vt. 688; *Pettingill v. Elkins*, 50 Vt. 431; *Missisquoi Bank v. Evarts*, 45 Vt. 296; *Sawyer v. Phaley*, 33 Vt. 69; *Yale v. Seely*, 15 Vt. 221; *Stevens v. Talcott*, 11 Vt. 25; *Melendy v. Bradford*, 56 Vt. 148; *Vincent v. Stinehour*, 7 Vt. 62; *Gale v. Lincoln*, 11 Vt. 152.

Wisconsin. — *Fowler v. Colton*, 1 Pin. (Wis.) 338; *Massuere v. Dickens*, 70 Wis. 91; *Goldsworthy v. Linden*, 75 Wis. 24; *Ketchum v. Ebert*, 33 Wis. 611; *Barndt v. Frederick*, 78 Wis. 1; *Douglass v. State*, 43 Wis. 392. The foregoing were civil cases; in criminal cases an opinion upon the weight of the evidence would probably be erroneous. See *Benedict v. State*, 14 Wis. 423.

United States. — *Carver v. Jackson*, 4 Pet. (U. S.) 89; *Ex p. Crane*, 5 Pet. (U. S.) 198; *Evans v. Eaton*, 7 Wheat. (U. S.) 426; *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank, etc., Co.*, 72 Fed. Rep. 413; *Mitchell v. Harmony*, 13 How. (U. S.) 130; *Consequa v. Willings, Pet.* (C. C.) 225; *Tracy v. Swartwout*, 10 Pet. (U. S.) 80; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 182; *Russell v. Ely*, 2 Black. (U. S.) 575; *Lovejoy v. U. S.*, 128 U. S. 171; *Simmons v. U. S.*, 142 U. S. 148; *Rucker v. Wheeler*, 127 U. S. 91; *Sorenson v. Northern Pac. R. Co.*, 36 Fed. Rep. 166; *Games v. Stiles*, 14 Pet. (U. S.) 322; *Eastern Transp. Line v. Hope*, 95 U. S. 297; *Haines v. McLaughlin*, 135 U. S. 584; *Hansen v. Boyd*, 161 U. S. 397; *Garrard v. Reynolds*, 4 How. (U. S.) 123; *U. S. v. Philadelphia, etc., R. Co.*, 123 U. S. 113; *Williams v. Conger*, 125 U. S. 397; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; *Brickill v. Baltimore*, 60 Fed. Rep. 98; *Harrison v. Rowan*, 3 Wash. (U. S.) 580; *U. S. v. Fourteen Packages of Pins, Gilp.* (U. S.) 235; *U. S. v. Sarchet, Gilp.* (U. S.) 273; *Watts v. Southern Bell Telephone, etc., Co.*, 66 Fed. Rep. 453; *Marine Ins. Co. v. Young*, 5 Cranch. (U. S.) 187; *Richardson v. Boston*, 24

How. (U. S.) 188; *Nudd v. Burrows*, 91 U. S. 439; *St. Louis, etc., R. Co. v. Phillips*, 66 Fed. Rep. 35; *Home Ben. Assoc. v. Sargent*, 142 U. S. 691; *Ætna L. Ins. Co. v. Ward*, 140 U. S. 76; *Pinkerton v. Ledoux*, 129 U. S. 346; *Chicago, etc., R. Co. v. Stahley*, 62 Fed. Rep. 363; *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568.

England. — *Belcher v. Prittie*, 4 M. & Scott 295, 10 Bing. 408, 25 E. C. L. 184; *Foster v. Steele*, 5 Scott 28; *Atty.-Gen. v. Good, McClel. & Y.* 286; *Brembridge v. Osborne*, 1 Stark. 374, 2 E. C. L. 145; *Petty v. Anderson*, 3 Bing. 170, 11 E. C. L. 84; *Sutton v. Sadler*, 3 C. B. N. S. 87, 91 E. C. L. 87; *Davidson v. Stanley*, 2 M. & G. 721, 40 E. C. L. 594; *Doe v. Strickland*, 8 C. B. 743, 65 E. C. L. 743; *Calmady v. Rowe*, 6 C. B. 893, 60 E. C. L. 893; *Pennell v. Dawson*, 18 C. B. 355, 86 E. C. L. 355; *Solarte v. Melville*, 7 B. & C. 435, 14 E. C. L. 74; 2 Hale's Hist. Com. L. 147; *Duberley v. Gunning*, 4 T. R. 652; *Rex v. Burdett*, 4 B. & Ald. 167, 6 E. C. L. 435; *Taylor v. Ashton*, 11 M. & W. 401; *Darby v. Ouseley*, 1 H. & N. 1.

"It is a solecism to say that a court may set aside the verdict of a jury if, in the opinion of the court, it be contrary to evidence, and yet that it is an invasion of the right of the jury over the facts if the court should present their views of the evidence in order to prevent the error instead of correcting it." *U. S. v. Fourteen Packages of Pins, Gilp.* (U. S.) 255.

1. *Tracy v. Swartwout*, 10 Pet. (U. S.) 80.

The Line Which Separates the Respective Provinces of Court and Jury must not be overlooked. Care must be taken that the jury are not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must understand that what is said as to the facts is only advisory, and is in no wise intended to fetter the exercise finally of their own independent judgment. *Nudd v. Burrows*, 91 U. S. 439.

Whenever the judge delivers his opinion to the jury on a matter of fact, it should be delivered as mere opinion,

them from the necessity of pronouncing an intelligent judgment.¹ They should be made to feel that upon them alone devolves the responsibility of their verdict. They ought not to be permitted to feel that they can take shelter under the opinion of the court.²

(2) *Necessity of Informing Jury that Opinion is Advisory Only.*—In order that the jury may not be misled into believing that they are bound to accept the opinion of the court, it would probably be better for the court so to state clearly and unequivocally, and a failure to do so may be reversible error.³ But if the language of the charge is such that the jury could have no doubt that it was the court's intention to leave the question on which the opinion was expressed to their determination, there can be no ground of complaint.⁴

and not as direction, and it should be impressed upon the jury that they are to decide the fact upon their own views of the evidence, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt. *New York Firemen Ins. Co. v. Walden*, 12 Johns. (N. Y.) 519.

"In order to preserve a just balance between the distinct powers of the court and the jury, and that the parties may enjoy, in unimpaired vigor, their constitutional right of having the law decided by the court and of having the fact decided by the jury, every charge should distinguish clearly between the law and the fact, so that the jury cannot misunderstand their rights or their duty, nor mistake the opinion of the judge upon matter of fact for his direction in point of law. The distinction is all-important to the jury. The direction of the judge, in the one case, is obligatory upon their consciences, and so they will, and so they ought to, regard it; but his opinion in the other case is mere advice, and the jury are bound to decide for themselves, notwithstanding the opinion of the judge, and to follow that opinion no farther than it corresponds with the conclusions of their own judgment. Unless this distinction be kept steadily in view, and be defined with all possible precision, the trial by jury may, in time, be broken down, and rendered nominal and useless." *New York Firemen Ins. Co. v. Walden*, 12 Johns. (N. Y.) 518.

1. *Ditmars v. Com.*, 47 Pa. St. 335.

2. *Holder v. State*, 5 Ga. 444.

The judge commented at large upon the evidence, and submitted it to the

jury without any controlling direction. It is well settled that an exception cannot be taken to a mere commentary on the evidence. The jury listen to the remarks of the court upon the testimony with the deference due to learning and experience, but with a perfect understanding that they must decide upon matters of fact according to their own convictions. It is only when the judge has plainly misled the jury as to the tendency and effect of the evidence, or has given them some erroneous rule for their guidance in matters of law, that the court is required to interfere and award a new trial. *Lansing v. Russell*, 13 Barb. (N. Y.) 521.

3. Where the court tells the jury that the evidence seems to prove certain facts, and there is evidence to the contrary, such a charge is erroneous if it fails to state that the jury are not bound by the opinion of the court. *Anderson v. Avis*, 62 Fed. Rep. 227.

It is not error for a trial court, in its charge to the jury, to express its opinion on a question of fact. If a party fears that the court's opinion will have undue influence on the jury, he may request a charge that the jury are the exclusive judges of that fact. *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245.

4. *First Baptist Church v. Rouse*, 21 Conn. 166; *Rucker v. Wheeler*, 127 U. S. 85; *Hansen v. Boyd*, 161 U. S. 405.

"The language of the judge is such that they could have no doubt that it was his intention to leave the question of secession and abandonment, as claimed by the plaintiffs, to them, to find as a matter of fact, from the circumstances admitted between the parties. He, indeed, accompanied the charge with a clear expression of his

(3) *Strong Expressions of Opinion Not Equivalent to Binding Instructions Proper.* — In charging on the facts the court is vested with large discretion, and strong expressions of opinion will be upheld unless they amount to a binding instruction or a positive direction to find one way or the other.¹

Erroneous Opinion. — It has been held that even an erroneous opinion on the facts is not a ground for reversal if the final decision thereon is left to the jury.²

(4) *Applications of the Rule.* — In accordance with these views it has been held not improper for the trial judge to state his opinion as to the credibility of witnesses,³ or as to the compara-

own opinion as to the weight of the evidence on that point; but the very manner in which he introduced into the charge the expression of such opinion, it being immediately after he had submitted the decision of the question to the jury, showed that he did not intend to direct or control them on that point. It is competent in all cases, and in many expedient, for the court not only to discuss but to express its opinion upon the weight of the evidence, without, however, directing the jury how to find the facts; and this is a right necessarily limited only by its own discretion." First Baptist Church v. Rouse, 21 Conn. 167.

On Trial of a Libel Suit, the jury were told that if the necessary effect of the publication was to diminish the plaintiff's respectability and abridge his comforts by exposing him to disgrace and ridicule, or if its tendency was to impair his condition, or alter his condition in society for the worse, it was libelous; that there could be little doubt but that the publication in question was libelous; that the whole scope and tendency of it was libelous. It was held that this was no ground for a new trial. It was an expression of opinion as to whether or not the publication in question was libelous; but as it was coupled with a definition sufficient to enable the jury to know what in law constituted libel, it was submitting it to them to pass on, accompanied with an opinion of the judge that it was libelous, which they might follow or not as they thought proper. Hunt v. Bennett, 4 E. D. Smith (N. Y.) 647, affirmed in 19 N. Y. 173.

1. Rex v. Burdett, 4 B. & Ald. 167, 6 E. C. L. 435; Foster v. Steele, 5 Scott 28; Johnston v. Com., 85 Pa. St. 54; Leibig v. Steiner, 94 Pa. St. 472; Fredericks v. Northern Cent. R. Co., 157

Pa. St. 103; Supplee v. Timothy, 23 W. N. C. (Pa.) 386.

The judge has no right to tell the jury that if he were in the jury-box he would find against the plaintiff, even if he qualifies by saying that they are not bound by his view of the evidence. Burke v. Maxwell, 81 Pa. St. 139, overruling Rutland Mfg. Co. v. Quinlan, 1 W. N. C. (Pa.) 456.

In Johnston v. Com., 85 Pa. St. 60, on a trial for burglary, the court in its charge said: "The commonwealth claims that evidence can establish nothing if this evidence will not establish the facts alleged in the third count, and I cannot, for my part, see how the jury can hesitate for a moment to convict the prisoner at the bar on the third count." This was held not to be error under the facts of the case, although it was a strong expression of opinion.

Considerable Latitude and Discretion must be left with the court in commenting on the evidence, and, unless it be unfair and misleading, the reviewing court will not interfere. Com. v. Doughty, 139 Pa. St. 383.

2. Taylor v. Ashton, 11 M. & W. 401; Hamet v. Dundass, 4 Pa. St. 178; Oyster v. Longnecker, 16 Pa. St. 269.

Slight inaccuracies in reviewing the facts, with expressions of opinion as to the merits, are not ground for reversal when accompanied by instructions that the facts are for the jury, and that they should be remembered, where the errors are not called to the attention of the court before the jury retire. Knapp v. Griffin, 140 Pa. St. 604.

3. Hoffman v. New York Cent. etc., R. Co., 46 N. Y. Super. Ct. 526, 87 N. Y. 25; Burr v. Sim, 4 Whart. (Pa.) 150; Dimmick v. Sexton, 125 Pa. St. 334.

Instances. — It is not error in a judge to tell a jury that a witness was "a very willing witness;" and that her

tive weight of testimony given by several witnesses,¹ or to comment on the absence of testimony,² or to express an opinion that there is nothing in the case to reduce an offense charged to one of lesser grade,³ or to direct the attention of the jury to any matter in the case affecting the credibility of a witness.⁴ The decisions set out in the notes will further serve to show the application of these principles.⁵

(5) *Court Not Bound to Express Opinion on the Evidence.* — It must not be understood from anything heretofore stated that the court can be required to give its opinion on the weight of the evidence. This is a matter resting entirely in its discretion, and it is under no circumstances bound to do so.⁶

(6) *How Federal Practice Affected by State — Constitutional or Statutory Provisions Against Expressions of Opinion.* — Of course,

testimony "deserves but little confidence," or to suggest the presumptions arising from the relationship and conduct of one of the parties. *Burr v. Sim*, 4 Whart. (Pa.) 150.

So a remark that the testimony of a certain witness is strong evidence as to a matter of fact, because it comes from an independent source, does not constitute error. *Rosevere v. Osceola Mills*, 169 Pa. St. 555.

Nor is it error to state that the character of the testimony is affirmative on the part of the plaintiff and of a negative quality on the part of the defendant. *Rosevere v. Osceola Mills*, 169 Pa. St. 555.

1. *Porter v. Seiler*, 23 Pa. St. 424.

2. *Frick v. Barbour*, 64 Pa. St. 120.

3. *McClain v. Com.*, 110 Pa. St. 263.

4. *Bruch v. Carter*, 32 N. J. L. 565.

5. It is not error, in an action for false imprisonment, for the court to express an opinion that more than nominal damages should be given, where the question as to what amount should be given is fully left to the jury. *Oswald v. Kennedy*, 48 Pa. St. 9.

In an action on a justice's bond, where the sole question was whether he had collected the money sued for in his official capacity, it was not error for the court, after recapitulating the testimony, to express an opinion that the justice had acted and received the money officially, at the same time referring the evidence to the jury with instructions that if they were satisfied with this fact the bail was liable, though no suit was brought on the note. *Ditmars v. Com.*, 47 Pa. St. 335.

An instruction that a former verdict and judgment, though admitted in evi-

dence, should have little or no weight on the decision of the case because it was overruled as being founded on erroneous instructions, was held correct. *Richardson v. Boston*, 24 How. (U. S.) 188.

An instruction in a criminal case that "the suppression or secretion of pertinent evidence by a defendant is always a prejudicial circumstance, and is sometimes entitled to great weight," is proper. *State v. Keith*, 47 Minn. 559.

In an action against a railroad company for personal injury the judge remarked that, personally, he did not believe that the defendant was guilty of negligence in not locking a certain switch and in not opening another switch, and that the company was not liable for the misconduct of a boy whose trespass caused the accident. This instruction was held not such an invasion of the province of the jury as authorized a reversal. *Fredericks v. Northern Cent. R. Co.*, 157 Pa. St. 103.

6. *Smith v. Carrington*, 4 Cranch (U. S.) 62; *U. S. v. Burnham*, 1 Mason (U. S.) 57; *Consequa v. Willings*, Pet. (C. C.) 225; *Crane v. Morris*, 6 Pet. (U. S.) 598; *Vincent v. Stinehour*, 7 Vt. 62; *Brainard v. Burton*, 5 Vt. 97; *Doon v. Ravey*, 49 Vt. 293; *Cohen v. Pemberton*, 53 Conn. 235; *Thomas v. Thomas*, 21 Pa. St. 315; *Clark v. Partidge*, 2 Pa. St. 13; *Lorain v. Hall*, 33 Pa. St. 270; *Haldeman v. Martin*, 10 Pa. St. 369; *Moore v. Meacham*, 10 N. Y. 207; *Bruch v. Carter*, 32 N. J. L. 565; *George v. Stubbs*, 26 Me. 243; *Shank v. State*, 25 Ind. 208.

In Maine and Indiana judges are no longer permitted to give an opinion as to the weight of the evidence.

in a state where the statutes do not forbid the presiding judge to express his opinion upon questions of fact to the jury, a judge of the United States courts may do so in a cause on trial in a federal court sitting in that state,¹ and the powers of the courts of the United States in this regard are not controlled by state statutes forbidding judges to express any opinion upon the facts.² So a state constitution cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact.³

c. RULE THAT COURT SHOULD NOT EXPRESS OPINION AS TO THE WEIGHT OF THE EVIDENCE — (1) *Statement of Rule.* — As stated in a preceding section, the practice in most states forbids any expression of opinion as to the weight and sufficiency of the evidence; and the rule, as will be subsequently shown, is most stringently enforced.⁴ Not infrequently judges evinced partisan-

1. *Mitchell v. Harmony*, 13 How. (U. S.) 115, *affirming* 1 *Blatchf.* (U. S.) 549.

2. *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545; *Nudd v. Burrows*, 91 U. S. 426.

3. *St. Louis, etc., R. Co. v. Vickers*, 122 U. S. 360.

Act of Congress, June 1, 1872, Construed. — The Act of Congress of June 1, 1872 (17 Stat. 197, § 5), provides that "the practice, pleadings, and forms and modes of proceeding, in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the same things, existing at the time in the courts of record of the state within which such circuit and district courts are held." The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the federal and state courts of the same locality. It had its origin in the code enactments of many of the states. While in the federal tribunals the common-law pleadings, forms, and practice were adhered to, in the state courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United

States which it prescribes. The remedy was complete. The personal administration by the judge of his duties while sitting upon the bench was not complained of. No one objected, or sought a remedy in that direction. We see nothing in the act to warrant the conclusion that it was intended to have such an application. If the proposition of the counsel for the plaintiff in error be correct, the powers of the judge, as defined by the common law, were largely trenching upon. A statute claimed to work this effect must be strictly construed. But no severity of construction is necessary to harmonize the language employed with the view we have expressed. The identity required is to be in 'the practice, pleadings, and forms and modes of proceeding.' The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context." *Nudd v. Burrows*, 91 U. S. 441.

4. *Alabama.* — *Higginbotham v. Higginbotham*, 106 Ala. 314; *Crosby v. Montgomery*, 108 Ala. 498; *Tubb v. Madding, Minor* (Ala.) 130; *Clemens v. Loggins*, 1 Ala. 622; *Boyd v. McIvor*, 11 Ala. 822; *Moore v. Robinson*, 62 Ala. 537; *Mobile, etc., R. Co. v. Williams*, 52 Ala. 278; *Marx v. Bell*, 48 Ala. 497; *Bynum v. Southern Pump, etc., Co.*, 63 Ala. 462; *Burkham v. Mastin*, 54 Ala. 122; *Kansas City, etc., R. Co. v. Crocker*, 95 Ala. 412; *Oliver v. State*, 17 Ala. 587; *Conville v. State*, 91 Ala. 39; *Postal Tel. Co. v. Brantley*,

ship in their charges, and moulded verdicts to their will; and juries as frequently shirked responsibility and really adopted the

107 Ala. 683; Gibson *v.* Snow Hardware Co., 94 Ala. 346; Smith *v.* Collins, 94 Ala. 394; Mitchell *v.* State, 94 Ala. 68; Shealy *v.* Edwards, 75 Ala. 411; Wilkinson *v.* Searcy, 76 Ala. 176; Buchanan *v.* State, 109 Ala. 7; Steele *v.* State, 83 Ala. 20; McKee *v.* State, 82 Ala. 32; Crawford *v.* State, 44 Ala. 45; Weil *v.* State, 52 Ala. 19; Cox *v.* Knight, 49 Ala. 173; Davis *v.* Hays, 89 Ala. 563; Smith *v.* State, 88 Ala. 73; Hair *v.* Little, 28 Ala. 236; Frazier *v.* Praytor, 36 Ala. 691; Parker *v.* Daughtry, 111 Ala. 529.

Arkansas. — Randolph *v.* McCain, 34 Ark. 696; Cameron *v.* Vandergriff, 53 Ark. 381; Keith *v.* State, 49 Ark. 439; Shinn *v.* Tucker, 37 Ark. 580; Dawson *v.* State, 29 Ark. 117; Polk *v.* State, 45 Ark. 165; Missouri Pac. R. Co. *v.* Byars, 58 Ark. 108; Stephens *v.* Oppenheimer, 45 Ark. 492; Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517; Flynn *v.* State, 43 Ark. 289; State *v.* Roper, 8 Ark. 491; Cummins *v.* James, 4 Ark. 616; Blankenship *v.* State, 55 Ark. 244; Sibley *v.* Ratliffe, 50 Ark. 477; Williams *v.* State, 50 Ark. 511.

California. — Miller *v.* Stewart, 24 Cal. 502; McNeil *v.* Barney, 51 Cal. 603; Battersby *v.* Abbott, 9 Cal. 565; People *v.* McLean, 84 Cal. 480; People *v.* Barry, 31 Cal. 357; People *v.* King, 27 Cal. 507; Levitzky *v.* Canning, 33 Cal. 305; People *v.* Taylor, 36 Cal. 266; People *v.* Ybarra, 17 Cal. 166; People *v.* Cline, 74 Cal. 575, 83 Cal. 374; People *v.* Gordon, 88 Cal. 422; People *v.* Cowgill, 93 Cal. 596; Treadwell *v.* Wells, 4 Cal. 260; People *v.* Murray, 86 Cal. 31; People *v.* Christensen, 85 Cal. 568; People *v.* Casey, 65 Cal. 260; Weiderkind *v.* Tuolumne County Water Co., 65 Cal. 431; People *v.* Travers, 88 Cal. 233; People *v.* Choy Ah Sing, 84 Cal. 276; Carpenter's Estate, 94 Cal. 406; Kauffman *v.* Maier, 94 Cal. 269; Pico *v.* Stevens, 18 Cal. 376; Bunting *v.* Saltz, 84 Cal. 168; People *v.* Walden, 51 Cal. 588; Stone *v.* Geyser Quicksilver Min. Co., 52 Cal. 315; People *v.* Carrillo, 54 Cal. 63; People *v.* Ah Sing, 59 Cal. 400; People *v.* Titherington, 59 Cal. 598; People *v.* Barney, 114 Cal. 554.

Florida. — Ferguson *v.* Porter, 3 Fla. 27; Williams *v.* La Penotiere, 32 Fla. 491; Baker *v.* Chatfield, 23 Fla. 540;

Williams *v.* Dickenson, 28 Fla. 90; Wheeler *v.* Baars, 33 Fla. 696; Adams *v.* State, 28 Fla. 511.

Georgia. — Southwestern R. Co. *v.* Singleton, 67 Ga. 306; Clark *v.* Cassidy, 62 Ga. 411; Hayden *v.* Neal, 62 Ga. 365; Jessup *v.* Gragg, 12 Ga. 261; De Saulles *v.* Leake, 56 Ga. 365; Jones *v.* State, 63 Ga. 456; Headman *v.* Rose, 63 Ga. 459; Berry *v.* State, 10 Ga. 511; Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644; Rushin *v.* Shields, 11 Ga. 636; Phillips *v.* Williams, 39 Ga. 597; Printup *v.* James, 73 Ga. 583; Raoul *v.* Newman, 59 Ga. 412; Cicero *v.* State, *54 Ga. 157; West *v.* Black, 65 Ga. 647; Wannack *v.* Macon, 53 Ga. 162; Ware *v.* State, 96 Ga. 349; Higginbotham *v.* Campbell, 85 Ga. 638; McVicker *v.* Conkle, 96 Ga. 584; Lovejoy *v.* State, 82 Ga. 87; Wyley *v.* Stanford, 22 Ga. 385; Bowie *v.* Maddox, 29 Ga. 285; Black *v.* Thornton, 30 Ga. 361; Primrose *v.* Browning, 56 Ga. 369; White *v.* State, 56 Ga. 385; Horne *v.* State, 37 Ga. 93; Davis *v.* State, 57 Ga. 66; Grant *v.* State, 45 Ga. 477; Atlanta, etc., R. Co. *v.* Newton, 85 Ga. 517; Stewart *v.* De Loach, 86 Ga. 729; Lellyett *v.* Markham, 57 Ga. 13; Everett *v.* Whitfield, 27 Ga. 133; Beverly *v.* Burke, 14 Ga. 70; Louisville, etc., R. Co. *v.* Tift, (Ga. 1896) 27 S. E. Rep. 765.

Illinois. — Herklerath *v.* Stookey, 63 Ill. 486; Frame *v.* Badger, 79 Ill. 441; Chicago, etc., R. Co. *v.* Hall, 90 Ill. 42; Protection L. Ins. Co. *v.* Dill, 91 Ill. 174; Seaverns *v.* Tribby, 48 Ill. 195; Chicago, etc., R. Co. *v.* Moranda, 108 Ill. 576; Lake Shore, etc., R. Co. *v.* Taylor, 46 Ill. App. 506; Bonney *v.* Meir, etc., Mfg. Co., 51 Ill. App. 380; Andrews *v.* People, 60 Ill. 354; Merchants' Ins. Co. *v.* Paige, 60 Ill. 448; Walsh *v.* Aylsworth, 46 Ill. App. 516; Humphreys *v.* Collier, 1 Ill. 297; Hartley *v.* Lybarger, 3 Ill. App. 524; Logg *v.* People, 92 Ill. 598; Toledo, etc., R. Co. *v.* Brooks, 81 Ill. 245; Chicago, etc., R. Co. *v.* Robinson, 106 Ill. 142; Elston, etc., Gravel Road Co. *v.* People, 96 Ill. 584; Hubner *v.* Feige, 90 Ill. 208; Andreas *v.* Ketcham, 77 Ill. 377; Wolcott *v.* Heath, 78 Ill. 433; Springfield Consol. R. Co. *v.* Sommer, 55 Ill. App. 553; Sanders *v.* People, 124 Ill. 218; New York, etc., R. Co. *v.* Blumenthal, 160 Ill. 40; William

opinion of the judge, finding their verdict as he directed. It was to put a stop to this, and to secure the constitutional right of

Graver Tank Works v. McGee, 58 Ill. App. 250; *Pittsburgh, etc., R. Co. v. Callaghan*, 157 Ill. 406; *Cleveland, etc., R. Co. v. Maxwell*, 59 Ill. App. 673; *Kuhlenbeck v. Hotz*, 53 Ill. App. 675; *Browning v. Jones*, 52 Ill. App. 597; *Richmond v. Roberts*, 98 Ill. 472; *Johnson v. People*, 94 Ill. 505; *McHard v. Ives*, 5 Ill. App. 400; *Mauro v. Platt*, 62 Ill. 450; *Hartshorn v. Byrne*, 147 Ill. 418; *Neibauer v. Sackett*, 53 Ill. App. 521; *Chicago Heights Land Assoc. v. Butler*, 55 Ill. App. 461; *Doerr v. Brune*, 56 Ill. App. 657; *Taylor v. Cox*, 153 Ill. 220; *Trott v. Wolfe*, 35 Ill. App. 163; *De Land v. Dixon Nat. Bank*, 111 Ill. 323; *Louisville, etc., R. Co. v. Shires*, 108 Ill. 617; *Rockwood v. Poundstone*, 38 Ill. 199; *Chicago, etc., R. Co. v. Dunleavy*, 27 Ill. App. 438; *Westbrook v. Howell*, 34 Ill. App. 571; *Frizell v. Cole*, 29 Ill. 465.

Indiana. — *Binns v. State*, 66 Ind. 428; *Richie v. State*, 58 Ind. 355; *Chamness v. Chamness*, 53 Ind. 301; *Wood v. Deutchman*, 75 Ind. 151; *Works v. Stevens*, 76 Ind. 186; *Fulwider v. Ingels*, 87 Ind. 420; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 437; *Sanders v. State*, 94 Ind. 149; *Hartford v. State*, 96 Ind. 468; *Goodwin v. State*, 96 Ind. 569; *Bird v. State*, 107 Ind. 156; *Cline v. Lindsey*, 110 Ind. 341; *Durham v. Smith*, 120 Ind. 467; *Duvall v. Kenton*, 127 Ind. 180; *Ohio, etc., R. Co. v. Percy*, 128 Ind. 207; *Canada v. Curry*, 73 Ind. 246; *Cain v. Hunt*, 41 Ind. 466; *Hitesman v. State*, 48 Ind. 473; *Camp v. Brown*, 48 Ind. 575; *Evansville, etc., R. Co. v. Wolf*, 59 Ind. 89; *Woollen v. Whitacre*, 91 Ind. 504; *Dodd v. Moore*, 91 Ind. 525; *Nelson v. Vorce*, 55 Ind. 455; *Hess v. Lowrey*, 122 Ind. 234; *Brough v. Parry*, 144 Ind. 463; *Faller v. Salmons*, 87 Ind. 328; *Gimbel v. Hufford*, 46 Ind. 125; *Comstock v. Whitworth*, 75 Ind. 132; *Unruh v. State*, 105 Ind. 123; *Davis v. Hardy*, 76 Ind. 272; *Ohio, etc., R. Co. v. Buck*, 130 Ind. 300; *Columbus v. Strassner*, 138 Ind. 301; *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 64; *Millner v. Eglin*, 64 Ind. 197; *Newman v. Hazelrigg*, 96 Ind. 73; *Garfield v. State*, 74 Ind. 60; *Morris v. State*, 101 Ind. 560; *Tobin v. Young*, 124 Ind. 507; *Koerner v. State*, 98 Ind. 20; *Lewis v. Christie*, 99 Ind. 382; *Finch v. Bergins*, 89 Ind. 360.

Iowa. — *Houston v. State*, 4 Greene (Iowa) 437; *State v. Miller*, 65 Iowa 60; *Leiber v. Chicago, etc., R. Co.*, 84 Iowa 97; *State v. Curran*, 51 Iowa 112; *Nimon v. Reed*, 79 Iowa 524; *Upton v. Paxton*, 72 Iowa 295; *Delvee v. Boardman*, 20 Iowa 446; *Bever v. Spangler*, 93 Iowa 576; *Clark v. Raymond*, 85 Iowa 737; *Richardson v. Hoyt*, 60 Iowa 68; *Phelps v. James*, 79 Iowa 262; *State v. Donovan*, 61 Iowa 369; *Napper v. Young*, 12 Iowa 450; *State v. Dorland*, (Iowa 1897) 72 N. W. Rep. 492.

Kansas. — *Lorie v. Adams*, 51 Kan. 692; *Junction City v. Blades*, 1 Kan. App. 85; *State v. Potter*, 16 Kan. 80; *Cavender v. Roberson*, 33 Kan. 627; *Kansas City, etc., R. Co. v. Ryan*, 49 Kan. 1; *Heithecker v. Fitzhugh*, 41 Kan. 50; *Atchison v. Jansen*, 21 Kan. 560.

Kentucky. — *Hurt v. Miller*, 3 A. K. Marsh. (Ky.) 337; *Brady v. Com.*, 11 Bush. (Ky.) 285; *Western v. Pollard*, 16 B. Mon. (Ky.) 321; *Carter v. Carter*, 10 B. Mon. (Ky.) 327; *Thompson v. Thompson*, 17 B. Mon. (Ky.) 28; *Botts v. Williams*, 17 B. Mon. (Ky.) 687; *Wright v. Com.*, 85 Ky. 123; *Cecil v. Johnson*, 11 B. Mon. (Ky.) 35.

Louisiana. — *State v. Smith*, 11 La. Ann. 633; *State v. Hahn*, 38 La. Ann. 169; *State v. Asberry*, 37 La. Ann. 125; *State v. O'Kean*, 35 La. Ann. 901; *State v. Jackson*, 35 La. Ann. 769; *State v. Williams*, 34 La. Ann. 959; *State v. Schnapper*, 22 La. Ann. 43; *State v. Lenares*, 12 La. Ann. 226; *State v. Lacombe*, 12 La. Ann. 195; *Rivere v. McCormick*, 14 La. Ann. 135; *State v. Shields*, 11 La. Ann. 395; *State v. Munco*, 12 La. Ann. 625; *State v. Swayze*, 30 La. Ann. 1323.

Maine. — *State v. Benner*, 64 Me. 267.

Maryland. — *Lyon v. George*, 44 Md. 295; *Miller v. Miller*, 41 Md. 623; *Mason v. Poulson*, 40 Md. 355; *Fairfax Forrest Min., etc., Co. v. Chambers*, 75 Md. 604; *Chipman v. Stansbury*, 16 Md. 154; *Groe v. Brien*, 1 Md. 438; *Munroe v. Woodruff*, 17 Md. 159.

Massachusetts. — *Com. v. Larrabee*, 99 Mass. 413; *Com. v. Briant*, 142 Mass. 463; *Com. v. Barry*, 9 Allen (Mass.) 276; *Com. v. Foran*, 110 Mass. 179; *McGregory v. Prescott*, 5 Cush. (Mass.) 67.

Mississippi. — *French v. Sale*, 63 Miss.

trial by a jury and not by a judge, that the various limitations on this common-law power were imposed by the Constitution or by

386; *Kearney v. State*, 68 Miss. 233; *Wesley v. State*, 37 Miss. 327; *Daniel v. Daniel*, (Miss. 1888) 4 So. Rep. 95; *Whitney v. Cook*, 53 Miss. 551; *Lockhart v. Camfield*, 48 Miss. 470; *Sartorius v. State*, 24 Miss. 602; *Johnson v. Stone*, 69 Miss. 826; *Louisville, etc., R. Co. v. Whitehead*, 71 Miss. 451.

Missouri. — *Labeaume v. Dodier*, 1 Mo. 618; *Glasgow v. Copeland*, 8 Mo. 268; *State v. Smith*, 53 Mo. 267; *Schneer v. Lemp*, 17 Mo. 142; *Chouquette v. Barada*, 28 Mo. 491; *Speed v. Herrin*, 4 Mo. 356; *State v. Hundley*, 46 Mo. 414; *Gilliam v. Ball*, 49 Mo. 249; *State v. Clark*, 18 Mo. App. 531; *Blair v. Mound City R. Co.*, 31 Mo. App. 224; *State v. Elkins*, 63 Mo. 159; *Copp v. Hardy*, 32 Mo. App. 588; *Kansas City, etc., R. Co. v. Dawley*, 50 Mo. App. 480; *Meyer Bros. Drug Co. v. McMahon*, 50 Mo. App. 18; *State v. Sivils*, 105 Mo. 530; *Glover v. Duhle*, 19 Mo. 360; *Hopper v. Vance*, 27 Mo. App. 336; *Henson v. St. Louis, etc., R. Co.*, 34 Mo. App. 636; *Kingsland, etc., Mfg. Co. v. St. Louis Malleable Iron Co.*, 29 Mo. App. 526; *Leeser v. Boekhoff*, 33 Mo. App. 223; *Williams v. Stephens*, 38 Mo. App. 158; *Carroll v. Paul*, 16 Mo. 226; *Fine v. St. Louis Public Schools*, 30 Mo. 166, 39 Mo. 59; *Anderson v. Kincheloe*, 30 Mo. 520; *Rose v. Spies*, 44 Mo. 20; *McDermott v. Barnum*, 19 Mo. 204; *Bryan v. Wear*, 4 Mo. 106; *Vaulx v. Campbell*, 8 Mo. 224; *Bogie v. Nolan*, 96 Mo. 85; *State v. Homes*, 17 Mo. 379; *State v. Dunn*, 18 Mo. 419; *Rothschild v. American Cent. Ins. Co.*, 62 Mo. 356; *Jones v. Jones*, 57 Mo. 138; *Miller v. Marks*, 20 Mo. App. 369.

Montana. — *Wastl v. Montana Union R. Co.*, 17 Mont. 213; *Knowles v. Nixon*, 17 Mont. 473; *State v. Gleim*, 17 Mont. 17; *State v. Sullivan*, 9 Mont. 174; *State v. Gay*, 18 Mont. 51.

Nebraska. — *Murphey v. Virgin*, 47 Neb. 692; *Olive v. State*, 11 Neb. 4; *Wilson v. Gamble*, 50 Neb. 426; *Culbertson v. Holliday*, 50 Neb. 229.

Nevada. — *State v. McGinnis*, 5 Nev. 337; *State v. Harkin*, 7 Nev. 377; *State v. Ah Tong*, 7 Nev. 148; *State v. Duffy*, 6 Nev. 138; *State v. Tickel*, 13 Nev. 502.

North Carolina. — *McRae v. Lilly*, 1 Ired. L. (N. Car.) 118; *Weisenfield v. McLean*, 96 N. Car. 248; *Reed*

v. Shenck, 2 Dev. L. (N. Car.) 415; *State v. Lipsey*, 3 Dev. L. (N. Car.) 485; *State v. Moses*, 2 Dev. L. (N. Car.) 452; *Berry v. Hall*, 105 N. Car. 154; *Wells v. Clements*, 3 Jones L. (N. Car.) 168; *Arey v. Stephenson*, 11 Ired. L. (N. Car.) 86; *State v. Brewer*, 98 N. Car. 607; *State v. Cardwell*, Busb. L. (N. Car.) 245; *Johnson v. Johnson*, 108 N. Car. 619; *Reel v. Reel*, 2 Hawks (N. Car.) 63; *State v. Jenkins*, 85 N. Car. 544; *Albertson v. Terry*, 109 N. Car. 8; *Harris v. Carrington*, 115 N. Car. 187; *Boing v. Raleigh, etc., R. Co.*, 87 N. Car. 360; *Melvin v. Easley*, 1 Jones L. (N. Car.) 386; *Paul v. Ward*, 4 Dev. L. (N. Car.) 247; *Threadgill v. Anson County*, 116 N. Car. 616; *Sherrill v. Western Union Tel. Co.*, 116 N. Car. 655.

North Dakota. — *Territory v. O'Hare*, 1 N. Dak. 30.

Oregon. — *State v. Huffman*, 16 Oregon 15; *Meyer v. Thompson*, 16 Oregon 194; *State v. Daly*, 16 Oregon 240.

South Carolina. — *State v. Green*, 5 S. Car. 65; *State v. Summers*, 19 S. Car. 94; *State v. Caddon*, 30 S. Car. 609; *State v. Williams*, 31 S. Car. 238; *Redding v. South Carolina R. Co.*, 5 S. Car. 69; *State v. White*, 15 S. Car. 381; *Benedict v. Rose*, 16 S. Car. 629; *Sharp v. Kinsman*, 18 S. Car. 108; *State v. Lewis*, 21 S. Car. 598; *Quattlebaum v. Black*, 24 S. Car. 59; *State v. Addy*, 28 S. Car. 4; *State v. Norton*, 28 S. Car. 572; *State v. Jenkins*, 21 S. Car. 595; *Woody v. Dean*, 24 S. Car. 503; *McCormick v. Calhoun*, 30 S. Car. 93; *State v. Smith*, 12 Rich. L. (S. Car.) 430; *Blakely v. Frazier*, 11 S. Car. 122; *State v. Smalls*, 24 S. Car. 591; *Polson v. Ingram*, 22 S. Car. 545; *State v. Houston*, 29 S. Car. 108; *Jackson v. Jackson*, 32 S. Car. 591; *State v. Wyse*, 32 S. Car. 45; *Howard v. Wofford*, 16 S. Car. 148; *Levi v. Legg*, 23 S. Car. 284; *Verdier v. Verdier*, 8 Rich. L. (S. Car.) 135; *State v. Brown*, 33 S. Car. 151; *White v. Augusta, etc., R. Co.*, 30 S. Car. 228; *Brock v. O'Dell*, 44 S. Car. 22.

Tennessee. — *Roper v. Stone*, Cooke (Tenn.) 499; *Fitzpatrick v. Fain*, 3 Coldw. (Tenn.) 15; *State v. Reynolds*, 4 Hayw. (Tenn.) 110; *Case v. Williams*, 2 Coldw. (Tenn.) 239; *Farmers', etc., Bank v. Harris*, 2 Humph. (Tenn.) 311; *Marshall v. Dodson*, 1

statutes. The trend of modern action, both legislative and judicial, is to watch over and protect very jealously the legitimate

Heisk. (Tenn.) 96; Ellis *v.* Spurgin, 1 Heisk. (Tenn.) 74; Johnson *v.* State, 2 Humph. (Tenn.) 283; Woodfolk *v.* Sweeper, 2 Humph. (Tenn.) 88; Wilcox *v.* State 3 Heisk. (Tenn.) 110; Kirtland *v.* Montgomery, 1 Swan (Tenn.) 452; James *v.* Brooks, 6 Heisk. (Tenn.) 150; Ayres *v.* Moulton, 5 Coldw. (Tenn.) 154; Warren *v.* State, 4 Coldw. (Tenn.) 130; Marr *v.* Marr, 5 Sneed (Tenn.) 385; Lyon *v.* Guild, 5 Heisk. (Tenn.) 175; Neideiser *v.* State, 6 Baxt. (Tenn.) 499; Claxton *v.* State, 2 Humph. (Tenn.) 181; Augusta Mfg. Co. *v.* Vertrees, 4 Lea (Tenn.) 75; Deihl *v.* Ottenville, 14 Lea (Tenn.) 191; Citizens' St. R. Co. *v.* Burke, (Tenn. 1897), 40 S. W. Rep. 1085.

Texas. — Texas, etc., R. Co. *v.* Murphy, 46 Tex. 357; Merritt *v.* State, 2 Tex. App. 177; Butler *v.* State, 3 Tex. App. 48; Rice *v.* State, 3 Tex. App. 451; Kildow *v.* Irick, (Tex. Civ. App. 1895) 33 S. W. Rep. 315; Hannah *v.* State, 1 Tex. App. 584; Pharr *v.* State, 7 Tex. App. 472; Ross *v.* State, 29 Tex. 500; Stuckey *v.* State, 7 Tex. App. 174; Stooksbury *v.* Swan, 85 Tex. 563; Stephenson *v.* State, 4 Tex. App. 591; Fisher *v.* State, 4 Tex. App. 181; Royall *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1895) 32 S. W. Rep. 186; Chester *v.* State, 1 Tex. App. 703; Davidson *v.* Wallingford, 88 Tex. 619; Cleveland *v.* Empire Mills, 6 Tex. Civ. App. 479; Johnson *v.* Brown, 51 Tex. 65; Altgelt *v.* Brister, 57 Tex. 432; Johnson *v.* State, 1 Tex. App. 610; Leverett *v.* State, 3 Tex. App. 214; Mayo *v.* Tudor, 74 Tex. 471; Needham *v.* State, 19 Tex. 332; Gray *v.* Burk, 19 Tex. 228; McFarland *v.* Wofford, 16 Tex. 602; Parrish *v.* State, 45 Tex. 52; Foster *v.* State, 1 Tex. App. 363; Chapman *v.* State, 1 Tex. App. 728; Alderson *v.* State, 2 Tex. App. 10; Massey *v.* State, 1 Tex. App. 564; Gibbs *v.* State, 1 Tex. App. 13; Castro *v.* Illies, 22 Tex. 479; Gay *v.* McGuffin, 9 Tex. 501; Howerton *v.* Holt, 23 Tex. 51; Clark *v.* State, 31 Tex. 575; Baines *v.* Ullmann, 71 Tex. 529; Costley *v.* Galveston City R. Co., 70 Tex. 112; Texas Cent. R. Co. *v.* Burnett, 80 Tex. 536; Swanson *v.* Melton, 4 Tex. App. Civ. Cas., § 265, (Tex. App. 1891) 17 S. W. Rep. 1088; Kerlicks *v.* Meyer, 84 Tex. 158; Ledbetter *v.* State, 21 Tex. App. 344; Tipton *v.* State, 30

Tex. App. 530; Horton *v.* State, (Tex. App. 1892) 19 S. W. Rep. 899; Muely *v.* State, 31 Tex. Crim. Rep. 155; Clifford *v.* Lee, (Tex. Civ. App. 1893) 23 S. W. Rep. 843; Macdonnell *v.* Fuentes, 7 Tex. Civ. App. 136; San Antonio, etc., R. Co. *v.* Long, 4 Tex. Civ. App. 497; Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87; Gulf, etc., R. Co. *v.* Grubbs, 7 Tex. Civ. App. 53; St. Louis Southwestern R. Co. *v.* Carden, (Tex. Civ. App. 1894) 26 S. W. Rep. 747; Bonham *v.* Crider, (Tex. Civ. App. 1894) 27 S. W. Rep. 419; Reynolds *v.* Weinman, (Tex. Civ. App. 1895) 33 S. W. Rep. 302; Spencer *v.* Shelburne, 11 Tex. Civ. App. 521; Clay County Land, etc., Co. *v.* Montague County, 8 Tex. Civ. App. 575; Galveston, etc., R. Co. *v.* Knippa, (Tex. Civ. App. 1894) 27 S. W. Rep. 730; Johnson *v.* State, 27 Tex. App. 163; Missouri Pac. R. Co. *v.* Christman, 65 Tex. 369; Frisby *v.* Withers, 61 Tex. 134; Freiberg *v.* Freiberg, 74 Tex. 122; Flannagan *v.* Nasworthy, 1 Tex. Civ. App. 470; Lee *v.* Wilkins, 1 Tex. Unrep. Cas. 287; Missouri Pac. R. Co. *v.* Bartlett, 81 Tex. 42; Lous-tanau *v.* Lambert, 1 Tex. Civ. App. 434; Yoakum *v.* Dunn, 1 Tex. Civ. App. 524; Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139; Meyer *v.* Smith, 3 Tex. Civ. App. 37; Shattuck *v.* McCartney, 1 Tex. App. Civ. Cas., § 558; Texas, etc., R. Co. *v.* Kirby, 1 Tex. App. Civ. Cas., § 564; Texas, etc., R. Co. *v.* Kane, 2 Tex. App. Civ. Cas., § 21; Missouri Pac. R. Co. *v.* White, 3 Tex. App. Civ. Cas., § 162; Smith *v.* State, 43 Tex. 103; Hollingsworth *v.* Holshousen, 17 Tex. 41; Kimbro *v.* Hamilton, 28 Tex. 560; Baker *v.* State, 6 Tex. App. 344; Bishop *v.* State, 43 Tex. 391; Haskew *v.* State, 7 Tex. App. 107; Biering *v.* Galveston First Nat. Bank, 69 Tex. 600; Hanna *v.* Hanna, 3 Tex. Civ. App. 51; Heldt *v.* Webster, 60 Tex. 209; San Antonio, etc., R. Co. *v.* Robinson, 73 Tex. 284; Veramendi *v.* Hutchins, 56 Tex. 422; Brown *v.* State, 23 Tex. 201; Hammond *v.* Coursey, 2 Tex. Unrep. Cas. 29; Grant *v.* State, 2 Tex. App. 164; Castleman *v.* Sherry, 42 Tex. 59; Dwyer *v.* Bassett, 63 Tex. 274; Willis *v.* Whitsitt, 67 Tex. 673; Sparks *v.* Dawson, 47 Tex. 139; Houston, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1897)

powers of the jury, and to prevent the court from overstepping the line which separates law from fact. Trial judges "cannot legally indicate their opinion, either expressly or impliedly, intentionally or otherwise, as to the credibility of the witnesses, or as to the truth of any fact in issue, and the subject of the evidence. They may declare the law fully and freely, but whether a certain contested fact has been proved is entirely for the jury, which involves both the credibility of the witness and the existence of the fact, whether said fact depends upon direct and positive testimony or upon inferences to be drawn from other proved facts. In fine, the whole matter of finding the facts of the case must be left entirely to the jury, without suggestions or leadings by the court."¹

When Rule Is Violated. — The inhibition against charging on the weight of the evidence (or charging "in respect to matters of fact," the language generally used in the constitutional or statutory provision prohibiting it), is violated when the court expresses in its charge its opinion upon the force and effect of the testimony, or of any part of it, or intimates its views upon the sufficiency or insufficiency of the evidence in whole or in part.²

40 S. W. Rep. 745; *Walker v. State*, 42 Tex. 361; *Missouri, etc., R. Co. v. Rogers*, (Tex. Civ. App. 1897) 40 S. W. Rep. 849; *Lockhart v. State*, 3 Tex. App. 567; *Halbert v. De Bode*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1011; *Morrison v. State*, 41 Tex. 516; *Barton v. Stroud Gibson Grocer Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1050; *Long v. State*, 1 Tex. App. 466; *Houston, etc., R. Co. v. Granberry*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1062; *Harris v. State*, 1 Tex. App. 75; *Mitchell v. Western Union Tel. Co.*, 12 Tex. Civ. App. 262; *Sargent v. Lawrence*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1075.

Virginia. — *McDowell v. Crawford*, 11 Gratt. (Va.) 377; *Tyler v. Chesapeake, etc., R. Co.*, 88 Va. 394; *Keel v. Herbert*, 1 Wash. (Va.) 203; *Ross v. Gill*, 1 Wash. (Va.) 88; *Whitacre v. M'Ilhanev*, 4 Munf. (Va.) 310; *McKinley v. Ensell*, 2 Gratt. (Va.) 333; *Wells v. Washington*, 6 Munf. (Va.) 532; *Cornett v. Rhudy*, 80 Va. 710; *Fowler v. Lee*, 4 Munf. (Va.) 373; *Fisher v. Duncan*, 1 Hen. & M. (Va.) 563.

Washington. — *Bardwell v. Ziegler*, 3 Wash. 34; *Freidrich v. Territory*, 2 Wash. 358; *Leonard v. Territory*, 2 Wash. Ter. 381.

West Virginia. — *State v. Greer*, 22 W. Va. 801; *State v. Thompson*, 21 W.

Va. 741; *State v. Hurst*, 11 W. Va. 75; *Dickeschied v. Wheeling Exch. Bank*, 28 W. Va. 341.

The Practice in New Hampshire. — In a number of New Hampshire decisions it is said that it is not the ordinary practice for the courts of that state to express opinions in regard to the weight of the evidence, *Haven v. Richardson*, 5 N. H. 126; *Cook v. Brown*, 34 N. H. 460; *Patterson v. Colebrook*, 29 N. H. 94; but that it is not irregular for them to make such suggestions in relation to the facts as they may suppose will be useful to the jury, the matter being left to them for decision, *Cook v. Brown*, 34 N. H. 460; *Patterson v. Colebrook*, 29 N. H. 94; *Flanders v. Colby*, 28 N. H. 34.

In a recent decision on this question there is a dictum to the effect that the practice of expressing opinions on the weight of the evidence is obsolete. *State v. Pike*, 49 N. H. 416. See also *Orr v. Quimby*, 54 N. H. 632; *Aldrich v. Wright*, 53 N. H. 404; *State v. Hodge*, 50 N. H. 520; *Cook v. Brown*, 34 N. H. 470; *Nutting v. Herbert*, 37 N. H. 346.

1. *State v. Williams*, 31 S. Car. 238; *McCormick v. Calhoun*, 30 S. Car. 93; *Norris v. Clinkscales*, 47 S. Car. 488.

2. *Norris v. Clinkscales*, 47 S. Car. 488.

It has been said that a charge to a

Judge's Personal Knowledge. — The fact that the presiding judge may have a personal knowledge of a matter of fact in dispute does not create any exception to the rule prohibiting him from expressing an opinion to the jury upon the question.¹

(2) *Applications of Rule* — (a) **What Are Charges on the Weight of the Evidence.** — In applying these principles it has been held erroneous for the court, in charging, to assume facts in controversy, or as to which there is no evidence,² or to state in charging that the evidence preponderates in favor of one side of the case if there has been any evidence tending to establish an opposite conclusion,³ or that the evidence is sufficient to maintain the issue,⁴ or that evidence is entitled to great weight,⁵ or is weighty and

jury is perfectly unexceptionable only when the judge confines himself to the duty of setting forth the law applicable to the case, without either expressing or intimating an opinion as to the weight of the evidence or the credibility of witnesses. *Ross v. State*, 29 Tex. 500.

It is not permissible for the court to express any opinion to the jury on questions of fact, even though in conformity to the previously expressed opinion of the Supreme Court upon reviewing a question of fact. *Chicago, etc., R. Co. v. Moranda*, 108 Ill. 576.

1. *Andreas v. Ketcham*, 77 Ill. 377.

2. *Ayres v. Moulton*, 5 Coldw. (Tenn.) 154; *Marshall v. Dodson*, 1 Heisk. (Tenn.) 96; *Missouri Pac. R. Co. v. Christman*, 65 Tex. 369; *Kimbro v. Hamilton*, 28 Tex. 560; *Baker v. State*, 6 Tex. App. 344; *Meyer Bros. Drug Co. v. McMahan*, 50 Mo. App. 18; *State v. Duffy*, 6 Nev. 138; *Albertson v. Terry*, 109 N. Car. 8; *Postal Tel. Co. v. Brantley*, 107 Ala. 683; *Roberts v. Mansfield*, 32 Ga. 228.

For a full discussion of authorized or erroneous assumptions, see *infra*, IV. 2. *What May Be Assumed in Instructions and Requests.*

Instances. — Where, in charging the jury in a criminal case, the court used the expression, "the guilt of defendant rests upon what is known as circumstantial evidence," this was a direct assumption of the guilt of the defendant, and was therefore manifest error. *State v. Duffy*, 6 Nev. 138. Whether there was evidence of incompetency, or whether there were circumstances which might be considered in connection with such evidence sufficient to show incompetency, are questions exclusively for the jury to determine, and a charge which assumes the existence

of such evidence and of such circumstances violates the rule which forbids a judge to charge upon the weight of the evidence. *Missouri Pac. R. Co. v. Christman*, 65 Tex. 369.

3. *Thompson v. Thompson*, 17 B. Mon. (Ky.) 28.

4. *Keel v. Herbert*, 1 Wash. (Va.) 203.

Thus it is error to charge that "from the whole testimony before them, the demand of the plaintiffs was not barred by the act of limitations." *Fisher v. Duncan*, 1 Hen. & M. (Va.) 563.

5. *State v. Gleim*, 17 Mont. 17; *Smith v. Meyers*, (Neb. 1897) 71 N. W. Rep. 1006; *Williams v. Dickenson*, 28 Fla. 91; *State v. Hundley*, 46 Mo. 414. *Contra*, *Durant v. Burt*, 98 Mass. 161, in which the court said: "A judge may 'state the testimony,' and this can hardly be done without calling the attention of the jury to the degree of weight and importance to be attached to particular facts, if they are proved or admitted. To say that certain circumstances deserve to be seriously considered, or are entitled to great weight, is not expressing an opinion as to what facts have been proved, but only instructing the jury with regard to the relative materiality and importance of different portions of the evidence."

"Violent Presumption." — A charge that certain *indicia* of fraud raise a "violent presumption" is erroneous. *Shealy v. Edwards*, 75 Ala. 411.

Strong and Irresistible Circumstance. — It is also error to charge that a fact "is a strong and almost irresistible circumstance." *Marr v. Marr*, 5 Sneed (Tenn.) 385. Or "if you believe, etc., that would be a strong circumstance to show, etc." *Phillips v. Williams*, 39 Ga. 602; *Stephenson v. State*, 40 Ga.

strong,¹ or that "it does not leave much room for doubt,"² or that a certain explanation given by a witness is "a most important and material explanation,"³ or to state that evidence is of little value,⁴ or is not entitled to receive weight or consideration,⁵ or is not material,⁶ or to characterize the evidence on one side as weak,⁷ or to state that evidence is inadequate,⁸ or insufficient,⁹ or to state that circumstances cannot outweigh positive evidence,¹⁰ or that "law-writers say that a chain of circumstances cannot lie, whilst a witness may,"¹¹ or that the court had heard no evidence of a certain fact when there was some evidence,¹² or that there is a conflict in the evidence when that is denied,¹³ or that there is no conflict in the evidence,¹⁴ or that "there seems to be no conflict of evidence,"¹⁵ or to state that the plaintiff was justifiable in bringing the action,¹⁶ or that upon a given state of facts the jury can have no reasonable doubt,¹⁷ or that "the testimony in the case

292. Or that the facts make not a slight but a strong circumstance from which they could infer that the pistol was concealed. *Warmock v. State*, 56 Ga. 503.

That Certain Acts Are Conclusive Evidence. — A charge is properly refused which instructs the jury that certain acts of the parties are conclusive evidence of an intention to abandon the original contract, when these facts are capable of explanation by other testimony submitted to them which, if believed, may show a different intention. *Burkham v. Mastin*, 54 Ala. 122.

1. *Cecil v. Johnson*, 11 B. Mon. (Ky.) 35; *Jenkins v. Tobin*, 31 Ark. 307.

2. *State v. Asberry*, 37 La. Ann. 124.

3. *State v. Swayze*, 30 La. Ann. 1323.

4. *Wannack v. Macon*, 53 Ga. 162; *West v. Black*, 65 Ga. 647; *State v. Wyse*, 32 S. Car. 45; *People v. Lyons*, 49 Mich. 78; *State v. Hundley*, 46 Mo. 414.

A justice's remark, on admitting a written conveyance of personalty in evidence before the jury in a claim case, that he thought the deed "worth but little," was held ground for reversal. *West v. Black*, 65 Ga. 647.

5. *Kauffman v. Maier*, 94 Cal. 269.

6. *Jessup v. Gragg*, 12 Ga. 261.

7. *Mauro v. Platt*, 62 Ill. 450.

8. *Johnson v. People*, 94 Ill. 505.

9. *Farmers', etc., Bank v. Harris*, 2 Humph. (Tenn.) 311; *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452.

10. *Bowie v. Maddox*, 29 Ga. 285.

11. *Cicero v. State*, 54 Ga. 157.

12. *Howard v. Wofford*, 16 S. Car. 148.

Characterizing Evidence as a Scintilla. — The judge presiding at a trial court

said that while there was some evidence to go to the jury, it was a bare scintilla, leaving the matter not proved. This was held erroneous. The evidence was competent or it was not, and it should have been withdrawn from the jury or submitted without expression of opinion. *Boing v. Raleigh*, etc., R. Co., 87 N. Car. 360.

13. *Black v. Thornton*, 30 Ga. 361. Compare *People v. Flynn*, 73 Cal. 511, in which it was held that the mere statement that there is a conflict in the evidence in certain respects is not an expression of opinion upon the weight of the evidence, or a charge with respect to matters of fact.

14. *Bardwell v. Ziegler*, 3 Wash. 34, in which it was said: "To tell the jury there is no dispute in the testimony on a certain point * * * is going too far. * * * The jury might conclude there was some dispute in the testimony. It is the exclusive province of the jury * * * to analyze the testimony and to determine for themselves whether there is any dispute in relation to all or any of the facts concerning which testimony is offered."

15. *Raoul v. Newman*, 59 Ga. 411.

16. *Johnson v. Johnson*, 108 N. Car. 619.

That Plaintiff is "Entitled to Damages." — In an action for crim. con., an instruction that the plaintiff "is entitled" to compensatory damages is erroneous. *Browning v. Jones*, 52 Ill. App. 597.

17. *Wilcox v. State*, 3 Heisk. (Tenn.) 110.

shows " ¹ or there is " some " evidence tending to show a fact, ² or that facts are or are not proved or disproved, ³ or to charge that certain facts constitute ⁴ or do not constitute ⁵ negligence, or to state what evidence would or would not show wilfulness, ⁶ or to characterize one class of evidence as the best evidence, ⁷ or as better than another kind of evidence, ⁸ or to state that two

1. *People v. Casey*, 65 Cal. 260; *Fitzpatrick v. Fain*, 3 Coldw. (Tenn.) 15.

It is error to charge that a portion of the testimony did not show what the defendant claimed that it did. *Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 548.

2. *State v. Donovan*, 61 Iowa 369. In this case it was held that the instruction would have been unobjectionable without the qualifying word "some."

3. *Bardwell v. Ziegler*, 3 Wash. 34; *Hartshorn v. Byrne*, 147 Ill. 418; *Cleveland v. Empire Mills*, 6 Tex. Civ. App. 479; *Smith v. State*, 43 Tex. 103; *People v. Cowgill*, 93 Cal. 596; *Marx v. Bell*, 48 Ala. 497; *State v. McGinnis*, 5 Nev. 337.

That Averment in Declaration Is Disproved. — It is erroneous to charge that an averment in a declaration is disproved by the evidence. *James v. Brooks*, 6 Heisk. (Tenn.) 150.

Charge Intimating that Fact Is Proved. — A charge which in effect may induce the jury to believe that in the opinion of the judge there is evidence sufficient to prove, or strongly tending to prove, a controverted fact, is objectionable. *Missouri Pac. R. Co. v. Christman*, 65 Tex. 369.

An instruction that "it is a rule of law that no person can accept, without objection, the service of another without being liable to pay its reasonable value; and I can see no good reason why such rule of law should not be applied to this case," is erroneous. *Richardson v. Hoyt*, 60 Iowa 68.

So it is erroneous to charge: "If you disbelieve all the evidence for the state, and believe every word of evidence for the defense, I charge you that the defendant is guilty. But of course you can look to all the evidence and make up your verdict on it." *White v. State*, 56 Ga. 385.

4. *New York, etc., R. Co. v. Blumenthal*, 160 Ill. 40; *William Graver Tank Works v. McGee*, 58 Ill. App. 250; *Chicago, etc., R. Co. v. Anderson*, 166 Ill. 572; *Cleveland, etc., R. Co. v. Maxwell*, 59 Ill. App. 673; *Blair v. Mound City R. Co.*, 31 Mo. App. 224; *Swan-*

son v. Melton, 4 Tex. App. Civ. Cas., § 265; *San Antonio, etc., R. Co. v. Long*, 4 Tex. Civ. App. 497; *Costley v. Galveston City R. Co.*, 70 Tex. 112; *Galveston, etc., R. Co. v. Knippa*, (Tex. Civ. App. 1894) 27 S. W. Rep. 730.

Instances. — It is error to instruct, as being on the weight of evidence, that the permitting a certain obstruction near a railroad track was a want of ordinary care. *Swanson v. Melton*, 4 Tex. App. Civ. Cas., § 265. Or that "the using of a flying or running switch without any precautionary signals is negligence in itself." *Cleveland, etc., R. Co. v. Maxwell*, 59 Ill. App. 673. Or that a railroad company which permits weeds to grow on its roadbed so as to conceal it from view is guilty of negligence. *San Antonio, etc., R. Co. v. Long*, 4 Tex. Civ. App. 497. Or that the scattering of sparks and cinders by a locomotive in such a way as to cause unnecessary danger is negligence. *Galveston, etc., R. Co. v. Knippa*, (Tex. Civ. App. 1894) 27 S. W. Rep. 730.

5. *Costley v. Galveston City R. Co.*, 70 Tex. 112.

6. *Evansville, etc., R. Co. v. Wolf*, 59 Ind. 89.

7. *State v. Elkins*, 63 Mo. 159.

8. *Wheeler v. Baars*, 33 Fla. 696; *Lyon v. George*, 44 Md. 295.

Toledo, etc., R. Co. v. Brooks, 81 Ill. 245, in which it was held that on a question of marriage, an instruction to the jury that the testimony of the plaintiff to the fact of her marriage was better evidence bearing on the question than the alleged fact that there was no record at the proper place of such alleged marriage, was erroneous.

Oral Evidence and Depositions. — An instruction that, all other things being equal, evidence of witnesses given in the presence of court and jury is entitled to greater weight than that of witnesses whose depositions have been taken and read in evidence, is erroneous. *Works v. Stevens*, 76 Ind. 181; *Millner v. Eglin*, 64 Ind. 197.

Oral and Written Evidence. — An in-

kinds of evidence are of equal credit,¹ or to comment on a failure to produce evidence,² or to direct the jury that they must discard certain evidence which they regard untrue,³ or where there is conflict in the evidence to charge that the jury must find the facts not proven so far as there is conflict,⁴ or that they must find for one or the other of the parties if they believe the evidence,⁵ or to charge that the plaintiff's evidence is sufficient to authorize a recovery unless it is overbalanced by proof of the defendant,⁶ or to charge that if there were two theories, one tending to show guilt and the other innocence, and both are reasonable, the jury must acquit,⁷ or to characterize a sale as a "so-called" sale,⁸ or to state that a person was "a fair purchaser for a valuable consideration."⁹

Further to illustrate the principles stated, the other decisions are set out in the notes.¹⁰

struction that, in determining what consideration induced the defendant to sign the note, the jury are to give greater weight to a letter written by the plaintiff to the defendant just after the signing than to the memory of the defendant at that time, is erroneous. *McHard v. Ives*, 5 Ill. App. 400.

1. *Lockhart v. Camfield*, 48 Miss. 470, where it was held that an instruction that a certificate of acknowledgment by a justice was entitled to equal credit with a disinterested witness was upon the weight of the evidence. See also *Canada v. Curry*, 73 Ind. 246.

2. *Leonard v. Territory*, 2 Wash. Ter. 381, where it was held erroneous to instruct that the fact that a prisoner does not disprove circumstances, if the jury believe he has the means of disproving them if false, lends additional weight to such as are proved; *Baines v. Ullmann*, 71 Tex. 529, where it was held that a charge which intimates to the jury that the testimony of a party to the suit might not be sufficient to warrant a finding upon it, if it appeared that he could have brought other testimony to the fact, was upon the weight of the evidence.

3. *Bishop v. State*, 43 Tex. 391, in which it was said that the improbability of a statement by a witness may diminish his credibility; there is no rule of law which requires a jury to discard it from their consideration. See also *Davidson v. Wallingford*, 88 Tex. 619, where it was held error to instruct the jury to disregard all evidence of a witness which was apparently based on what others had told him.

4. *Kansas City, etc., R. Co. v. Crocker*, 95 Ala. 412.

5. *Smith v. Collins*, 94 Ala. 394; *Sherrill v. Western Union Tel. Co.*, 116 N. Car. 655; *Gibson v. Snow Hardware Co.*, 94 Ala. 346. See also *Mobile, etc., R. Co. v. Williams*, 52 Ala. 278; *Scott v. Winship*, 20 Ga. 429.

6. *Huff v. Cox*, 2 Ala. 311, in which it was said that such a charge assumes the credibility of the witness, which is a question to be referred to the jury.

7. *Fonville v. State*, 91 Ala. 39. See also *Mitchell v. State*, 94 Ala. 68.

8. *Kuhlenbeck v. Hotz*, 53 Ill. App. 675.

9. *Fowler v. Lee*, 4 Munf. (Va.) 373.

10. *Instances — In General.* — The following instructions have been held erroneous: "This is a case in which you have to rely upon just such evidence as can be obtained, on account of the death of persons who might know facts. You are left to a limited source for evidence." *McVicker v. Conkle*, 96 Ga. 584. "This case has already consumed too much unnecessary time. I have allowed this prisoner great latitude in introducing evidence at unseasonable times, in order that he might show, if he could, his innocence." *Davis v. State*, 57 Ga. 66. "If you think there is some evidence in favor of the plaintiff's side of the case, whether it be little or great, it is your duty to find in her favor." *Bunting v. Saltz*, 84 Cal. 168. "The case read by counsel for plaintiff, in *Voss v. Robertson*, 46 Ala. 483, is so much like this in its facts, and in the law it decides, that it would seem to be unneces-

(b) **What Are Not Charges on the Weight of the Evidence.** — On the other hand, a charge of court is not a charge upon the weight of the

sary to say anything further on the subject." *Moore v. Robinson*, 62 Ala. 537. "If you find from the evidence that defendant in his evidence testified, etc., and you find from the evidence the acts and conduct of the defendant in the transaction speak louder than the words thus testified by him, etc." *Wilkinson v. Searcy*, 76 Ala. 176. "It is your duty to carefully scrutinize any claim or set-off presented by the defendant." *Farrow v. Flatt*, 61 Ill. App. 118. That no damages having been alleged or proved, the jury could not render a verdict for damages. *Levi v. Legg*, 23 S. Car. 284. Where the incriminating evidence against the accused consists almost entirely of a similarity of tracks discovered near the scene of the crime and other tracks shown to have been made by the defendant, that in case there is nothing more than mere tracks, the jury would not be authorized to find the defendant guilty, unless there was some peculiarity about the tracks. *Ware v. State*, 96 Ga. 349. "The failure or inability of the defendant to show his innocence does not lend any probative force to the incriminative facts, if any, shown by the state, or raise any presumption of guilt against the defendant." *Johnson v. State*, 27 Tex. App. 163. That if a parent did certain acts in correcting a child, that correction would exceed the bounds of moderation, and "would be barbarous in the extreme." *Johnson v. State*, 2 Humph. (Tenn.) 283. "If the jury believe all the evidence offered on behalf of the defendant, and all the evidence offered for the plaintiff so far as the same does not conflict with the evidence on behalf of the defendant, they should find in favor of the plaintiff." *Dickeschied v. Wheeling Exch. Bank*, 28 W. Va. 349.

In charging that the jury might give exemplary damages if the trespass was accompanied with circumstances of aggravation, the judge remarked by way of illustration: "Such [damages] as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others." This was held reversible error, *Hair v. Little*, 28 Ala. 237; as was also an instruction that "in determining whether or not

plaintiff was guilty of contributory negligence, the jury should take into consideration the familiarity of the plaintiff with the sidewalk, and the time of day and condition of the weather at the time he was injured," *Bonham v. Crider*, (Tex. Civ. App. 1894) 27 S. W. Rep. 419; and that "any settlement or compromise between the parties after the levy of attachment would be binding to the extent of such settlement and compromise; but the giving the note sued on, and the payment of the six hundred dollars by the defendants, would not release the damages claimed by them in this suit, unless they were expressly and unequivocally released by the defendants, and the burden of showing such release is on the plaintiff," *Lee v. Wilkins*, 1 Tex. Unrep. Cas. 287. So in an action for damages by the overflow of water caused by the breaking of a dam, it was held that an instruction that unless the dam had gates sufficient for certain specified purposes it was negligently constructed, was upon the weight of the evidence; also an instruction that it was the duty of the defendant to "constantly" examine the dam during the season of freshets. *Weiderkind v. Tuolumne County Water Co.*, 65 Cal. 431. So, also, an instruction which directed the jury that it would be a false representation, if the defendants gave a written guaranty as a true description of their land, even though they did not know said description to be false, was held to be erroneous; so it is error to instruct that the representation by means of a guaranty was false, or that such fact was one that should have been determined by the jury. *Phelps v. James*, 79 Iowa 262.

An enumeration to the jury of a variety of circumstances detailed in the evidence, with a declaration that the circumstances are badges of fraud, and accompanied with the remark that it is for the jury to inquire how it is possible for the circumstances to have existed without fraud, is erroneous. *Reel v. Reel*, 2 Hawks (N. Car.) 63. See also *Freiberg v. Freiberg*, 74 Tex. 122.

So, on a trial for assault with intent to commit murder, it being proved that the party assaulted was struck, the jury should not be charged that "though

evidence unless it is fairly susceptible of a construction which would indicate to the jury that in the opinion of the court some contested issue has been proved, or from which the opinion of the court on such issue might be inferred.¹ Thus it has been held not erroneous to assume, in charging, admitted or uncontroverted facts;² or to explain the purpose for which evidence is admitted;³ or to declare the law applicable to a given state of facts;⁴ or to direct attention to a feature of the case presented

death did not ensue, malice aforethought was legally implied from the act as though such result had followed." *State v. Munco*, 12 La. Ann. 625. So in such an action where the defense was insanity, an instruction is erroneous which tells the jury that "it is not sufficient to warrant an acquittal for the defendant simply to show that at times he acted and talked strangely and singularly; but that the jury must believe from the testimony that he was insane at the very time that he committed the offense, and that he was so insane that he could not distinguish right from wrong." *State v. Smith*, 53 Mo. 267.

Instructions in Prosecutions for Homicide. — In prosecutions for murder the following instructions have been held objectionable: That "murder is of very frequent occurrence in the community, and when a case is clearly made out, there should be an unqualified verdict, to deter others from crime," *State v. Shields*, 11 La. Ann. 395; that "if I were on the jury I would bring in a verdict of murder in the second degree," *Warren v. State*, 4 Coldw. (Tenn.) 130; that when the proof to sustain an alibi "is not satisfactory, the failure to prove it satisfactorily is a circumstance unfavorable to the defendant; but it is no more so than an attempt to clear himself by any other false or fabricated testimony," *Adams v. State*, 28 Fla. 511; that "while it is true that innocent persons have been

convicted in the past, there is no proof in this case of any such fact," and that the jury "are not justified in considering such matters in determining the guilt or innocence of this defendant," which "must be determined from the evidence admitted in the case, and not from sympathy or prejudice," and that "if all criminals must go free because there is a possibility of jurors making mistakes, society might as well disband," *People v. Travers*, 88 Cal. 233; that the defendant is guilty as principal or not at all, where there was some evidence that he aided and abetted the murder, *Lovejoy v. State*, 82 Ga. 87.

1. *Gulf, etc., R. Co. v. Pettis*, 69 Tex. 689.

2. *Hogan v. Shuart*, 11 Mont. 498; *State v. Angel*, 7 Ired. L. (N. Car.) 27; *People v. Lee Sare Bo*, 72 Cal. 623; *McLellan v. Wheeler*, 70 Me. 285; *State v. Day*, 79 Me. 125; *Marshall v. Morris*, 16 Ga. 368; *Denham v. Trinity County Lumber Co.*, 73 Tex. 78; *Ft. Worth, etc., R. Co. v. Pearce*, 75 Tex. 281; *Wintz v. Morrison*, 17 Tex. 372; *McFadden v. Schill*, 84 Tex. 77.

Assuming Nonexistence of Evidence. — In assuming the nonexistence of evidence excluded, or not offered, the court does not interfere with the discretion of the jury. *Territory v. Gay*, 2 Dakota 144.

3. *Davis v. Gerber*, 69 Mich. 246; *Howerton v. Holt*, 23 Tex. 51; *Clark v. State*, 31 Tex. 574; *Ross v. State*, 29 Tex. 499.

4. *Yarborough v. State*, 86 Ga. 396; *State v. Smith*, 11 La. Ann. 633.

Instance. — A charge reciting the facts as claimed to have been proved, and giving the law upon them if found by the jury to be true, is not an instruction upon the facts. *Pritchett v. Overman*, 3 Greene (Iowa) 531.

When the plaintiff's title, as alleged, consists of a number of facts establishing a continued possession and claim under a color of title; with defined

on conflicting evidence, without assuming that it is established, but merely for the purpose of announcing the law applicable thereto;¹ or to state that evidence which was objected to during the progress of the trial was competent evidence, its sufficiency being left to the jury;² or that evidence is open to two constructions without directing which to take;³ or to state what the real issue is when the attention of the jury has been drawn therefrom by the line of argument;⁴ or to state that the plaintiff "brings evidence to show;"⁵ or that an instruction is refused because there is no evidence on which to base it;⁶ or, in jurisdictions where summing up is still allowed, to state or recapitulate the evidence;⁷ or to analyze, compare, and explain the evidence;⁸

boundaries, for ten years, it is not error for the court to enumerate in the charge the various facts thus alleged, and to instruct the jury to find for the plaintiffs if they had been proved. Such a charge is not liable to the objection of being a charge on the weight of evidence. *Andrews v. Parker*, 48 Tex. 94.

1. *Owens v. Missouri Pac. R. Co.*, 67 Tex. 679.

2. *Carroll v. Roberts*, 23 Ga. 492.

An instruction that "all the evidence produced and admitted in the case is legal evidence; whether it is credible, or worthy of credit, is a matter for the jury to determine from all the facts and circumstances in proof in the case," is not a comment on the evidence. *State v. Munson*, 76 Mo. 109.

3. *Wiley v. Stanford*, 22 Ga. 385.

4. *State v. West*, 43 La. Ann. 1006.

Where most of the testimony related to the question of payment and is conflicting upon that question, an instruction that the main question of fact is the question of payment is not a charge with respect to matters of fact. *Low v. Warden*, 77 Cal. 94.

5. *Central R. Co. v. Freeman*, 75 Ga. 331.

6. *Pillsbury v. Sweet*, 80 Me. 392.

7. *Hiott v. Pierson*, 35 S. Car. 611; *State v. Dawkins*, 32 S. Car. 17; *State v. Glover*, 27 S. Car. 602; *Harrington v. Harrington*, 107 Mass. 332; *Com. v. Barry*, 9 Allen (Mass.) 276; *People v. Christensen*, 85 Cal. 568.

In *Com. v. Barry*, 9 Allen (Mass.) 276, Chief Justice Bigelow says: "The prohibition must be regarded as a restraint only on the expression of an opinion by the court on the question whether a particular fact or series of facts involved in the issue of a case is or is not established by the evidence. In other words, it is to be construed so

as to prevent courts from interfering with the province of juries by any statement of their own judgment or conclusion upon matters of fact. This construction effectually accomplishes the great object of guarding against any bias or undue influence which might be created in the minds of jurors, if the weight of the opinion of the court should be permitted to be thrown into the scale, in deciding upon issues of fact. But further than this the legislature did not intend to go. The statute was not designed to deprive the court of all power to deal with the facts proved. On the contrary, the last clause of the section very clearly contemplates that the duty of the court may not be fully discharged by a mere statement of the law. By providing that the court may also state the testimony, the manifest purpose of the legislature was to recognize and affirm the power and authority of the court, to be exercised according to its discretion, to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law."

8. *Hamlin v. Treat*, 87 Me. 310; *York v. Maine Cent. R. Co.*, 84 Me. 128.

Stating Recollection of Evidence. — The judge may call the attention of the jury to the evidence and state his recollection of what has or has not been testified to, submitting the same to their consideration and judgment. *Eddy v. Gray*, 4 Allen (Mass.) 435. Thus, in summing up the evidence, the court said: "Whether her testimony be true or false, she testified most positively that the prisoner was the man who committed the rape upon her," and was about to proceed to consider other testimony, when the prisoner's counsel called attention to his failure to state

or to read from the evidence, at the jury's request, the parties being present;¹ or to charge upon facts on which the jury are not called upon to pass;² or to direct the jury to find a stated verdict if they believe that certain facts have been proved;³ or to say that a fact is proved if the jury believe the witness who testified thereto;⁴ or to state that there was evidence of a circumstantial nature;⁵ or to direct the jury to look to the whole evidence, so far as they could give credit to it, and not to one particular circumstance alone which might tend to a different conclusion;⁶ or that if the evidence cannot be reconciled the jury should determine who of the witnesses are entitled to the greater credibility;⁷ or to state that there is no evidence in support of a particular fact or issue when such is the case;⁸ or to refer to acts or declarations in evidence to make clear the rules of law which limit their effect.⁹

The decisions set out in the notes will further serve to show the application of the rule.¹⁰

that the prosecutrix had said that she did not know the woman C. G., to which the judge said: "Yes, I believe that she did say that." This was held not an intimation of opinion. *State v. Freeman*, 100 N. Car. 429.

Misstatement of Fact.—If the judge inadvertently misstates a fact in evidence, the counsel should, at the time, call his attention to it, in order that it may be corrected, otherwise he waives exception thereto. Such a misstatement is not an "expression of an opinion upon an issue of fact arising in the case," within the meaning of *Maine Stat. 1874, c. 212. Grows v. Maine Cent. R. Co.*, 69 Me. 412.

1. *Green v. State*, 43 Ga. 368.

Enumeration of Circumstances Leading to an Irresistible Conclusion of Fact.—Where a simple enumeration of circumstances leads to an irresistible conclusion of fact, the court cannot be considered as expressing an opinion on such fact contrary to the statute, in merely making such enumeration, where there is no peculiar significance of voice or manner in making it. *State v. Noblett*, 2 Jones L. (N. Car.) 418.

2. *State v. Sims*, 16 S. Car. 495. In this case the court said: "We do not see that the circuit judge violated the inhibition of art. 4, § 26 of the Constitution, by charging upon the facts of the case. What he said about there being a tumultuous assemblage at Griffin's store on that day, and the calm that came over the crowd when the police arrived, was not pertinent to the

issue. The jury was not charged with the finding of these facts. Their inquiry was whether after the police arrived they had been riotously assaulted and beaten, and whether a prisoner subsequently arrested by them had been rescued from their grasp. The statement of the judge objected to had nothing to do with these questions, and could not have affected the verdict."

3. *State v. Mitchell* 41 La. Ann. 1073; *Love v. Gregg*, 117 N. Car. 467; *Andrews v. Parker*, 48 Tex. 94; *Ryan v. Los Angeles Ice, etc., Co.*, 112 Cal. 244. See also *Alabama G. S. R. Co. v. Moody*, 90 Ala. 46; *Lagrone v. Timmerman*, 46 S. Car. 372.

A charge enumerating the facts constituting the plaintiffs' case, and directing the jury if they consider those facts proved to find for the plaintiffs, is not on the weight of evidence. *Andrews v. Parker*, 48 Tex. 94.

4. *Sneed v. Creath*, 1 Hawks (N. Car.) 309; *Russell v. Ely*, 2 Black (U. S.) 575.

5. *People v. Wong Ah Foo*, 69 Cal. 180.

6. *Anderson v. Martindale*, 61 Tex. 188.

7. *Rideus v. State*, 41 Tex. 199.

8. *People v. Welch*, 49 Cal. 174; *People v. King*, 27 Cal. 507; *Wells v. Clements*, 3 Jones L. (N. Car.) 168; *Reed v. Shencck*, 2 Dev. L. (N. Car.) 415.

9. *Jacobs v. Totty*, 76 Tex. 343.

10. **Instructions Not on Weight of Evidence.**—The following instructions

(3) *Expressing Opinion by Interrogatories to Jury.* — To render a charge objectionable as being on the weight of evidence, it is

were held not to be on the weight of the evidence: a hypothetical statement which presupposes as its basis that the issues have already been determined, *State v. Benner*, 64 Me. 267; a charge as to the title to property sufficient to sustain an indictment for wilful burning, *Jones v. State*, 5 Tex. App. 130; "if you find a verdict for the plaintiff, you will answer," followed by the questions to be answered if the verdict is for the plaintiff, *Smith v. Dawley*, 92 Iowa 312; that the verdict of the jury should be one which would satisfy the jurors' consciences that they had done justice to the people, and that such a verdict would satisfy the people, *People v. Harper*, 83 Mich. 273; "You may consider this as a circumstance in determining the guilt or innocence of the defendant," *State v. O'Neil*, 13 Oregon 183; a statement that rape is a charge easily made, but difficult to be disproved, *Morrissey v. Ingham*, 111 Mass. 63; that it would require ten years of hard study for the judge to qualify himself to perform the plaintiff's duties, *Fitzsimons v. Guanahani Co.*, 16 S. Car. 192; a statement of what are the duties of a carrier, it being left for the jury to determine from the facts whether the defendant did his duties, *Madden v. Port Royal, etc., R. Co.*, 41 S. Car. 440; an instruction explaining, in a general way, the different forms and kinds of insanity, on a trial in which general insanity is set up, *Carr v. State*, 96 Ga. 284; an instruction that "if a party, through mere fear of his life (there being no apparent or real danger), kill another it is not justifiable," *Wesley v. State*, 37 Miss. 327; that facts proven are not conclusive evidence of another fact, *Dabney v. Taliaferro*, 4 Rand. (Va.) 256; *Bogle v. Sullivan*, 1 Call (Va.) 561 [the correctness of these decisions is doubtful]; that "negligence, like any other fact, may be established by showing facts and circumstances bearing more or less directly upon the fact of negligence," *Baker v. Chicago, etc., R. Co.*, 73 Iowa 389; the issue by the trial judge of a bench warrant on the motion of the prosecuting attorney for the arrest and detention of a witness who had just testified before the jury on the charge of perjury, *State v. Strado*, 38 La. Ann. 562; that if the jury "find from the evi-

dence that the defendant did wilfully set fire to the stack of fodder, as charged against him, * * * then he would be guilty of the offense charged, notwithstanding a portion only of the stack of fodder was consumed," *Cesure v. State*, 1 Tex. App. 20; that in an action for malicious prosecution the jury should take into consideration certain facts in determining whether there was malice and want of probable cause, such an instruction not intimating that the facts, if found true, constitute malice and probable cause; *Keesling v. Doyle*, 8 Ind. App. 43; an interrogatory as follows: "Would a prudent man have driven his mule across the bridge with two ladies in his buggy, with that sign staring him in the face? Would a man of ordinary prudence have driven or led, as Mr. B. did?" *Acker v. Anderson County*, 20 S. Car. 499 [in this case the court could not have more strongly expressed his opinion that the plaintiff was guilty of negligence, unless he had told the jury so, in so many words]; an instruction which, after reciting all the testimony relating to a material inquiry of fact, asked the jury if they could lay their fingers on any part of it showing the fact, *McRae v. Lilly*, 1 Ired. L. (N. Car.) 118 [this also seems to be a pretty strong intimation of opinion]; an interrogatory as follows: "Has the state shown to your satisfaction that the accused is guilty of the crime with which he stands charged? Does this array of facts and circumstances in proof before you show beyond all reasonable doubt — do they convince you beyond all reasonable doubt — that he is guilty of the crime?" *Inman v. State*, 72 Ga. 269; that a witness appeared to have given a very fair and candid statement, and seemed to be a creditable man, *State v. Davis*, 4 Dev. L. (N. Car.) 612; that the jury should not regard a deed read to them as evidence of title when the grantee, who was a party to the cause, had filed a disclaimer of any interest under the deed, *Prather v. Wilkens*, 68 Tex. 187; that a conviction cannot be based upon the testimony of an accomplice unless corroborated by other credible testimony, *Schoenfeldt v. State*, 30 Tex. App. 695; that a paper in evidence not signed by the plaintiff would not bind him unless adopted by him, *Smith v.*

not necessary that it should be in the form of a statement. An instruction may intimate an opinion though couched in the form

Traders' Nat. Bank, 82 Tex. 368; that the pardon of a plaintiff who had been convicted of felony rendered him a competent witness, "leaving his credibility to be determined by you from all the facts and circumstances in evidence," *Costley v. Galveston City R. Co.*, 70 Tex. 112; that "the credibility of witnesses and weight of evidence are committed entirely to the jury, and by their conclusions thereon, under the law given them by the court in charge, they should determine their verdict," *Webb v. State*, 5 Tex. App. 65; an instruction in respect to testimony offered to corroborate that of an accomplice, that "the want of corroboration in the testimony not material, or contradiction where immaterial, is of no consequence in determining the guilt of the defendants," *Jackson v. State*, 4 Tex. App. 292; that proof by one of the subscribing witnesses to a bond for title (which acknowledged the receipt of the purchase-money) that he did not see the purchase-money paid, was not sufficient to overturn the acknowledgment in the bond, such an instruction being as to the effect and not as to the weight of the evidence, *Wright v. Thompson*, 14 Tex. 558; that if the jury find certain facts which, if true, constitute a defense, to be true, then they should find the issue in a particular manner, *Bartlett v. Board of Education*, 59 Ill. 364; that if the jury find from the evidence all the facts stated, and, among others, that the defendant fraudulently appropriated money which he had embezzled, they should find him guilty, *People v. Cobler*, 108 Cal. 538; that if the jury believed the plaintiff's testimony they "would be justified in finding that he was in the exercise of due care," such instruction being preceded by a correct definition of due care, *McKean v. Salem*, 148 Mass. 109; instructions in actions for personal injuries, enumerating the facts which the jury might consider in estimating damages, such facts not being assumed in the charge, *Newman v. Dodson*, 61 Tex. 91; an instruction to find for the defendant if the plaintiff was guilty of contributory negligence, and if he would not have been injured but for it, *Campbell v. McCoy*, 3 Tex. Civ. App. 298; to consider the plaintiff's physical pain and suffering

as actual damages, it being undisputed that the plaintiff had broken three ribs and one leg, *Baldrige, etc., Bridge Co. v. Cartrett*, 75 Tex. 628; that "if the jury believe the bumper which caused the injury to the plaintiff was defective, and had been allowed to remain so by the defendant, the plaintiff is entitled to a recovery, even though he may have been able to discover such defects by the use of ordinary care and diligence," *Evans v. Chamberlain*, 40 S. Car. 104; that if it was the duty of a designated employee of plaintiff's intestate to perform a certain duty, and he failed to use ordinary care in performing it, and the accident happened in consequence thereof, the defendant was negligent, *Western, etc., R. Co. v. Bussey*, 95 Ga. 584; that if the defendant allowed obstructions to remain on its right of way, so that the view of approaching trains was obstructed, and failed to give the signals required by statute, it was negligence, especially where the court afterwards left it with the jury to determine whether the leaving of such obstructions on the right of way was negligence, *Missouri, etc., R. Co. v. Sledge*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1102; that if the jury should find that the defendant's cross-ties and rails were defective, and that such defects were known or might have been known, they should find for the plaintiff if his injuries resulted therefrom, *Texas, etc., R. Co. v. Hardin*, 62 Tex. 367; an instruction calling the jury's attention to the broad powers of eminent domain granted to railroad companies, in an action against a railroad company for injuries caused by falling from a bridge, *Rembert v. South Carolina R. Co.*, 31 S. Car. 309; that a servant has a right to presume that appliances furnished by his master are reasonably safe, *Missouri, etc., R. Co. v. Gordon*, 11 Tex. Civ. App. 672; that in determining whether employees in charge of a railroad engine exercised ordinary care in approaching it, the jury might consider the rate of speed, the place of the accident, the signals, if any were given, and all other circumstances relative to the management of the train, *Lloyd v. St. Louis, etc., R. Co.*, 128 Mo. 595; that if the jury "believed * * * that the defendant

of questions put to the jury. By such means the judge may strongly indicate his impression as to the truth or falsity of cer-

sold the whiskey * * * and suffered it to be deposited in his house, where the party purchasing knew where it was, and that the said party purchasing went and drank of the whiskey," they would find the defendant guilty, *May v. State*, 35 Tex. 650; an instruction in an action for forcible and lawful detainer that "there has been considerable evidence introduced here in the way of letters and certificates, applications to file, and other evidence that would ordinarily tend to show right of possession or such title as a man could acquire to unsurveyed land; but the question of right of possession and title is not in the case," *Brand v. Servoss*, 11 Mont. 86; an instruction, in an action for failure of a telegraph company to deliver a message, that if the agent receiving the message had no authority to do so, and that if the plaintiff could not have learned this by reasonable diligence, he could not recover, *Southwestern Tel., etc., Co. v. Dale*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1059; an instruction to "look to all the testimony, and the fact that some of the witnesses have been impeached, in order to decide whether or not they should believe those witnesses as to any facts that the defendants are required to establish, and, if they believe them, how far," *Howard v. Colquhoun*, 28 Tex. 134; the following language in a charge: "In so far in this case as circumstantial evidence is relied on to convict," this not being an intimation that the court thought there was direct evidence in the case, *Roe v. State*, 25 Tex. App. 33; an instruction that "the evidence is sufficient on which to convict of the charge," in response to a request by the defendant for an instruction "that the evidence does not sustain the charge;" such instruction applies only to the sufficiency in law of the evidence to sustain the indictment, provided the jury shall be satisfied with its weight, *Com. v. Lawless*, 103 Mass. 425; that certain evidence was sufficient to authorize the jury to find a certain fact, in response to a request by a party for a ruling that it was insufficient, *Com. v. Brigham*, 123 Mass. 248; that if the jury find the testimony of certain facts to be true, the plaintiff can recover where such facts, if established,

would entitle the plaintiff to recover, *Partridge v. Sterling*, 79 Mich. 303; an inquiry by the judge, of defendant's counsel, as to whether it would be fair to permit a declaration of an absent person imputing criminality to the prosecutrix to be given in evidence, and refuse his subsequent denial of the truth of the charge, *State v. Brown*, 100 N. Car. 519; a statement that if the contract in the suit had been performed to its full extent and no conditions had exonerated the defendant, it would have been a very profitable matter to the plaintiff; that as it resulted, he might have lost the opportunity of putting a profit of fifteen or twenty thousand dollars in his pocket; and that it is a great disappointment to a man to lose such an amount as that, *Oakman v. Boyce*, 100 Mass. 477; an instruction: "Did the plaintiffs, in placing their cotton or having it placed on the platform of the compress association, act as an ordinarily prudent man would have acted, taking into consideration its surroundings, its proximity to passing engines, etc., the purposes for which it was placed there, etc.?" *Martin v. Missouri Pac. R. Co.*, 3 Tex. Civ. App. 133; an instruction in an action for keeping a gambling device, that the law does not tolerate any subterfuge in violation of its penal laws, and that if the defendant employed any person to watch such device, and if there was money lost and won upon it, a conviction could be had, *Jeffries v. State*, 61 Ark. 308; an instruction that direct and positive evidence is not required to establish fraud, but may be gathered or inferred from all the facts and circumstances in evidence, and that if the jury believe certain facts to be proved they must find fraud, *Alberger v. White*, 117 Mo. 347; that a witness might be discredited if it was shown that he had sworn falsely in the case, or had made contradictory statements under oath upon material points, as well as by introducing witnesses to swear that his reputation for truth and veracity was bad, and if it appeared to them from all the circumstances proved that a designated witness had sworn falsely upon one or more material points, or if he had contradicted himself, that they should consider the same in determining the weight to be given to his evidence; that

tain testimony, and in effect impose on the jury a terse but powerful argument.¹

(4) *Intimation of Opinion Otherwise than by Express Instruction.*—An incidental expression of opinion during the course of the trial, if not expressed in the hearing of the jury, furnishes no ground of exception,² but the opinion of the court can be as effectively conveyed to the jury by expressing it in their hearing while ruling upon evidence as by embodying it in what purports to be a declaration of the law for their instruction.³ Accordingly, it has been held that in ruling on the evidence an expression of opinion on the evidence which is not necessary in order to explain the ruling is erroneous.⁴

the legal effect of such false swearing would be to impair the credibility of the witness, but that they must determine the weight to be given to his evidence, *Bowles v. Glasgow*, 2 Tex. Unrep. Cas. 714; a charge in an action by the president of a railroad company to recover upon a *quantum meruit* that "the salaries of railroad presidents in the land are very high, much higher than the salaries of the officers of the state, * * * and are made so because of the great responsibility attached to the office," and the high order of ability required, *Bowen v. Carolina, etc., R. Co.*, 34 S. Car. 217; an instruction that "the question for you to determine is, has the plaintiff's property been permanently damaged by" putting in the track and taking up a part of the street, in an action for injury to property in which there was evidence that in front of plaintiff's property a good deal of the street had been cut away by the unauthorized construction of the defendant's track, *McFadden v. Schill*, 84 Tex. 77.

1. *State v. Norton*, 28 S. Car. 572; *State v. Jenkins*, 21 S. Car. 596; *State v. Addy*, 28 S. Car. 4; *Freidrich v. Territory*, 2 Wash. 358.

Instances.—Thus, in a trial for murder, where the defendant testified in his own behalf, to ask the jury whether there was one in a thousand who, under such circumstances, could resist the temptation to sway from the truth, *State v. Addy*, 28 S. Car. 4; so, also, the following instruction in a murder trial, on the question as to whether the defendants believed that they were in peril, was condemned: "But in solving that question you will ask yourselves, how could it be that either of the prisoners could have had such a

belief? The dead man was unarmed. He was sitting on a trunk, taking off his wet clothes, and putting on dry clothes. When he was approached, he rose in his place. He had on nothing at all but his shirt and drawers, and one leg of his breeches was on, and one leg was off. Was the deceased, then, in such a condition, or did he have such a weapon, as to raise a reasonable apprehension in the minds of the father and son that the son was in danger of great bodily harm, or of losing his life?" *State v. Norton*, 28 S. Car. 572.

2. *Anderson v. State*, 42 Ga. 10; *Phillips v. Beene*, 16 Ala. 720.

"It cannot be seriously contended that every expression of opinion by the court during the progress of the trial, if erroneous, shall furnish ground for reversal. Such opinion must, in some way, influence the result of the cause, or be supposed to do so, by being given in charge to the jury, or by a refusal to charge, or by being connected with the exclusion or admission of the evidence. A judge may decide right from a wrong reason, and if his decision be right, the revising court will not reverse, whatever erroneous propositions of law he may assume as the predicate for his conclusion." *Phillips v. Beene*, 16 Ala. 723.

3. *State v. Harkin*, 7 Nev. 383.

4. *State v. Harkin*, 7 Nev. 383. In this case, a murder trial, the prosecution contended that death resulted from a kick inflicted on the breast of the deceased, and introduced testimony tending to show that the defendant knocked the deceased down and kicked him on the face and also on the breast. The defendant contended that the deceased was not kicked on the breast, and that the wound or bruise on the breast re-

Determining Facts Preliminary to Certain Evidence. — It frequently happens, however, that the admissibility of evidence depends upon the establishment of some necessary preliminary facts, and the court must determine what facts have been shown to exist, in order to determine what further facts may properly be shown. Where this is the case it has been held that an expression of opinion is not erroneous; that the mere announcement of the ruling may in itself be equivalent to an expression of an opinion.¹

With This Exception it is probable that any expression of opinion not given by way of instruction, whether purporting to be addressed to counsel or to the jury, will operate to reverse.²

sulted from a fall which, it was testified, happened the day before the affray. The testimony tending to establish the fact of the kicking on the face was much stronger and more positive than that going to show the kicking on the breast. The prosecution was allowed, against objection of the defendant, to prove by physicians that they detected signs of bruises on the breast, and the objection was taken that the state had not shown that any wound or bruise had been inflicted upon the breast of the deceased by the defendant. In overruling this objection the judge remarked, in the presence of the jury, that there was "as much testimony that defendant had kicked deceased upon the chest, as upon the face."

State v. Dick, 2 Winst. L. (N. Car.) 46. In this case a question arose as to the withdrawal of certain confessions of the prisoner. The court declined withdrawing them, but remarked to the solicitor for the state that after the other evidence already given in the cause, he, the solicitor, might withdraw them if he chose to do so, which the solicitor declined.

1. *Reed v. Clark*, 47 Cal. 200, in which it was held that when the admissibility of certain evidence depends upon the question whether some preliminary fact has been proved, it is not error for the court to state to counsel, in passing upon the question, that as the case then stands, *prima facie*, such fact had been proven; *Reinhart v. Miller*, 22 Ga. 413, where on a motion to reject a marriage contract as evidence, on the ground that its execution had not been proven, the court, in passing on the motion, said that certain evidence raised "a strong presumption that the contract was executed." See

also *People v. McLean*, 84 Cal. 483. In this case the defendant, at the close of the case for the prosecution, moved for a discharge on the ground that the evidence was not sufficient to go to the jury. In ruling on the motion the court stated certain facts which in its opinion the evidence tended to prove, and the revising court held that this was not erroneous.

2. In an action to recover for a map, the defense set up that the view of the defendant's residence, which was printed thereon, was incorrect. After the evidence had been submitted, the defendant's attorney asked the court whether or not his honor would know the view to be the residence of defendant, were defendant's name taken from the view. The court replied: "I do not know that I would." This was held a ground of reversal. *Andreas v. Ketcham*, 77 Ill. 377.

A remark that this was "a civil suit, but if the jury considered the evidence they would find the case decidedly criminal," was held reversible error. *Furhman v. Huntsville*, 54 Ala. 263.

Remarks as to Character of Witness. — If the character of a witness is called in question on the trial, and the judge makes a remark from the bench indorsing his respectability, it is good cause for reversal if the testimony of the witness is material. *McMinn v. Whelan*, 27 Cal. 300.

This Is Based on the Soundest Reasons. — From the high and authoritative position of the judge presiding at a trial before a jury, his influence over them is necessarily very great, and he has it in his power, by words, or actions, or both, materially to prejudice the rights and interest of one or the other of the parties. *McMinn v. Whelan*, 27 Cal. 320.

The right of a party to have the jury pass upon the facts, uninfluenced by any opinion of the court, "cannot be lawfully denied by the simple evasion of looking at the counsel instead of at the jury."¹

(5) *Effect of Subsequent Charge Leaving Question to Jury.* — Where the trial judge, in charging, intimates an opinion as to the weight of the evidence, or as to the credibility of the witnesses, the error is not cured by subsequently instructing that the jury are the sole judges of such matters,² or that no expression of opinion was intended,³ or that the court had no right to trench upon their province in that regard.⁴

2. What May Be Assumed in Instructions and Requests — a. ASSUMPTION OF MATTERS IN CONTROVERSY — (1) Statement of Rule. — An instruction which assumes the existence or non-existence of material facts in issue invades the province of the jury, and is erroneous if there be any evidence in conflict with such assumption.⁵ Courts, in their charges, should not directly or indirectly assume any controverted fact, nor use equivocal phrases which may leave such an impression. As has been well

1. *State v. Harkin*, 7 Nev. 383.

2. *Territory v. O'Hare*, 1 N. Dak. 30; *People v. Lyons*, 49 Mich. 78; *State v. Ah Tong*, 7 Nev. 148; *Shorb v. Kinzie*, 100 Ind. 429; *Gilliam v. Ball*, 49 Mo. 249. *Contra*, *People v. Chew Sing Wing*, 88 Cal. 268.

3. *State v. Harkin*, 7 Nev. 377; *State v. Dick*, 2 Winst. L. (N. Car.) 45; *State v. White*, 15 S. Car. 393. In this last case the court said: "The admonition given to the jury at the close of the charge, though eminently proper, 'that the law makes them the sole judges of the evidence, and that the judge can express no opinion on the facts, or if he does they are not bound by it,' was not, in our opinion, sufficient to do away with the effect of the previous expression of opinion as to the character of the homicide in question. For the jury are not only not bound by any expression of opinion by the judge as to the facts, but the object of the constitutional provision is to preserve the jury from being in any way influenced by the judge's opinion as to the facts, and when, as in this case, a very decided opinion is expressed by the judge as to the real point in issue — the character of the homicide — we think it not unlikely that some or perhaps all of the jury may have been influenced by such an expression of opinion from so high a source, and that, therefore, a new trial should be granted."

4. *People v. Kindleberger*, 100 Cal. 369.

5. *Alabama.* — *Williams v. Harts-horn*, 30 Ala. 211; *Costly v. Tarver*, 38 Ala. 107; *Tabler v. Sheffield Land, etc., Co.*, 87 Ala. 305; *Williams v. Cannon*, 9 Ala. 348; *Woolfork v. Sullivan*, 23 Ala. 548; *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501; *Wadsworth v. Dunnam*, 98 Ala. 610; *Blanchard v. Floyd*, 93 Ala. 53; *Jonas v. Field*, 83 Ala. 445; *De Loach Mills Mfg. Co. v. Middlebrooks*, 95 Ala. 459; *Garrett v. Sewell*, 95 Ala. 456; *Brinson v. Edwards*, 94 Ala. 447; *Taylor v. State*, 48 Ala. 157; *Ashworth v. State*, 63 Ala. 120; *Henderson v. Marx*, 57 Ala. 169; *Cummins v. State*, 58 Ala. 387; *Bain v. State*, 70 Ala. 4; *Thompson v. State*, 47 Ala. 37; *David v. Malone*, 48 Ala. 428; *Harris v. Murfree*, 54 Ala. 161; *Brown v. Isbell*, 11 Ala. 1010; *Thompson v. Armstrong*, 5 Ala. 383; *Bradford v. Marbury*, 12 Ala. 520; *McDougald v. Rutherford*, 30 Ala. 253; *Jones v. Fort*, 36 Ala. 449; *Jones v. Yarbrough*, 2 Ala. 524; *Phillips v. McGrew*, 13 Ala. 255; *Mims v. Sturdevant*, 16 Ala. 154; *Cain v. Penix*, 29 Ala. 374; *Brooks v. Hildreth*, 22 Ala. 469; *Whitsett v. Slater*, 23 Ala. 626; *McKenzie v. Branch Bank*, 28 Ala. 606; *Knight v. Vardeman*, 25 Ala. 262; *Tarleton v. Johnson*, 25 Ala. 300; *Hudson v. Weir*, 29 Ala. 294; *Foust v. Yielding*, 28 Ala. 658; *Elam v. State*, 25 Ala. 53;

said: "The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court,

Richmond, etc., *R. Co. v. Trousdale*, 99 Ala. 389; *Nashville, etc., R. Co. v. Hammond*, 104 Ala. 191; *Worswick v. Hunt*, 106 Ala. 559; *Steed v. Knowles*, 97 Ala. 573.

Arizona. — *Territory v. Kay*, (*Arizona* 1889) 21 Pac. Rep. 152.

Arkansas. — *Armistead v. Brooke*, 18 Ark. 521; *Montgomery v. Erwin*, 24 Ark. 540; *Bolinger v. Fowler*, 14 Ark. 29; *Strawn v. State*, 14 Ark. 550; *Atkins v. State*, 16 Ark. 593; *Burr v. Williams*, 20 Ark. 171; *Floyd v. Ricks*, 14 Ark. 286; *Polk v. State*, 36 Ark. 117; *State Bank v. McGuire*, 14 Ark. 530; *McMurray v. Boyd*, 58 Ark. 504; *Townsley-Myrick Dry Goods Co. v. Greenfield*, 58 Ark. 625, 25 S. W. Rep. 282; *Little Rock, etc., R. Co. v. Barker*, 33 Ark. 350.

California. — *Fairbanks v. Woodhouse*, 6 Cal. 433; *Dean v. Ross*, 105 Cal. 227; *People v. Bishop*, 81 Cal. 113; *Weil v. Paul*, 22 Cal. 492; *People v. Hurley*, 57 Cal. 145; *Vulicevich v. Skinner*, 77 Cal. 239; *People v. Buster*, 53 Cal. 612; *Llewellyn Steam Condenser Mfg. Co. v. Malter*, 76 Cal. 242; *Wood v. Tomlinson*, 53 Cal. 720; *Preston v. Keys*, 23 Cal. 193; *Caldwell v. Center*, 30 Cal. 539; *Bradley v. Lee*, 38 Cal. 362; *People v. Dick*, 34 Cal. 663; *People v. Williams*, 17 Cal. 142; *People v. Hurtado*, 63 Cal. 288.

Colorado. — *Downing v. Brown*, 3 Colo. 571; *Jackson v. Burnham*, 20 Colo. 532; *Weil v. Nevitt*, 18 Colo. 10.

Connecticut. — *Miles v. Douglas*, 34 Conn. 393.

District of Columbia. — *Huber v. Teuber*, 3 MacArthur (D. C.) 484.

Florida. — *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209; *Daggett v. Willey*, 6 Fla. 482; *Ashmead v. Wilson*, 22 Fla. 255.

Georgia. — *Howell v. Lawrenceville Mfg. Co.*, 31 Ga. 663; *Patten v. Newell*, 30 Ga. 271; *Covington v. State*, 79 Ga. 687; *McDonald v. Beall*, 55 Ga. 288; *Towns v. Kellett*, 11 Ga. 286; *Vaughn v. Miller*, 76 Ga. 712; *Chambers v. Gardner*, 89 Ga. 270; *Robinson v. Schly*, 6 Ga. 515; *Harrison v. Thompson*, 9 Ga. 310.

Illinois. — *Wilson v. Bauman*, 80 Ill. 493; *Bradley v. Coolbaugh*, 91 Ill. 148; *Warren v. Wright*, 3 Ill. App. 602; *Illinois Cent. R. Co. v. Zang*, 10 Ill. App. 594; *Wallace v. De Young*, 98 Ill.

638; *Arundale v. Foreman*, 2 Ill. App. 572; *Clement v. Boone*, 5 Ill. App. 109; *Wharton v. People*, 8 Ill. App. 232; *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *Frantz v. Rose*, 89 Ill. 590; *Coon v. People*, 99 Ill. 368; *Goodkind v. Rogan*, 8 Ill. App. 413; *Protection L. Ins. Co. v. Dill*, 91 Ill. 174; *Hinsdale-Doyle Granite Co. v. Armstrong*, 6 Ill. App. 315; *Chicago, etc., R. Co. v. Jones*, 13 Ill. App. 634; *Small v. Brainard*, 44 Ill. 355; *Dart v. Horn*, 20 Ill. 212; *Wall v. Goodenough*, 16 Ill. 415; *Sherman v. Dutch*, 16 Ill. 283; *Hix v. People*, 157 Ill. 382; *Gillingham v. Christen*, 55 Ill. App. 17; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9; *Harlev v. Weiner*, 58 Ill. App. 340; *Michigan Southern, etc., R. Co. v. Shelton*, 66 Ill. 424; *American Ins. Co. v. Crawford*, 89 Ill. 62; *Lake Shore, etc., R. Co. v. Beam*, 11 Ill. App. 215; *St. Louis Bridge Co. v. Miller*, 138 Ill. 465; *Wabash, etc., R. Co. v. Moran*, 13 Ill. App. 72; *Haines v. Inter Ocean Pub. Co.*, 20 Ill. App. 207; *Bressler v. Schwertferger*, 15 Ill. App. 294; *Collins v. Thomas*, 13 Ill. App. 51; *Hanchett v. Mansfield*, 16 Ill. App. 407; *Evans v. Dickey*, 117 Ill. 291; *Morey v. Pierce*, 14 Ill. App. 91; *Grim v. Murphy*, 110 Ill. 271; *Chicago, etc., R. Co. v. Robinson*, 106 Ill. 142; *Kinney v. People*, 108 Ill. 519; *Barrelett v. Bellgard*, 71 Ill. 280; *Yundt v. Hartrunft*, 41 Ill. 9; *Peoria M. & F. Ins. Co. v. Anapow*, 45 Ill. 86; *Hassett v. Johnson*, 48 Ill. 68; *Reno v. Wilson*, 49 Ill. 95; *Collins v. Waters*, 54 Ill. 485; *Durham v. Goodwin*, 54 Ill. 469; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Arundale v. Foreman*, 2 Ill. App. 572; *Olsen v. Upsahl*, 69 Ill. 273; *Adams v. Smith*, 58 Ill. 417; *Toledo, etc., R. Co. v. Patterson*, 63 Ill. 304; *Chapman v. Stewart*, 63 Ill. 332; *Cusick v. Campbell*, 68 Ill. 508; *Sherman v. Dutch*, 16 Ill. 283; *Chicago v. Bixby*, 84 Ill. 82; *Indianapolis, etc., R. Co. v. Miller*, 71 Ill. 463; *Munford v. Miller*, 7 Ill. App. 62; *Chicago, etc., R. Co. v. Bloomfield*, 7 Ill. App. 211; *La Salle v. Thorndike*, 7 Ill. App. 282; *Flaherty v. McCormick*, 7 Ill. App. 411; *Ruddock v. Belton*, 7 Ill. App. 517; *Chicago, etc., R. Co. v. Dvorak*, 7 Ill. App. 555; *Duffield v. Delancey*, 36 Ill. 258; *Frasure v. Zimmerly*, 25 Ill. 202; *Peoria, etc., R. Co. v. Rice*, 144 Ill. 227; *Ohio, etc., R. Co. v. Thillman*, 143 Ill. 127; *England v.*

and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced

Selby, 93 Ill. 340; Township 13, S. R. 3 W. v. Misenheimer, 78 Ill. 22; American v. Rimpert, 75 Ill. 228; Chichester v. Whiteleather, 51 Ill. 259; Scott v. People, 141 Ill. 195.

Indiana. — Finch v. Bergins, 89 Ind. 360; Steele v. Davis, 75 Ind. 191; Huffman v. Cauble, 86 Ind. 591; Noblesville, etc., Gravel Road Co. v. Gause, 76 Ind. 142; Heckelman v. Rupp, 85 Ind. 286; Landers v. Beck, 92 Ind. 49; Kuhns v. Gates, 92 Ind. 66; Ohio, etc., R. Co. v. Percy, 128 Ind. 197; Malone v. Stickney, 88 Ind. 594; Jackman v. State, 71 Ind. 149; Terry v. State, 13 Ind. 70; Binns v. State, 66 Ind. 428; Densmore v. State, 67 Ind. 306; Carter v. Pomeroy, 30 Ind. 438; Kintner v. State, 45 Ind. 175; Smathers v. State, 46 Ind. 447; Reynolds v. Cox, 11 Ind. 262; Ball v. Cox, 7 Ind. 453; Cincinnati, etc., R. Co. v. Clarkson, 7 Ind. 595; Matthews v. Story, 54 Ind. 477; Conaway v. Shelton, 3 Ind. 334; Hackleman v. Moat, 4 Blackf. (Ind.) 164; Evansville, etc., R. Co. v. Wolf, 59 Ind. 89; Snyder v. State, 59 Ind. 105; Barker v. State, 48 Ind. 163; Driskill v. State, 7 Ind. 338; Keiser v. Lines, 57 Ind. 431; Broker v. Scobey, 56 Ind. 588; Cottrell v. Gammon, 84 Ind. 243; Louisville, etc., Consol. R. Co. v. Utz, 133 Ind. 265; Chicago, etc., R. Co. v. Spilker, 134 Ind. 380; Wallis v. Luhring, 134 Ind. 447; Hindman v. Timme, 8 Ind. App. 416; Scott v. State, 64 Ind. 400; Bell v. Hungate, 13 Ind. 382.

Iowa. — Bryan v. Brazil, 52 Iowa 350; Walters v. Chicago, etc., R. Co., 41 Iowa 71; Robinson v. Chapline, 9 Iowa 91; Tifield v. Adams, 3 Iowa 487; Howes v. Carver, 3 Iowa 257; Seekel v. Norman, 78 Iowa 254; Luman v. Kerr, 4 Greene (Iowa) 159; Keenan v. Missouri State Mut. Ins. Co., 12 Iowa 126; Kennedy v. Rosier, 71 Iowa 671; Neville v. Chicago, etc., R. Co., 79 Iowa 232; State v. Tarr, 28 Iowa 397; Perigo v. Chicago, etc., R. Co., 55 Iowa 326; Russ v. Steamboat War Eagle, 14 Iowa 363; State v. Jones, 33 Iowa 9; Ruter v. Foy, 46 Iowa 132; Napper v. Young, 12 Iowa 450; Case v. Burrows, 52 Iowa 146; Bowersock v. Winners, 60 Iowa 84; Roach v. Parcell, 61 Iowa 98; State v. Stowell, 60 Iowa 535; State v. Potts, 78 Iowa 656.

Kansas. — State v. Lewallen, 55 Kan. 690; Junction City v. Blades, 1 Kan.

App. 85; Wilson v. Fuller, 9 Kan. 176; Baughman v. Penn, 33 Kan. 505.

Kentucky. — Berry v. Com., 10 Bush (Ky.) 19; Cunningham v. Com., 9 Bush (Ky.) 151; Leiber v. Com., 9 Bush (Ky.) 14; Edgerton v. Com., 7 Bush (Ky.) 145; Thome v. Haley, 1 Dana (Ky.) 268; Bowman v. Bartlet, 3 A. K. Marsh. (Ky.) 98; Letcher v. Yantis, 3 Dana (Ky.) 162; Cain v. Cain, 1 B. Mon. (Ky.) 213; Stith v. Jones, 4 B. Mon. (Ky.) 378; Kendall v. Hughes, 7 B. Mon. (Ky.) 371; Myers v. Sanders, 7 Dana (Ky.) 506; Fry v. Rees, 1 Dana (Ky.) 519; Avery v. Meek, 96 Ky. 192; Adams v. Tiernan, 5 Dana (Ky.) 394; Louisville, etc., R. Co. v. Earl, 94 Ky. 368; Swope v. Schafer, (Ky. 1887) 4 S. W. Rep. 300.

Maine. — Linscott v. Trask, 35 Me. 150; Whipple v. Wing, 39 Me. 424; Lord v. Kennebunkport, 61 Me. 462; Witherell v. Maine Ins. Co., 49 Me. 200.

Maryland. — Glenn v. Rogers, 3 Md. 312; Gaither v. Martin, 3 Md. 146; Cooke v. Kell, 13 Md. 469; Townshend v. Townshend, 7 Gill (Md.) 24; Turner v. Ellicott, 9 Md. 52; M'Elderry v. Flannagan, 1 Har. & G. (Md.) 308; Duval v. Farmers' Bank, 7 Gill & J. (Md.) 44; Ragan v. Gaither, 11 Gill & J. (Md.) 472; Conolly v. Kettlewell, 1 Gill (Md.) 260; Frazier v. Griffie, 8 Md. 50.

Massachusetts. — Clough v. Whitcomb, 105 Mass. 482; Clifton v. Litchfield, 106 Mass. 34.

Michigan. — Beaubien v. Kellogg, 69 Mich. 333; Turner v. Phoenix Ins. Co., 55 Mich. 236; Chadwick v. Butler, 28 Mich. 349; Hudson v. Feige, 58 Mich. 148; Saginaw, etc., R. Co. v. Chappell, 56 Mich. 190; Ross v. Houghton, 54 Mich. 337; Bulen v. Granger, 63 Mich. 311; Weyburn v. Kipp, 63 Mich. 79; Hughes v. Detroit, etc., R. Co., 65 Mich. 10; Brooke v. Grand Trunk R. Co., 15 Mich. 332; Litchfield v. Garratt, 10 Mich. 426; Schroeder v. Farmers' Mut. F. Ins. Co., 87 Mich. 310; McIntosh v. McIntosh, 79 Mich. 198; Webster v. Fowler, 89 Mich. 303; People v. Schick, 75 Mich. 592; Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112; Wilcox v. Young, 66 Mich. 687; Carpenter v. Greenop, 84 Mich. 49; People v. Gastro, 75 Mich. 127; Hewitt v. Begole, 22 Mich. 31; McCullough v. Minneap-

case, when they can thus shift the responsibility of a decision of

olis, etc., R. Co., 101 Mich. 234; Maltby v. Plummer, 71 Mich. 578; Stewart v. Cincinnati, etc., R. Co., 89 Mich. 315; Britton v. Grand Rapids St. R. Co., 90 Mich. 159; Lewis v. Rice, 61 Mich. 97; Hill v. Graham, 72 Mich. 659; Wreggitt v. Barnett, 99 Mich. 477.

Minnesota. — Schwartz v. Germania L. Ins. Co., 21 Minn. 215; Smith v. Dukes, 5 Minn. 373.

Mississippi. — Dunlap v. Hearn, 37 Miss. 471; Dougherty v. Vanderpool, 35 Miss. 165; Lyle v. McInnis, (Miss. 1895) 17 So. Rep. 510; Harmon v. Goodbar Shoe Co., (Miss. 1895) 18 So. Rep. 118; French v. Sale, 63 Miss. 386; Barker v. Justice, 41 Miss. 240; Doe v. Hamilton, 23 Miss. 496; Dix v. Brown, 41 Miss. 131; Alabama, etc., R. Co. v. Phillips, 70 Miss. 14.

Missouri. — Garesche v. Boyce, 8 Mo. 228; Chouteau v. Searcy, 8 Mo. 733; Hartman v. Muelbach, 2 Mo. App. Rep. 956; Fullerton v. Fordyce, 121 Mo. 1; St. Louis, etc., R. Co. v. St. Louis Union Stock-Yards Co., 120 Mo. 541; Patton v. Penquite, 32 Mo. App. 595; Dulaney v. St. Louis Sugar Refining Co., 42 Mo. App. 659; Wright v. Fonda, 44 Mo. App. 634; State v. Gann, 72 Mo. 374; State v. Wheeler, 79 Mo. 366; State v. Owens, 79 Mo. 619; State v. Kuhlmann, 5 Mo. App. 588; Lee v. St. Louis Hame Mfg. Co., 6 Mo. App. 578; Wyandotte, etc., R. Co. v. Waldo, 70 Mo. 629; Donnell v. Lewis County Sav. Bank, 80 Mo. 165; State v. Straszer, 9 Mo. App. 583; Lionberger v. Mayer, 12 Mo. App. 575; Cahill v. Liggett, etc., Tobacco Co., 14 Mo. App. 596; Wilkerson v. Thompson, 82 Mo. 317; Comer v. Taylor, 82 Mo. 341; Maxwell v. Hannibal, etc., R. Co., 85 Mo. 96; Compton v. Johnson, 19 Mo. App. 88; Muirhead v. Hannibal, etc., R. Co., 19 Mo. App. 634; Dowling v. Allen, 88 Mo. 293, 14 Mo. App. 590; Bank of North America v. Crandall, 87 Mo. 208, 13 Mo. App. 597; Rothschild v. Frensdorf, 21 Mo. App. 318; McGinnis v. Missouri Pac. R. Co., 21 Mo. App. 399; Matthews v. Missouri Pac. R. Co., 26 Mo. App. 76; Stoher v. St. Louis, etc., R. Co., 91 Mo. 509; State v. Castor, 93 Mo. 242; State v. Mason, 96 Mo. 559; Liggett v. Morgan, 98 Mo. 39; Chicago, etc., R. Co. v. Vivian, 33 Mo. App. 583; Pindell v. St. Louis, etc., R. Co., 34 Mo. App. 675; Robertson v. Drane, 100 Mo. 273; Werner v.

O'Brien, 40 Mo. App. 483; Dimmitt v. Hannibal, etc., R. Co., 40 Mo. App. 654; Rice v. McFarland, 41 Mo. App. 489; Walker v. Kansas City, 99 Mo. 647; Stone v. Hunt, 94 Mo. 475; Krider v. Milner, 99 Mo. 145; Thompson v. Botts, 8 Mo. 710; Chouquette v. Barada, 28 Mo. 491; Merritt v. Given, 34 Mo. 98; Turner v. Loler, 34 Mo. 461; Moffatt v. Conklin, 35 Mo. 453; Sawyer v. Hannibal, etc., R. Co., 37 Mo. 240; State v. Dillihunt, 18 Mo. 331; Holliday v. Jones, 59 Mo. 482; Glasgow v. Lindell, 50 Mo. 60; Woods v. Atlantic Mut. Ins. Co., 50 Mo. 112; Hanlon v. O'Keefe, 38 Mo. App. 273; Dickson v. Missouri Pac. R. Co., 104 Mo. 491; Wilkerson v. Eilers, 114 Mo. 245; Peck v. Ritchey, 66 Mo. 114.

Montana. — Mattingly v. Lewisohn, 13 Mont. 508.

Nebraska. — Metz v. State, 46 Neb. 547; Waters v. Shafer, 25 Neb. 225; Labaree v. Klosterman, 33 Neb. 150; Paine v. Kohl, 14 Neb. 580; Powell v. Yeazel, 46 Neb. 225; Terry v. Beatrice Starch Co., 43 Neb. 866; Chicago, etc., R. Co. v. Anderson, 38 Neb. 112; Blue Valley Lumber Co. v. Smith, 48 Neb. 293.

Nevada. — Gaudette v. Travis, 11 Nev. 149; State v. Duffy, 6 Nev. 138.

New Hampshire. — Cheshire R. Co. v. Foster, 51 N. H. 490.

New Jersey. — Kipp v. Den, 24 N. J. L. 854.

New Mexico. — Pryor v. Portsmouth Cattle Co., 6 N. Mex. 44.

New York. — Watson v. Gray, 4 Keyes (N. Y.) 385, 4 Abb. App. Dec. (N. Y.) 540; People v. Upton, 38 Hun (N. Y.) 107; People v. Barberi, 149 N. Y. 256; People v. Brow, 90 Hun (N. Y.) 509; Schoenholtz v. Third Ave. R. Co., 16 Misc. Rep. (N. Y. Supreme Ct.) 7; Gurney v. Smithson, 7 Bosw. (N. Y.) 396; Townley v. Fall Brook Coal Co., (Supreme Ct.) 12 N. Y. Supp. 649; Rettig v. Fifth Ave. Transp. Co., 6 Misc. Rep. (N. Y. Super. Ct.) 328.

North Carolina. — Southerland v. Wilmington, etc., R. Co., 106 N. Car. 100; Fleming v. Wilmington, etc., R. Co., 115 N. Car. 676; State v. Collins, 8 Ired. L. (N. Car.) 407; McMillan v. Baxley, 112 N. Car. 578.

Ohio. — Weybright v. Fleming, 40 Ohio St. 52; Cline v. State, 43 Ohio St. 332; Hastings v. Allen, 14 Ohio 58.

Oregon. — Yarnberg v. Watson, 13

the issue from themselves to the court." ¹ When the evidence

Oregon 11; State *v.* Whitney, 7 Oregon 386; State *v.* Mackey, 12 Oregon 154; Owens *v.* Snell, 29 Oregon 483.

Pennsylvania. — Armstrong *v.* Hussey, 12 S. & R. (Pa.) 315; Greber *v.* Kleckner, 2 Pa. St. 289; Moore *v.* Miller, 8 Pa. St. 272; Payne *v.* Reese, 100 Pa. St. 306; Pennsylvania R. Co. *v.* Bock, 93 Pa. St. 427; Insurance Co. *v.* Meckes, 38 Leg. Int. (Pa.) 318; Forker *v.* Sandy Lake, 130 Pa. St. 123; Winters *v.* Mowrer, 163 Pa. St. 239; Potts *v.* Jones, 140 Pa. St. 48; Branson *v.* Kitchenman, 148 Pa. St. 541; Cullum *v.* Wagstaff, 48 Pa. St. 300; Mahaffey *v.* Ferguson, 156 Pa. St. 156; Halfman *v.* Pennsylvania Boiler Ins. Co., 100 Pa. St. 202; Walls *v.* Walls, 170 Pa. St. 48; Com. *v.* McMahon, 145 Pa. St. 413; Citizens' Pass. R. Co. *v.* Ketcham, 122 Pa. St. 228; Brownfield *v.* Hughes, 128 Pa. St. 194; Ham *v.* Delaware, etc., Canal Co., 142 Pa. St. 617; Haupt *v.* Haupt, 157 Pa. St. 469; Dunseath *v.* Pittsburg, etc., Traction Co., 161 Pa. St. 124.

South Carolina. — Wilson *v.* Atlanta, etc., R. Co., 16 S. Car. 587; Moore *v.* Columbia, etc., R. Co., 38 S. Car. 1.

South Dakota. — Wood *v.* Steinau, (S. Dak. 1896) 68 N. W. Rep. 160; Rapp *v.* Giddings, 4 S. Dak. 492.

Tennessee. — Roper *v.* Stone, Cooke (Tenn.) 497.

Texas. — Brown *v.* State, 3 Tex. App. 295; Crozier *v.* Kirker, 4 Tex. 252; Wells *v.* Barnett, 7 Tex. 584; Hardy *v.* De Leon, 5 Tex. 211; Austin *v.* Talk, 26 Tex. 127; Andrews *v.* Marshall, 26 Tex. 212; Williams *v.* Davidson, 43 Tex. 2; Longley *v.* State, 3 Tex. App. 612; Alderson *v.* State, 2 Tex. App. 10; Grant *v.* State, 2 Tex. App. 163; Cobb *v.* Beall, 1 Tex. 342; Houston City St. R. Co. *v.* Artusey, (Tex. Civ. App. 1895) 31 S. W. Rep. 319; White *v.* State, 21 Tex. App. 339; Refugio *v.* Byrne, 25 Tex. 193; Houston, etc., R. Co. *v.* Nixon, 52 Tex. 19; Willis *v.* Hudson, 72 Tex. 598; Overall *v.* Armstrong, (Tex. Civ. App. 1894) 25 S. W. Rep. 440; Galveston, etc., R. Co. *v.* Kutac, 76 Tex. 473; East Texas F. Ins. Co. *v.* Brown, 82 Tex. 631; Wilkinson *v.* Johnson, 83 Tex. 392; Boaz *v.* Schneider, 69 Tex. 128; Texas, etc., R. Co. *v.* Pennell, 2 Tex. Civ. App. 127; Texas Land, etc., Co. *v.* Watson, 3 Tex. Civ. App. 233; Gulf, etc., R. Co. *v.* Nelson, 5 Tex. Civ. App. 387; Gulf,

etc., R. Co. *v.* Brown, (Tex. Civ. App. 1894) 24 S. W. Rep. 918; Southern Pac. Co. *v.* Ammons, (Tex. Civ. App. 1894) 26 S. W. Rep. 135; Frank *v.* Tatum, (Tex. Civ. App. 1894) 26 S. W. Rep. 900; Dallas, etc., El. R. Co. *v.* Harvey, (Tex. Civ. App. 1894) 27 S. W. Rep. 423; International, etc., R. Co. *v.* Startz, (Tex. Civ. App. 1894) 27 S. W. Rep. 759; Southwestern Tel., etc., Co. *v.* Dale, (Tex. Civ. App. 1894) 27 S. W. Rep. 1059; Hanna *v.* Hanna, 3 Tex. Civ. App. 51; Landman *v.* Glover, (Tex. Civ. App. 1894) 25 S. W. Rep. 994; Golden *v.* Patterson, 56 Tex. 628; Rousel *v.* Stanger, 73 Tex. 670; Kelley *v.* Collier, 11 Tex. Civ. App. 353; Brewer *v.* State, (Tex. Crim. App. 1894) 27 S. W. Rep. 139; Grigg *v.* Jones, (Tex. Civ. App. 1894) 26 S. W. Rep. 885; Kimbro *v.* Hamilton, 28 Tex. 560; Bonner *v.* Green, 6 Tex. Civ. App. 96; St. Louis Southwestern R. Co. *v.* McCullough, (Tex. Civ. App. 1895) 33 S. W. Rep. 285; Gulf, etc., R. Co. *v.* White, (Tex. Civ. App. 1895) 32 S. W. Rep. 322.

Virginia. — Norfolk, etc., R. Co. *v.* Cottrell, 83 Va. 512; Houston *v.* Com., 87 Va. 257.

Washington. — Bell *v.* Washington Cedar-Shingle Co., 8 Wash. 27.

West Virginia. — Harrison *v.* Farmers' Bank, 4 W. Va. 393; Parkersburg Nat. Bank *v.* Als, 5 W. Va. 50; State *v.* Robinson, 20 W. Va. 714.

Wisconsin. — Zonne *v.* Wierson, 3 Chand. (Wis.) 240; Owen *v.* Long, (Wis. 1897) 72 N. W. Rep. 364.

United States. — Hickory *v.* U. S., 160 U. S. 408; Louisville, etc., R. Co. *v.* Kelly, 63 Fed. Rep. 407; Caldwell *v.* U. S., 8 How. (U. S.) 366; Cohen *v.* West Chicago St. R. Co., 60 Fed. Rep. 698; Hicks *v.* U. S., 150 U. S. 442; Knickerbocker L. Ins. Co. *v.* Foley, 105 U. S. 350; Adams *v.* Roberts, 2 How. (U. S.) 486; Leavenworth Second Nat. Bank *v.* Hunt, 11 Wall. (U. S.) 391; Washington, etc., R. Co. *v.* Gladmon, 15 Wall. (U. S.) 401; New Orleans Ins. Co. *v.* Piaggio, 16 Wall. (U. S.) 378; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291; Lucas *v.* Brooks, 18 Wall. (U. S.) 436; Merchants' Mut. Ins. Co. *v.* Baring, 20 Wall. (U. S.) 159; Orleans *v.* Platt, 99 U. S. 676; Continental Imp. Co. *v.* Stead, 95 U. S. 161.

1. People *v.* Williams, 17 Cal. 142.

It is error for the court in its charge.

is conflicting the jury should be left to find the facts without the interference of the court.¹ Hence, if there is any evidence tending to prove a fact, no matter how slight, the court has no right to take such evidence from the consideration of the jury.²

Not Cured by Instructions Submitting Question. — So it has been held erroneous to assume the existence of a fact in an instruction, though other instructions submitted the question whether or not it did exist.³ But such an assumption will not be ground for reversal if the charge, taken as a whole, presents the case properly to the jury.⁴

Refusal Proper. — It follows, then, from what has been said, that a request for an instruction, subject to the vice mentioned, should be refused.⁵ But, on the other hand, if a request assumes that

to refer to facts in controversy "as shown by the evidence." Commercial F. Ins. Co. v. Morris, 105 Ala. 498.

1. Bradley v. Coolbaugh, 91 Ill. 148. **It Is the Province of the Jury**, not of the court, to find from the evidence what is proved. The jury alone can determine the credibility of the evidence and what it proves, and a charge that assumes to do this is erroneous. Thompson v. State, 47 Ala. 37; David v. Malone, 48 Ala. 428.

2. Stevens v. Snyder, 8 Ill. App. 362; Protection L. Ins. Co. v. Dill, 91 Ill. 174; Miller v. Mutual Ben. L. Ins. Co., 31 Iowa 216; Clark v. McGraw, 14 Mich. 139; Louisville, etc., R. Co. v. Campbell, 7 Heisk. (Tenn.) 253; Lewis v. Rice, 61 Md. 97; Baltimore, etc., R. Co. v. Thompson, 10 Md. 76; Thistle v. Frostburg Coal Co., 10 Md. 129; Morrison v. Whiteside, 17 Md. 452; Anderson v. Timberlake, (Ala. 1897) 22 So. Rep. 431.

However slight the effect of testimony, and however little the consideration to which it is entitled from the jury, still its weight is to be determined by them, and should not be determined beforehand by the court in an instruction. Miller v. Mutual Ben. L. Ins. Co., 31 Iowa 216.

When, from the circumstances proved in a case, a reasonable suspicion or presumption of a fact may be inferred, although the court might think the jury well justified in not inferring such fact, yet it is not error for the judge in his charge to submit the matter to the jury to be passed upon by them. Blackledge v. Clark, 2 Ired. L. (N. Car.) 934.

3. Bressler v. Schwertferger, 15 Ill. App. 294; Cahoon v. Marshall, 25 Cal.

197. Compare State v. Hecox, 83 Mo. 531.

Where certain instructions given assumed that an alleged settlement was not made, which was the question at issue and upon which the evidence was conflicting, it was held that the fact that other instructions were given stating that if the settlement had been made, then, etc., did not cure the error. Bressler v. Schwertferger, 15 Ill. App. 294.

4. People v. McDowell, 64 Cal. 467; Evansville, etc., R. Co. v. Talbot, 131 Ind. 221.

5. *Alabama.* — Skains v. State, 21 Ala. 218; Poe v. State, 87 Ala. 65; Smith v. Collins, 94 Ala. 394; Griel v. Lomax, 94 Ala. 641; Knox v. Fair, 17 Ala. 503; Williamson v. Tyson, 105 Ala. 644; Waters v. Spencer, 22 Ala. 460; Yarborough v. Moss, 9 Ala. 382; Murray v. State, 18 Ala. 727; Boddie v. State, 52 Ala. 395; Little v. State, 89 Ala. 99; Moore v. Watts, 81 Ala. 261; Allen v. State, 111 Ala. 80.

Arkansas. — St. Louis, etc., R. Co. v. Trimble, 54 Ark. 354.

Colorado. — Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323.

Connecticut. — Simpson v. Post, 40 Conn. 321.

Florida. — Louisville, etc., R. Co. v. Yniestra, 21 Fla. 700.

Illinois. — West Chicago St. R. Co. v. Estep, 162 Ill. 130; Carpenter v. Joliet First Nat. Bank, 119 Ill. 352; Straus v. Minzesheimer, 78 Ill. 492.

Indiana. — Lafayette, etc., R. Co. v. Murdoch, 68 Ind. 137; Binns v. State, 66 Ind. 428.

Kansas. — Jaedicke v. Scrafford, 15 Kan. 120.

Kentucky. — Moore v. Wilcox, 4

a certain question of fact is before the jury, and asks an instruction on that assumption, the party presenting it cannot after-

Dana (Ky.) 534; M'Kinny v. Kenny, 1 A. K. Marsh. (Ky.) 460.

Louisiana. — State v. Barnes, 48 La. Ann. 460.

Maine. — Franklin Bank v. Cooper, 39 Me. 542.

Maryland. — Munroe v. Woodruff, 17 Md. 159; Colvin v. Warford, 20 Md. 357; Johnson v. Harvey, 30 Md. 259; Planters' Mut. Ins. Co. v. Deford, 38 Md. 382; Roloson v. Carson, 8 Md. 208; Canby v. Frick, 8 Md. 163; State v. Baker, 8 Md. 44; McTavish v. Carroll, 7 Md. 352; Baltimore, etc., R. Co. v. Resley, 7 Md. 397; Atwell v. Miller, 6 Md. 10; Peterkin v. Inloes, 4 Md. 175; Baltimore, etc., R. Co. v. Woodruff, 4 Md. 242; Funk v. Kincaid, 5 Md. 404; Hammond v. Inloes, 4 Md. 138; Scott v. Bay, 3 Md. 431; Field v. Insurance Co. of North America, 3 Md. 244; Steuart v. Williams, 3 Md. 425; Nailor v. Bowie, 3 Md. 251; Lewis v. Kramer, 3 Md. 265; Okisko Co. v. Matthews, 3 Md. 168; Stewart v. Redditt, 3 Md. 67; Brown v. Elliott, 2 Md. 75; Franklin F. Ins. Co. v. Hamill, 6 Gill (Md.) 94; Bullitt v. Musgrave, 3 Gill (Md.) 31; Maltby v. Northwestern Virginia R. Co., 16 Md. 422; Felis Point Sav. Inst. v. Weedon, 18 Md. 320; Denmead v. Coburn, 15 Md. 20; Cropper v. Pittman, 13 Md. 190; Shriner v. Lamborn, 12 Md. 170; Giles v. Ebsworth, 10 Md. 333; Mitchell v. Mitchell, 10 Md. 234; Berry v. Griffin, 10 Md. 27; Boyd v. McCann, 10 Md. 118; Gaither v. Myrick, 9 Md. 118.

Massachusetts. — Brooks v. Somerville, 106 Mass. 271; Stone v. Sanborn, 104 Mass. 319; Goss v. Calkins, 162 Mass. 492; Bassett v. Porter, 4 Cush. (Mass.) 487; Bailey v. Bailey, 97 Mass. 373; Hopcraft v. Kittredge, 162 Mass. 1; Nonantum Worsted Co. v. North Adams Mfg. Co., 156 Mass. 331; Hannah v. Connecticut River R. Co., 154 Mass. 529.

Michigan. — Hayes v. Homer, 36 Mich. 374; Prentiss v. Ross, 96 Mich. 83; Foley v. Riverside Storage, etc., Co., 85 Mich. 7; Towle v. Dunham, 84 Mich. 268; People v. Gosch, 82 Mich. 22; Wilcox v. Young, 66 Mich. 687.

Minnesota. — Sanborn v. School Dist. No. 10, 12 Minn. 17; Lake Superior, etc., R. Co. v. Greve, 17 Minn. 322; Hocum v. Weitherick, 22 Minn. 152;

Starkey v. De Graff, 22 Minn. 314; Chandler v. De Graff, 25 Minn. 88; Jones v. Town, 26 Minn. 172; Faber v. St. Paul, etc., R. Co., 29 Minn. 465; Macy v. St. Paul, etc., R. Co., 35 Minn. 200; Wilcox v. Chicago, etc., R. Co., 24 Minn. 269; Siebert v. Leonard, 21 Minn. 442; Conehan v. Crosby, 15 Minn. 13; Simpson v. Krumdick, 28 Minn. 352.

Mississippi. — Moye v. Herndon, 30 Miss. 110.

Missouri. — Stewart v. Nelson, 79 Mo. 522; State v. Hope, 102 Mo. 410.

Nebraska. — Hitchcock v. Shager, 32 Neb. 477; Blue Valley Lumber Co. v. Smith, 48 Neb. 293.

Nevada. — People v. Bonds, 1 Nev. 33; Tognini v. Kyle, 17 Nev. 209.

New Hampshire. — Whitney v. Goin, 20 N. H. 354.

New Jersey. — Bellis v. Phillips, 28 N. J. L. 125.

New York. — Deems v. Crook, 1 Edm. Sel. Cas. (N. Y. Cir. Ct.) 95; New York v. Price, 5 Sandf. (N. Y.) 542; New York Ice Co. v. North Western Ins. Co., 12 Abb. Pr. (N. Y. Supreme Ct.) 420; Carpenter v. Brown, 6 Barb. (N. Y.) 148; Pratt v. Ogden, 34 N. Y. 20; Rouse v. Lewis, 4 Abb. App. Dec. (N. Y.) 121, 2 Keyes (N. Y.) 352; Hope v. Lawrence, 50 Barb. (N. Y.) 258; Schwerin v. McKie, 5 Robt. (N. Y.) 404; Vroman v. Rogers, (Brooklyn City Ct.) 5 N. Y. Supp. 426; Lee v. Troy Citizens' Gas Light Co., 98 N. Y. 115; Le Roy v. Park F. Ins. Co., 39 N. Y. 56; De Loge v. New York Cent., etc., R. Co., 92 Hun (N. Y.) 149; Eiseman v. Heine, 2 N. Y. App. Div. 319; New Jersey Steamboat Co. v. New York, 109 N. Y. 621, 14 N. Y. St. Rep. 57; Ellison v. Sessions, (C. Pl.) 18 N. Y. Supp. 108; People v. Flack, 57 Hun (N. Y.) 83; Holbrook v. Utica, etc., R. Co., 12 N. Y. 236.

North Carolina. — Chaffin v. Lawrence, 5 Jones L. (N. Car.) 179; McQuay v. Richmond, etc., R. Co., 109 N. Car. 585.

Ohio. — Brown v. State, 18 Ohio St. 496.

Oregon. — Salomon v. Cress, 22 Oregon 177.

Pennsylvania. — Pennsylvania R. Co. v. McTighe, 46 Pa. St. 316; Smith v. Arsenal Bank, 104 Pa. St. 518; Schmidt v. McGill, 120 Pa. St. 405; Smith v.

wards object that there was no evidence in the cause justifying the submission of the question.¹ A party who has requested an instruction, which is refused, cannot object to an instruction substantially the same, that it assumes facts of which there is no evidence.²

(2) *What Is an Assumption — Illustrated.* — The decisions set out in the notes hereto serve to enunciate the principles stated in the preceding subdivision, condemning instructions or requests which assume controverted facts.³

People's Mut. Live Stock Ins. Co., 173 Pa. St. 15; Draucker v. Arick, 161 Pa. St. 357; Means v. Gridley, 164 Pa. St. 387; Lynch v. Welsh, 3 Pa. St. 294; Groft v. Weakland, 34 Pa. St. 304; Arbuckle v. Thompson, 37 Pa. St. 170.

South Carolina. — Shaw v. Cunningham, 16 S. Car. 632; State v. Evans, 23 S. Car. 210; Watts v. Blalock, 17 S. Car. 162; Devereux v. Champion Cotton Press Co., 17 S. Car. 71; Anderson v. Holmes, 14 S. Car. 164.

South Dakota. — Arneson v. Spawn, 2 S. Dak. 269.

Texas. — Hatch v. De La Garza, 22 Tex. 176; Hicks v. Bailey, 16 Tex. 229; Duffel v. Noble, 14 Tex. 640; Gray v. Burk, 19 Tex. 228; McCown v. Schrimpf, 21 Tex. 22.

Wisconsin. — Morse v. Gilman, 18 Wis. 373; Ohlweiler v. Lohmann, 88 Wis. 75; Pickett v. Crook, 20 Wis. 358; Timm v. Bear, 29 Wis. 254.

United States. — White v. Van Horn, 159 U. S. 3; Illinois Cent. R. Co. v. Davidson, 76 Fed. Rep. 517.

1. Auburn Bolt, etc., Works v. Shultz, 143 Pa. St. 256.

2. Philadelphia, etc., R. Co. v. Howard, 13 How. (U. S.) 307.

3. **Account — Action on.** — On the trial of an action on account, a statement that the defendant substantially admits the account is objectionable if he does in fact dispute it. Clifton v. Litchfield, 106 Mass. 34.

Agency. — Where the evidence was conflicting as to whether K. was agent of the defendant company, it was erroneous for the charge to assume that he was agent, and to charge that the company was chargeable with knowledge communicated to him. East Texas F. Ins. Co. v. Brown, 82 Tex. 631.

In an action against a married woman, where it is a disputed question whether her husband acted as her agent or not in contracting a debt in suit, it is improper to assume the fact

of his agency. Vaughn v. Miller, 76 Ga. 712.

Where there was conflicting evidence as to whether the defendant's agent had power to waive a certain stipulation in a contract, an instruction assuming that the company was bound by his act was erroneous. Gulf, etc., R. Co. v. Brown, (Tex. Civ. App. 1894) 24 S. W. Rep. 918. And where the authority of an agent for the defendant is a mixed question of law and fact, it is error for the court in an instruction to assume such authority to the full measure necessary. Haines v. Inter Ocean Pub. Co., 20 Ill. App. 207.

In an action to recover for medical services rendered to a married woman, the evidence being conflicting as to whether or not the defendant acted as agent in getting the plaintiff's services, it was erroneous to charge that the defendant did so act. Ellison v. Sessions, (C. Pl.) 18 N. Y. Supp. 108.

Alteration of Written Instrument. — An instruction to the jury that in case they found that the draft sued on had been altered the plaintiff could not recover unless he explained the alteration is erroneous where the draft shows no alteration. Patten v. Newell, 30 Ga. 271. So in an action on a note, there being no dispute as to the defendant's signature, and the issue being whether the plaintiff had fraudulently altered the amount, it was erroneous so to charge the jury as to give them the idea that the defense denied the execution of the note altogether. Winters v. Mower, 163 Pa. St. 239.

Award. — A request for an instruction that an award was void because of the improper conduct of the arbitrators, without leaving it to the jury to find any facts constituting the misconduct, is erroneous. Roloson v. Carson, 8 Md. 208.

Contracts — Actions on. — On a trial of an action for breach of contract

(3) *What Is Not an Assumption — Illustrated.* — An instruction which states hypothetically facts which the evidence tends

which both parties agree was terminated at a certain time, and where they differ only as to whether the termination was by mutual consent, the refusal of instructions framed on the assumption that the contract subsisted some months later, is not erroneous. *Stone v. Sanborn*, 104 Mass. 319.

Criminal Prosecutions. — In a criminal prosecution it is erroneous for an instruction to assume the guilt of the defendant, *State v. Whitney*, 7 Oregon 386; *State v. Mackey*, 12 Oregon 154; *People v. Bishop*, 81 Cal. 113; *Brown v. State*, 3 Tex. App. 295; *White v. State*, 21 Tex. App. 339; or to assume that the name of the party killed is correctly stated in the indictment, *State v. Dillihunt*, 18 Mo. 331; or to assume that a knife used was not a dangerous weapon, and that it was kept concealed, *Berry v. Com.*, 10 Bush (Ky.) 19; or to assume that the defendant used a deadly weapon, *Wharton v. People*, 8 Ill. App. 232; or to assume that the defendant used the instrument, with which he was charged to have slain the deceased, in a manner calculated to produce death, *Leiber v. Com.*, 9 Bush (Ky.) 14; or to assume that the defendant made a confession, *Covington v. State*, 79 Ga. 687; *Cunningham v. Com.*, 9 Bush (Ky.) 149; *Binns v. State*, 66 Ind. 428; and to charge on that theory, *Covington v. State*, 79 Ga. 687; or to assume that the defendant made threats, *Cline v. State*, 43 Ohio St. 332; or to assume that a certain person was the owner of the property alleged to have been stolen, where the ownership was contested, *Hix v. People*, 157 Ill. 382; or to assume the existence of contemporaneous thefts and charge them as a criminative fact on a prosecution for receiving stolen property, there being no evidence of such thefts, *Brewer v. State*, (Tex. Crim. App. 1894) 27 S. W. Rep. 139; or to assume, on a prosecution for retailing liquor, that the defendant had knowledge of the intemperate habits of the person to whom he sold the liquor, *Elam v. State*, 25 Ala. 53; or to use the word "victim" on a trial for murder, as it seems to assume a wrongful killing, *People v. Williams*, 17 Cal. 142; or, on a murder trial, to state that a crime had been committed, *Jackman v. State*, 71 Ind. 149; or to assume that the defendant voluntarily

went to live with the deceased in a meretricious relation without any promise of marriage, where there was evidence that he had obtained possession of her person by fraudulent devices, and that she had subsequently lived with him on a promise of marriage, *People v. Barberi*, 149 N. Y. 256; or to charge as follows, in a murder trial: "Was S. * * * murdered? In determining that question, the court thinks you can have no hesitation whatever." *People v. Dick*, 34 Cal. 663.

Damages — Measure of. — An instruction is erroneous which assumes that the case is of such a nature that punitive damages may be given in assessing damages. *Collins v. Waters*, 54 Ill. 485.

Where, in an action for a balance due on a sale of goods, the defendant set up a breach of warranty of value, and that a portion only of the goods were delivered, which were invoiced by him at a certain amount, it was held that a charge that the measure of damages was the difference between the amount warranted and the invoice was improper, as assuming the existence of controverted facts. *Smith v. Dukes*, 5 Minn. 373.

Ejectment. — Where there were two defendants in ejectment, and but one had admitted the tenancy, a request which assumes that both were estopped from denying the plaintiff's title, without leaving to the jury to find that the other came into possession of part of the premises under the former, is erroneous. The court cannot properly assume this fact. *Funk v. Kincaid*, 5 Md. 404.

Forcible Entry and Detainer. — In a proceeding for forcible entry and detainer, an instruction to the jury that "the undisputed possession of the plaintiff for between two and three years is evidence of his title and right of possession in him, until a better title is shown," is erroneous as assuming that he had, and had proved that he had, undisputed possession of the premises between two and three years. *Wall v. Goodenough*, 16 Ill. 415.

Limitations — Statute of. — A request for an instruction that "on the evidence in this case the statute of limitations is a bar to this suit" is properly

to prove is not erroneous under the rule just stated. Thus it is entirely competent for the judge to charge the jury that if they

refused, where there is no evidence on which to base it. *Krider v. Milner*, 99 Mo. 145.

Mechanic's Lien — Foreclosure. — A request for instruction that if the claim for lien was filed more than six months after all the materials were furnished for any one of the houses designated, the verdict must be for the defendant in regard to such house, is error, because the lien continues until six months after the completion of the work, and such request assumes that the building had been completed more than six months before filing the claim; so a request which assumes that the several buildings constituting a manufacturing establishment were separate and distinct in contemplation of the mechanics' lien laws, without submitting that question to the jury, is erroneous. *Okisko Co. v. Matthews*, 3 Md. 168.

Notes — Actions on. — In an action on two notes the protests of both were offered in evidence to prove demand and refusal, and one of the protests was held inadmissible. It was held that a prayer that assumes the plaintiff's right to recover on both notes was erroneous. *Nailor v. Bowie*, 3 Md. 251. So an instruction which assumes a fact as proved, as that certain words under the signature to a note were written when it was executed and were a part of the signature, is erroneous. *Burr v. Williams*, 20 Ark. 171. And in instructing the jury as to the effect of the extension of time of payment in discharging the surety on a note, it is error to assume the knowledge of the payee when he extended the time that the surety signed as such, where the evidence on that point is conflicting. *Howell v. Lawrenceville Mfg. Co.*, 31 Ga. 663.

Personal Injuries. — Where the evidence is conflicting as to whether plaintiff received certain injuries (*Fullerton v. Fordyce*, 121 Mo. 1), or whether injuries received were permanent (*Houston City St. R. Co. v. Artusey*, (Tex. Civ. App. 1895) 31 S. W. Rep. 319), it is erroneous for instructions to assume these facts.

Where the plaintiff, an employee of the defendant, had seen the machine by which he was injured, in operation, for six months previous to the injury,

a charge assuming that he did not know that it was dangerous is erroneous. *Avery v. Meek*, 96 Ky. 192.

Where the evidence tends to show contributory negligence it is error for the instruction to assume that the deceased was in the exercise of reasonable and ordinary care at the time of his death. *Wabash, etc., R. Co. v. Moran*, 13 Ill. App. 72.

Where there is no evidence to show a wilful or intentional injury the instruction should not assume that there was wilful negligence. *Chicago, etc., R. Co. v. Jones*, 13 Ill. App. 634.

An instruction that if the jury believe the injury to the plaintiff occurred "by reason of the neglect of the employees of the defendant to obey the signal of the semaphore," etc., is improper as assuming as a fact the neglect of the defendant's employees to obey such signal. *Illinois Cent. R. Co. v. Zang*, 10 Ill. App. 594.

Where it appeared that the injured person was first seen at a point beyond the platform where it was claimed that he was injured, but it did not appear whether he had been struck by the platform or not, it was improper to refer to the platform as that "by which the deceased was injured." *Perigo v. Chicago, etc., R. Co.*, 55 Iowa 326.

In an action for injuries caused by an alleged wrongful ejection from a train, the court instructed as follows: "The jury are instructed that if they believe, from the evidence, that the plaintiff had not paid or offered to pay his fare from Elkhart to South Bend, then the defendant would not be warranted in throwing the plaintiff from the train in a way to endanger his life or limb, or throw him off while the train was in motion." This instruction was held an erroneous assumption of the very matter in dispute. *Michigan Southern, etc., R. Co. v. Shelton*, 66 Ill. 424.

Replevin. — Where an action of replevin was brought against several parties, an instruction assuming the guilt of all the parties is erroneous. *Dart v. Horn*, 20 Ill. 212.

Res Judicata. — Where there is a question of fact for the jury as to the identity of the subject-matter of the two suits, an instruction that the judgment in the first suit is a bar is prop-

believe the testimony adduced, they should find a verdict for one party or the other. Such a charge does not trench upon the

erly refused. *Bellis v. Phillips*, 28 N. J. L. 125.

Sales.—An instruction that if the jury find that "after the sale" the sheriff placed the goods under the control of the defendant, etc., is erroneous as assuming the fact of the sale. *Gaither v. Martin*, 3 Md. 146. So is an instruction that if the jury find from all the evidence that the goods sold in this case were sold on the credit of the defendant, then the plaintiff is entitled to recover, *Cropper v. Pittman*, 13 Md. 190; and an instruction characterizing a sale as a "pretended sale," where the evidence tends to show a purchase for value and in good faith, is erroneous, *Powell v. Yeazel*, 46 Neb. 225. So is an instruction that the burden of proof is on the plaintiff to show the sale fraudulent where the sale was claimed to be fraudulent and the evidence is conflicting. *Landman v. Glover*, (Tex. Civ. App. 1894) 25 S. W. Rep. 994.

An instruction assuming that in all cases of the sale of goods an actual delivery is necessary to render the sale valid when it is to depend upon delivery alone, is erroneous. *Atwell v. Miller*, 6 Md. 10.

In an action for breach of warranty, the warranty being denied, an instruction should not assume that the article in question was not as warranted. *Goodkind v. Rogan*, 8 Ill. App. 413.

Where the main issue is whether a sale was made in fraud of a vendor's creditors, a request to charge that the vendor was insolvent or in embarrassed circumstances at the time of the sale was properly refused. *Smith v. Collins*, 94 Ala. 394.

Trespass.—An instruction that "if the plaintiff has sustained no injury by reason of the alleged trespass, still he is entitled to a verdict for nominal damages," assumes the commission of a trespass. *Steele v. Davis*, 75 Ind. 191. So in trespass for damages upon the execution of a distress warrant, instructions to the jury that "the manner in which the warrant was executed and the plaintiff's property used is evidence for the consideration of the jury to show malice on the part of the defendants, and may be taken into consideration * * * in enhancement of the damages," are erroneous as assuming the facts as de-

termined. *Sherman v. Dutch*, 16 Ill. 283. And an instruction that the plaintiff "is entitled to recover in this action all damages proved to have been sustained by him on account of the trespasses committed by defendant on plaintiff's premises, as alleged in the declaration," is erroneous, because it assumes that the defendant committed the trespasses. *Small v. Brainard*, 44 Ill. 355.

Trover.—An instruction assuming the conversion of personalty is properly refused where there is some evidence that the property was sold with the consent of the party seeking to recover its value. *Prentiss v. Ross*, 96 Mich. 83. And a charge assuming that a conversion is proved, when the evidence merely establishes an intention to convert, is also erroneous. *Knight v. Vardeman*, 25 Ala. 262.

Where the main point in issue in an action of trover for the conversion of a horse is whether the parties had traded horses or not, it was error to instruct that "the plaintiff is not entitled to rescind the trade and reclaim the horse unless defendant perpetrated a fraud upon him," because such instruction assumes the matter in dispute. *Potts v. Jones*, 140 Pa. St. 48.

Wills — Action to Set Aside.—On the trial of an issue to impeach the validity of a will, where there is proof of general rationality and also of delusion in a testator, the court cannot properly assume that the testator's delusion was habitual and thus throw the burden of proof on the caveatees to show that he was free from such delusion at the time the will was executed. *Townshend v. Townshend*, 7 Gill (Md.) 24.

Work and Service Performed.—An instruction that in ascertaining the sum to be allowed for services the jury "should be guided by the custom in such like cases," is erroneous for assuming the existence of a custom in like cases. *Canby v. Frick*, 8 Md. 163. So in an action for work done under a written contract afterwards modified by a verbal promise, the question whether such verbal promise was made was properly submitted to the jury, and an instruction ignoring such verbal promise was properly refused. *Morse v. Gilman*, 18 Wis. 373. A request that if the jury find that the plaintiffs per-

appropriate office of a jury.¹ So a charge which is made to rest upon what the jury shall believe from the evidence,² or which states facts as having been "claimed" by one of the parties,³ or which states matters of common knowledge,⁴ is not obnoxious to the criticism that it assumes the existence of the facts.

In the notes hereto are set out other decisions in which certain instructions are held not to be vicious as improperly assuming facts in controversy.⁵

formed their work under the contract offered in evidence by the defendant, assumes the existence and execution of the contract, and is erroneous. *Baltimore, etc., R. Co. v. Resley*, 7 Md. 297. In an action to recover for services performed by a real estate broker, an instruction that where two or more agents have the same property for sale, in the absence of collusion on the part of the vendor the agent through whose instrumentality the sale is carried to completion is entitled to a commission, is erroneous as assuming the employment of other agents. *Salomon v. Cress*, 22 Oregon 177.

1. *Jones v. Edwards*, 57 Miss. 28; *Morgan v. Wattles*, 69 Ind. 260; *Logansport v. Justice*, 74 Ind. 378; *Paul v. Meek*, 6 Ala. 753; *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143; *Ham v. Delaware, etc., Canal Co.*, 142 Pa. St. 617; *State v. Thompson*, 19 Iowa 299; *Fulton v. Maccracken*, 18 Md. 528; *Jackson v. Burnham*, 20 Colo. 532; *San Antonio, etc., R. Co. v. Keller*, 11 Tex. Civ. App. 569.

May Be Based on Party's Theory of What Evidence Shows.—Where instructions are given at the instance of each party, based upon the theory that the evidence shows a certain state of facts, and directing the jury if they find the facts one way to find for the plaintiff, and if they find the facts as claimed by the defendant to find for him, it cannot be said that the plaintiff's instruction is misleading as assuming a state of facts. *Eames v. Rend*, 105 Ill. 506.

2. *Ladd v. Pigott*, 114 Ill. 647; *Hannibal, etc., R. Co. v. Martin*, 111 Ill. 219; *Mullin v. Spangenberg*, 112 Ill. 140; *Chicago v. Sheehan*, 113 Ill. 658; *Chicago, etc., R. Co. v. Avery*, 109 Ill. 314; *Missouri Pac. R. Co. v. Lehmburg*, 75 Tex. 61; *Austin, etc., R. Co. v. Beatty*, 73 Tex. 592; *Galveston, etc., R. Co. v. Waldo*, (Tex. Civ. App. 1895) 32 S. W. Rep. 783; *O'Connell v. St. Louis Cable, etc., R. Co.*, 106 Mo. 482; *State v. Grayor*, 89 Mo. 600;

Sioux City, etc., R. Co. v. Smith, 22 Neb. 775.

Using Words "As You May Find."—The court instructed as follows: "You may find for the plaintiff for any amount which you may find was collected and not paid over, if any was so collected and not paid over, or you may find for the whole amount collected and not paid over, after deducting such amount as you may find was consumed by fire." *Bronnenburg v. Charman*, 80 Ind. 475.

3. *Hawley v. Chicago, etc., R. Co.*, 71 Iowa 717; *Carraher v. San Francisco Bridge Co.*, 81 Cal. 98.

4. *Harris v. Shebek*, 151 Ill. 287.

The assumption, in an instruction, that the mere keeping of a place where intoxicating liquors are sold in violation of law is of itself a common nuisance, without any judicial determination of that fact, is not error under the Kansas Crimes Act, § 392, declaring such a place to be a common nuisance, and providing for punishment of the keeper and abatement of the place "upon the judgment of a court having jurisdiction finding said place to be a nuisance under this section." *State v. Saxton*, 2 Kan. App. 13.

5. Contracts—Actions on.—An instruction that "it is incumbent on the defendants, under the contract alleged in plaintiff's declaration, to show an offer to perform, or some sufficient excuse for nonperformance on their part, in order to excuse themselves from liability to pay damages, if the evidence shows that the plaintiffs were ready and willing to perform their part of the contract," does not assume the existence of a contract. *Bird v. Forceman*, 62 Ill. 212.

Where an answer sets up payment as a consequence of certain transactions between the plaintiff and the defendant, an instruction which speaks of "payment of the note sued on by plaintiff to defendants, as alleged in their answer," does not assume pay-

b. ASSUMPTION OF MATTERS NOT IN EVIDENCE. — It is error for the court, in instructing the jury, to assume the exist-

ment in money. *Semple v. Crouch*, 8 Mo. App. 593.

In an action based on the defendant's failure to furnish the plaintiff with all the ice he might need in his business, the court, after instructing the jury fully upon facts which would entitle the plaintiff to recover, at the request of the plaintiff further charged that the fact that the plaintiff required more ice in his business in the warmer months, and requested the defendant to furnish him with a greater quantity than he had furnished during the preceding months, would not release the defendant from the contract, or from damages sustained by the plaintiff, unless the defendant was willing to furnish the amount required by the contract and the plaintiff refused to receive it. It was held that, taken with other portions of the charge, it was not misleading the jury to assume the liability of the defendant for damages. *Egan v. Faendel*, 19 Minn. 231.

Condemnation Proceedings — Damages.

— An instruction that the jury should consider all the inconvenience or annoyance proved by the evidence as resulting from the condemnation proposed does not assume that the plaintiff will necessarily be subjected to annoyance and inconvenience from the condemnation. *Chicago, etc., R. Co. v. Wolf*, 137 Ill. 360.

Criminal Prosecutions — Assault. — An instruction that it was "important that you determine whether the alleged assault, or assault and battery, made upon W. [the deceased] by defendant, either alone or in company with others, was an unlawful or a lawful act," does not assume that the assault was proved. *Patterson v. State*, 70 Ind. 341.

1 An instruction that "if the jury believe * * * that A, an adult male, did on," etc., "commit an aggravated assault on the person of B, a female, you will find the defendant guilty," etc., is not objectionable as telling the jury that A is an adult male, and B a female. *Davis v. State*, 6 Tex. App. 133.

Larceny. — An instruction that the jury cannot convict unless the state proves that the defendant stole some portion of the property described; that the property stolen was of some value;

that the property stolen was the property of, etc.; that the act of stealing was committed within two years, etc., does not assume that the property was stolen. *Huber v. State*, 57 Ind. 341.

Mur' v. — Where the court in charging spoke of the "place of the alleged murder," and afterwards of the "time and place of the murder," it was held that the jury could not consider that the court assumed the murder to have been proved. *People v. Chun Heong*, 86 Cal. 329.

Where it was shown that the death of the deceased was caused by a blow struck by the defendant with a club, an instruction that if the defendant, in the heat of passion and without design to cause death, by "means and use of a dangerous weapon, to wit, a wooden club, feloniously killed the deceased, and that the killing was not justifiable or excusable, they will find him guilty of manslaughter," does not assume that the club was a dangerous weapon. *State v. Grayor*, 16 Mo. App. 558, 89 Mo. 600.

An instruction that "the first question for you to consider is, was J. killed at or near Liberty church, in, etc., on, etc., and, if so, was the killing murder or manslaughter?" does not assume that J. was the person found dead. *Beavers v. State*, 58 Ind. 530.

Where the court, before giving the instructions asked for by the defendant, the substance of which had been already given by him, told the jury that he did not desire to have any question in the case, and that he would give the instructions asked for in addition to those already given, and that he did not deem it necessary to give certain instructions that he usually gave in homicide cases, it was held that the remarks of the court were not an intimation that the case was one of unusual enormity, or that the instructions asked by the defendant were given under protest. *People v. Lee Sare Bo*, 72 Cal. 623.

Personal Injuries — Actions for. — A direction to find such sum as will compensate for the injury, if any, does not assume that there was an injury. *Western Union Tel. Co. v. Linn*, (Tex. Civ. App. 1893) 23 S. W. Rep. 895.

An instruction that a servant "did

ence of facts in support of which there is no evidence. This constitutes a direct perversion of the testimony upon which alone the jury are to render their verdict. The court, as well as the jury, is to consider only the testimony offered in court.¹

not accept risks which grew out of any defects in the road which rendered it more hazardous than reasonable, unless he had knowledge" thereof, is not objectionable as assuming the existence of defects. *Taylor, etc., R. Co. v. Taylor*, 79 Tex. 104.

An instruction that "the particulars of the alleged injury and negligence are set forth in the petition, as plaintiff claims the facts were," and which then proceeds to state the gist of the action and submits the question to the jury, does not assume the facts stated in the petition to be true. *Hotel Assoc. v. Walter*, 23 Neb. 280.

An instruction that if the jury should find for plaintiff they should allow "first, the expenses incurred by plaintiff in attempting to cure himself of his injuries; second, his loss of time occasioned by this; third, his bodily pain and suffering, and mental anguish," does not assume that the plaintiff had incurred expenses, lost time, and endured bodily pain. *Klutts v. St. Louis, etc., R. Co.*, 75 Mo. 642.

An instruction that the plaintiff "was not informed—it is for you to say whether he was or not—that he must not work in the place where he was at work at the time this accident happened," does not assume that the plaintiff was not informed. *Nugent v. Breuchard*, 91 Hun (N. Y.) 12.

An instruction that "the plaintiff * * * brings this suit against the defendant to recover damages for injuries alleged to have been received by the negligence of the defendant in the operation of a car on which he was riding, by reason of which said car collided with another car, and plaintiff was thrown to the ground and permanently injured," is not objectionable as an assumption of facts. *San Antonio, etc., R. Co. v. Keller*, 11 Tex. Civ. App. 569.

Where the recovery for personal injuries was based on the ground that the defendant negligently left a ditch in the highway unprotected, it is not improper to charge that if the defendant negligently left the ditch unprotected, and the plaintiff, without negligence on his part, fell into it, the jury should

find for the plaintiff. *Britton v. St. Louis*, 120 Mo. 437.

Sales.—The court instructed that "testimony has been introduced tending to show that * * * the plaintiff and defendant traded and exchanged animals, etc. The plaintiff * * * has introduced testimony intended to show that said exchange or sale was and is void, because defendant falsely and fraudulently warranted the said mule to be sound, knowing that it was unsound, etc. Wherefore plaintiff seeks to avoid or rescind the contract of sale." The instruction was held not erroneous as an assumption of fact. *Graham v. Nowlin*, 54 Ind. 389.

Witnesses—Contradiction of.—On a prosecution for manslaughter in which the accused testified in his own behalf, an instruction was given that in determining the degree of credibility to be accorded to the testimony of the accused, the jury should take into consideration the fact, if it was a fact, that he had been contradicted by other witnesses. It was held that this instruction did not assume that the accused had been contradicted. *Moeck v. People*, 100 Ill. 242.

Work and Services—Actions for.—In an action for wages, an instruction telling the jury to "find in favor of the plaintiff such amount as they may believe * * * to be the reasonable value of such services," does not assume that the services were of some value. *Blackman v. Cowan*, 11 Mo. App. 589.

1. *Alabama.*—*Kidd v. State*, 83 Ala. 58; *Miller v. State*, 110 Ala. 69; *Crane v. State*, 111 Ala. 45.

Arkansas.—*Little Rock, etc., R. Co. v. Wells*, 61 Ark. 354; *Foster v. Pitts*, 63 Ark. 387.

California.—*People v. Messersmith*, 61 Cal. 246; *People v. Strong*, 30 Cal. 151; *People v. Lee Chuck*, 74 Cal. 30.

Georgia.—*Perkins v. Attaway*, 14 Ga. 27; *Green v. Willingham*, (Ga. 1897) 28 S. E. Rep. 42.

Illinois.—*Chicago West Div. R. Co. v. Mills*, 91 Ill. 39; *Chicago, etc., R. Co. v. Harwood*, 90 Ill. 425; *Pease v. Catlin*, 1 Ill. App. 88; *Chicago, etc.,*

But "the assumption of a fact by the court is materially different from giving instructions to the jury without any evidence to support them. To assume a fact is to state as proved that which is to be proved, as, 'if the jury find that after the sale' assumes the fact of the sale, and was therefore erroneous. * * * But to instruct the jury upon an hypothesis of which there was no evidence is to leave them to assume or find that for which there was no foundation. The errors, though closely similar, are by no means the same." 1

Possible Existence of Facts. — It is likewise error to assume the pos-

R. Co. *v.* Lammert, 12 Ill. App. 408; Spicer *v.* People, 11 Ill. App. 294; Tantum *v.* Tantum, 5 Ill. App. 598; Russell *v.* Minter, 83 Ill. 150; Chicago, etc., R. Co. *v.* Bryan, 90 Ill. 126; Chicago, etc., R. Co. *v.* Hall, 90 Ill. 42; Freeman *v.* Exchange Bank, 59 Ill. App. 197; Andreas *v.* Ketcham, 77 Ill. 377; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177.

Indiana. — Moore *v.* State, 65 Ind. 382; Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460.

Iowa. — Howes *v.* Carver, 3 Iowa 257.

Michigan. — Schoenberg *v.* Voigt, 36 Mich. 310; Hart *v.* Firzlaff, 67 Mich. 514; Hood *v.* Olin, 68 Mich. 165; Brower *v.* Edson, 47 Mich. 91; People *v.* Gosch, 82 Mich. 22.

Missouri. — Gerren *v.* Hannibal, etc., R. Co., 60 Mo. 405.

Nebraska. — Newton Wagon Co. *v.* Diers, 10 Neb. 284; Dunbier *v.* Day, 12 Neb. 596; Turner *v.* O'Brien, 11 Neb. 108; Kay *v.* Noll, 20 Neb. 380; Williams *v.* State, 46 Neb. 704.

Nevada. — State *v.* Harrington, 12 Nev. 125.

New Hampshire. — Flanders *v.* Stark, 37 N. H. 424; Hill *v.* Spear, 50 N. H. 253.

Pennsylvania. — Musselman *v.* East Brandywine, etc., R. Co., 2 W. N. C. (Pa.) 105; Kelly *v.* Eby, 141 Pa. St. 176.

Tennessee. — Hill *v.* Childress, 10 Yerg. (Tenn.) 515.

Texas. — Texas Land, etc., Loan Co. *v.* Watson, 3 Tex. Civ. App. 233; Holtzclaw *v.* State, 26 Tex. 682; Hardy *v.* De Leon, 5 Tex. 211; Galveston, etc., R. Co. *v.* Smith, 81 Tex. 479; Ivey *v.* Williams, 78 Tex. 685; Texas, etc., R. Co. *v.* French, 86 Tex. 96; Missouri Pac. R. Co. *v.* Platzer, 73 Tex. 117; Wootiers *v.* Kaufman, 73 Tex. 395; Gulf, etc., R. Co. *v.* Blohn, 73 Tex. 637; Houston, etc., R. Co. *v.* Tierney,

72 Tex. 312; Galveston, etc., R. Co. *v.* Faber, 63 Tex. 344; Houston, etc., R. Co. *v.* Gilmore, 62 Tex. 391; Hampton *v.* Dean, 4 Tex. 455; Sanger *v.* Henderson, 1 Tex. Civ. App. 417; Texas, etc., R. Co. *v.* Moore, 8 Tex. Civ. App. 296.

Vermont. — Redding *v.* Redding, 69 Vt. 500.

United States. — Jones *v.* Randolph, 104 U. S. 108; Ward *v.* U. S., 14 Wall. (U. S.) 28; Davis *v.* Patrick, 122 U. S. 138.

Instances. — An instruction that the killing was not disputed by the defense is erroneous, when no such admission on the part of the defendant was made on the trial nor involved in the theory of the defense. People *v.* Lee Chuck, 74 Cal. 30. And in a criminal case an assumption in a charge that the defendant has confessed the crime when he has not is erroneous. People *v.* Strong, 30 Cal. 151. So an instruction is improper which assumes the existence of a partnership, where there was no evidence of such fact. Freeman *v.* Exchange Bank, 59 Ill. App. 197.

Where there was no evidence before the court that any witness had sworn falsely, but the main witness for the plaintiff, before his dismissal as such witness, had asked leave to make a correction and retraction of a part of his testimony, it was held error on the part of the court to instruct the jury that the maxim *falsus in uno, falsus in omnibus*, applied. Kay *v.* Noll, 20 Neb. 380.

In an action for damages by negligence a charge which permits the jury to consider whether the plaintiff did not contribute thereto is erroneous, in the absence of evidence that he did not exercise due care. Brower *v.* Edson, 47 Mich. 91.

1. Baltimore *v.* Poultney, 25 Md. 18.

sible existence of a state of facts which the jury have no right to find, because of a want of evidence.¹

Refusal Proper. — This being so, a request for instructions which assumes the existence of facts not in evidence is improper, and should be refused.²

c. ASSUMPTION OF MATTERS WHICH EVIDENCE SHOWS DO NOT EXIST. — So it is erroneous to assume the existence of facts which the evidence shows or tends to show do not exist.³

d. ASSUMPTION OF MATTERS ADMITTED BY THE PLEADINGS. — It is not error to assume the existence of a fact alleged in the petition when it is admitted, or not denied, in the answer,⁴ and it has been held error to assume that a matter admitted by the pleadings was in issue.⁵

e. ASSUMPTION OF MATTERS ADMITTED BY THE PARTIES. — So the court may, in charging the jury, assume as true what is admitted by the parties, or by the party against whom the instruction is given,⁶ or may instruct that the fact is established,

1. *Crete v. Childs*, 11 Neb. 252; *Farmers' L. & T. Co. v. Montgomery*, 30 Neb. 34; *Bowie v. Spaid*, 26 Neb. 635.

2. *California*. — *People v. Cotta*, 49 Cal. 166; *Crawford v. Roberts*, 50 Cal. 235; *People v. Roemer*, 114 Cal. 51.

Illinois. — *Wilcox v. Kinzie*, 4 Ill. 218; *Chicago West Div. R. Co. v. Mills*, 91 Ill. 39; *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334.

Massachusetts. — *Chase v. Horton*, 143 Mass. 118.

Missouri. — *Jennings v. Schwab*, 64 Mo. App. 13; *Washington Mut. F. Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; *Mascheck v. St. Louis R. Co.*, 3 Mo. App. 600.

New York. — *Tochman v. Brown*, 33 N. Y. Super. Ct. 409; *Rushmore v. Hall*, 12 Abb. Pr. (N. Y. Supreme Ct.) 420.

Pennsylvania. — *Lebanon Mut. Ins. Co. v. Losch*, 109 Pa. St. 100; *Heffner v. Chambers*, 121 Pa. St. 84; *Harper v. Philadelphia Traction Co.*, 175 Pa. St. 129.

Texas. — *Flanagan v. Boggess*, 46 Tex. 331; *Dorsey v. State*, 1 Tex. App. 33; *Daniels v. State*, 24 Tex. 389.

United States. — *Washington, etc., R. Co. v. Gladmon*, 15 Wall. (U. S.) 401; *St. Louis, etc., R. Co. v. Spencer*, 71 Fed. Rep. 93.

Instances. — In a criminal prosecution a request for an instruction which assumes that an admission has been

made by the prosecution should be refused when such admission was not in fact made. *People v. Cotta*, 49 Cal. 166.

So it is proper to refuse an instruction as to the law of the defense, based upon the supposed existence of a fact which there is no evidence tending to establish. *Dorsey v. State*, 1 Tex. App. 33.

3. *Bowman v. Roberts*, 58 Miss. 126; *McCown v. Schrimpf*, 21 Tex. 22; *Texas Land, etc., Co. v. Watson*, 3 Tex. Civ. App. 233; *Chicago, etc., R. Co. v. Beach*, 29 Ill. App. 157; *Jones v. Grossman*, 59 Mo. App. 195; *Moffatt v. Conklin*, 35 Mo. 453; *Carlisle v. Hill*, 16 Ala. 398; *Smith v. Morrow*, 5 Litt. (Ky.) 217; *Burrows v. Delta Transp. Co.*, 106 Mich. 582; *Dodge v. Brown*, 22 Mich. 446; *Leslie v. Smith*, 32 Mich. 64.

Instance. — As for instance, an assumption that there is a question whether a note sued on was due when paid, when it shows on its face that it was not due. *Texas Land, etc., Co. v. Watson*, 3 Tex. Civ. App. 233.

4. *Wiley v. Keokuk*, 6 Kan. 94; *Wiley v. Man-a-to-wah*, 6 Kan. 111.

5. *Gulf, etc., R. Co. v. Wilbanks*, 7 Tex. Civ. App. 489; *Orth v. Clutz*, 18 B. Mon. (Ky.) 223.

6. *Madden v. Blythe*, 7 Port. (Ala.) 258; *People v. Hobson*, 17 Cal. 424; *People v. Phillips*, 70 Cal. 61; *Walker v. Wootten*, 18 Ga. 119; *Weekes v. Cottingham*, 58 Ga. 559; *Johnson v.*

or that it should be considered as established.¹

f. ASSUMPTION UPON AGREED STATEMENT OF FACTS. — So the court may properly assume the existence or nonexistence of facts, where the facts are agreed upon by counsel.²

g. ASSUMPTION OF MATTERS CONCLUSIVELY SHOWN. — Where the evidence on a point is clear and conclusive, and is not contradicted by other evidence, it is never a ground for reversal that the court in its charge assumes the existence of such fact, or states that it is proved, no matter what view the reviewing court may take of the propriety of so doing.³ According to some decisions such assumption is harmless error, if improper.⁴ According to others it is proper for the court to do

State, 30 Ga. 426; *Martin v. People*, 13 Ill. 341; *Finnell v. Walker*, 48 Ill. App. 331; *St. Louis, etc., R. Co. v. Kirby*, 104 Ill. 345; *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334; *Heartt v. Rhodes*, 66 Ill. 351; *Louisville, etc., Consol. R. Co. v. Utz*, 133 Ind. 265; *McKenna v. Hoy*, 76 Iowa 322; *Waters v. Riggin*, 19 Md. 536; *Wright v. Towle*, 67 Mich. 255; *Mooney v. York Iron Co.*, 82 Mich. 263; *Burt v. Long*, 106 Mich. 210; *Cook v. Whitfield*, 41 Miss. 541; *Pope v. Kansas City Cable R. Co.*, 99 Mo. 400; *McGuire v. St. Louis, etc., R. Co.*, 43 Mo. App. 354; *Herriman v. Chicago, etc., R. Co.*, 27 Mo. App. 435; *Taylor v. Scherpe, etc., Architectural Iron Co.*, 133 Mo. 349; *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334; *McManus v. Woolverton, (C. Pl.)* 19 N. Y. Supp. 545; *State v. Williams*, 2 Jones L. (N. Car.) 194; *State v. Rash*, 12 Ired. L. (N. Car.) 382; *Hedgepeth v. Robertson*, 18 Tex. 858; *Fahey v. State*, 27 Tex. App. 146; *Cooper v. Denver, etc., R. Co.*, 11 Utah 46.

"What all parties to a litigation treat and assume as a fact during the entire progress of the trial before the court, the court, without error, may assume for convenience in drafting its instructions to the jury." *Taylor v. Scherpe, etc., Architectural Iron Co.*, 133 Mo. 349.

Error to Treat Admitted Facts as in Issue. — An instruction treating as in doubt or in issue the correctness of a matter which is admitted is erroneous. *Blaul v. Tharp*, 83 Iowa 665.

1. *Wood v. Porter*, 56 Iowa 161.

Applications of Rule. — In an action brought by an employee to recover for personal injuries sustained, where it is admitted that the machine by which

the plaintiff was injured was dangerous, an instruction is not improper which assumes that the machine was dangerous. *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334.

The court may assume as true that which the prisoner, in his defense, has treated as true; as, where a prisoner indicted for murder does not pretend that, if guilty of the homicide, he is guilty of anything but murder; but relies, in his defense, solely upon the ground that he was not guilty of the homicide. *State v. Rash*, 12 Ired. L. (N. Car.) 382.

It Is Often a Matter of Convenience in giving instructions, and avoids circumlocution, to assume the existence of certain facts about which the parties are agreed; and neither party, under such circumstances, can afterwards make the assumption a ground of objection to the instructions. *Martin v. People*, 13 Ill. 341.

2. *State v. Pritchard*, 16 Nev. 101.

3. *Corley v. Anderson*, 5 Tex. Civ. App. 213; *Stephenson v. Wright*, 111 Ala. 579; *Drennen v. Smith*, (Ala. 1897) 22 So. Rep. 442; *People v. Phillips*, 70 Cal. 61.

It is not proper to treat evidence as undisputed unless it is not opposed by direct evidence, and also not in conflict with just and proper inferences deducible from other facts proved. *Schultz v. Schultz*, (Mich. 1897) 71 N. W. Rep. 854.

4. *District of Columbia.* — *Bragg v. Bletz*, 7 D. C. 105.

Illinois. — *Lanark v. Dougherty*, 45 Ill. App. 266; *Garretson v. Becker*, 52 Ill. App. 255; *Paxton v. Frew*, 52 Ill. App. 393; *Gerke v. Fancher*, 158 Ill. 375.

Indiana. — *Jones v. State*, 78 Ind.

so.¹ And where a fact is so established as to be beyond dispute, the court may properly refuse to instruct the jury as to the neces-

219; *Howard County v. Legg*, 110 Ind. 484; *Louisville, etc., R. Co. v. Jones*, 108 Ind. 557; *Beckner v. Riverside, etc., Turnpike Co.*, 65 Ind. 468; *Astley v. Capron*, 89 Ind. 175; *Koerner v. State*, 98 Ind. 13; *Hinshaw v. Gilpin*, 64 Ind. 116; *Fullen v. Coss*, 82 Ind. 549; *Hindman v. Timme*, 8 Ind. App. 416.

Kentucky. — *Turpin v. McKee*, 7 Dana (Ky.) 305.

Mississippi. — *Cook v. Whitfield*, 41 Miss. 541; *Lamar v. Williams*, 39 Miss. 342; *Heirn v. M'Caughan*, 32 Miss. 17; *Fleming v. Fulton*, 6 How. (Miss.) 473.

Missouri. — *Rice v. McFarland*, 41 Mo. App. 489; *Walker v. Kansas City*, 99 Mo. 647; *Fields v. Wabash, etc., R. Co.*, 80 Mo. 206; *Barr v. Armstrong*, 56 Mo. 577; *Caldwell v. Stephens*, 57 Mo. 589; *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491; *Mauerman v. Siemerts*, 71 Mo. 101.

Montana. — *Mattingly v. Lewisohn*, 13 Mont. 508.

Tennessee. — *Farquhar v. Toney*, 5 Humph. (Tenn.) 502.

Texas. — *Bonner v. Green*, 6 Tex. Civ. App. 96.

West Virginia. — *Sheff v. Huntington*, 16 W. Va. 307.

An instruction which assumes as true a fact in issue is wrong; but where the evidence is clear and convincing as to such fact, and there is no contradictory testimony as to such fact, the giving of such an instruction will not warrant a reversal of such cause. *Caldwell v. Stephens*, 57 Mo. 589.

1. *Alabama*. — *Marx v. Leinkauff*, 93 Ala. 453; *Henderson v. Mabry*, 13 Ala. 713; *Swift v. Fitzhugh*, 9 Port. (Ala.) 39; *Madden v. Blythe*, 7 Port. (Ala.) 258; *Williams v. Shackelford*, 16 Ala. 318; *Nelms v. Williams*, 18 Ala. 650; *Stephenson v. Wright*, 111 Ala. 579.

California. — *People v. Lee Sare Bo*, 72 Cal. 623; *People v. Messersmith*, 61 Cal. 246; *Watson v. Damon*, 54 Cal. 278; *Terry v. Sickles*, 13 Cal. 427; *People v. Phillips*, 70 Cal. 61.

Georgia. — *Jones v. State*, 65 Ga. 621; *Marshall v. Morris*, 16 Ga. 368.

Illinois. — *Hanrahan v. People*, 91 Ill. 144; *Cook County v. Harms*, 108 Ill. 151; *Davis v. People*, 114 Ill. 86.

Indiana. — *Chicago, etc., R. Co. v.*

Spilker, 134 Ind. 401; *Hawkins v. State*, 136 Ind. 634; *Home Ins. Co. v. Marple*, 1 Ind. App. 415; *Smith v. State*, 28 Ind. 321.

Iowa. — *Muir v. Miller*, 82 Iowa 700; *Kenosha Stove Co. v. Shedd*, 82 Iowa 540; *Thorp v. Craig*, 10 Iowa 461; *Hughes v. Monty*, 24 Iowa 499; *State v. Meshek*, 61 Iowa 316; *Russ v. Steamboat War Eagle*, 14 Iowa 363; *Hall v. Manson*, 90 Iowa 585; *Noble v. White*, (Iowa 1897) 72 N. W. Rep. 556; *State v. Huff*, 76 Iowa 200.

Kansas. — *State v. Herold*, 9 Kan. 194; *State v. Mortimer*, 20 Kan. 93; *Douglass v. Geiler*, 32 Kan. 499.

Kentucky. — *Thompson v. Brannin*, (Ky. 1897) 40 S. W. Rep. 914.

Michigan. — *Welch v. Olmstead*, 90 Mich. 492; *McDonnell v. Ford*, 87 Mich. 198; *Kramer v. Gustin*, 53 Mich. 291; *Wisner v. Davenport*, 5 Mich. 501; *Gillett v. Knowles*, 97 Mich. 77; *Mooney v. York Iron Co.*, 82 Mich. 263; *Wright v. Towle*, 67 Mich. 255; *Ockenfells v. Moeller*, 79 Mich. 314.

Minnesota. — *Alden v. Minneapolis*, 24 Minn. 254.

Missouri. — *Herriman v. Chicago, etc., R. Co.*, 27 Mo. App. 435; *Price v. Haeberle*, 25 Mo. App. 201; *State v. Moore*, 101 Mo. 316; *Hall v. Missouri Pac. R. Co.*, 74 Mo. 298; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 248.

Montana. — *Hogan v. Shuart*, 11 Mont. 498.

Nebraska. — *Camp v. Pollock*, 45 Neb. 771; *Gran v. Houston*, 45 Neb. 813.

Nevada. — *Menzies v. Kennedy*, 9 Nev. 152.

North Carolina. — *Staton v. Mullis*, 92 N. Car. 623; *State v. McLain*, 104 N. Car. 894.

Pennsylvania. — *Com. v. Mudgett*, 174 Pa. St. 211.

South Carolina. — *Williams v. Connor*, 14 S. Car. 621.

Texas. — *Missouri Pac. R. Co. v. James*, (Tex. 1888) 10 S. W. Rep. 332; *Western Union Tel. Co. v. Cooper*, (Tex. 1892) 20 S. W. Rep. 47; *Trinity, etc., R. Co. v. Lane*, 79 Tex. 643; *Blum v. Schram*, 58 Tex. 524; *Gulf, etc., R. Co. v. Cornell*, 84 Tex. 541; *Linn v. Wright*, 18 Tex. 317; *International, etc., R. Co. v. Stewart*, 57 Tex. 166; *Caruth v. Grigsby*, 57 Tex. 259; *Ellis v. Stewart*, (Tex. Civ. App. 1893)

sity of proof of such fact.¹ So a number of decisions hold that where all the evidence on both sides tends to show a fact,² or the facts are uncontested,³ or there is no room to doubt or hesitate

24 S. W. Rep. 585; *McFadden v. Schill*, 84 Tex. 77; *Irvin v. Bevil*, 80 Tex. 332; *Hedgepeth v. Robertson*, 18 Tex. 858; *Wilson v. Simpson*, 80 Tex. 279; *Ft. Worth, etc., R. Co. v. Pearce*, 75 Tex. 281; *Missouri Pac. R. Co. v. Platzer*, 73 Tex. 117; *Hunnicult v. State*, 75 Tex. 233; *Texas Cent. R. Co. v. Rowland*, 3 Tex. Civ. App. 158; *Voss v. Feurmann*, (Tex. Civ. App. 1893) 23 S. W. Rep. 936; *Gulf, etc., R. Co. v. Pierce*, 7 Tex. Civ. App. 597; *Corley v. Anderson*, 5 Tex. Civ. App. 213; *Anderson v. Nuckles*, (Tex. Civ. App. 1896) 34 S. W. Rep. 184; *Sickles v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1896) 35 S. W. Rep. 493; *Bonner v. Green*, 6 Tex. Civ. App. 96; *Texas, etc., R. Co. v. Moore*, 8 Tex. Civ. App. 289; *Eastham v. Sims*, 11 Tex. Civ. App. 133; *Missouri, etc., R. Co. v. Whitaker*, 11 Tex. Civ. App. 668.

Washington. — *Edwards v. Territory*, 1 Wash. Ter. 195.

Wisconsin. — *Engmann v. Immel*, 59 Wis. 249.

Where Parties Testify Alike. — Where, on a trial before the court and jury, the plaintiff and the defendant testify substantially alike as to a material fact, in instructing the jury on the law of the case the court may properly assume that such fact is established, the same as if admitted by the pleadings or by the parties in open court on the trial. *Douglass v. Geiler*, 32 Kan. 499; *Menzies v. Kennedy*, 9 Nev. 152.

A party will not be sustained when he complains that the judge, in his charge to the jury, assumed as true the existence of a state of facts not contradicted by evidence, and was sustained by testimony introduced by himself. *Caruth v. Grigsby*, 57 Tex. 259.

Where Evidence Is All One Way. — Where the evidence is all one way, and unquestionably proves the fact for which it was introduced, the court may tell the jury that the fact is proved, and instruct them to find accordingly. *State v. Herold*, 9 Kan. 194.

It is not error to assume a fact as to which all the witnesses agree and about which there is no room for controversy. *Russ v. Steamboat War Eagle*, 14 Iowa 363; *Hanrahan v. People*, 91 Ill. 144.

Thus an instruction which assumes that an accident occurred is proper where all the witnesses testify that it did occur. *Trinity, etc., R. Co. v. Lane*, 79 Tex. 623.

Where Evidence Most Favorable to Defendant Proves His Guilt. — If, according to the evidence most favorable to the defendant, he is guilty, it is not error to charge the jury that if they believe the testimony of any witness examined the defendant is guilty. *State v. Burke*, 82 N. Car. 551.

1. *Muir v. Miller*, 82 Iowa 700; *Wright v. Hardie*, (Tex. Civ. App. 1895) 30 S. W. Rep. 675.

If there is no evidence as to a fact the court may so charge. *White v. Suffolk, etc., R. Co.*, (N. Car. 1897) 27 S. E. Rep. 1002.

The Rule in Ohio. — In Ohio it has been held not erroneous for the court to refuse to give instructions which require it to assume or imply the existence of material facts in issue in the case, although such facts are clearly proven by the evidence submitted to the jury. *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670.

2. *Druse v. Wheeler*, 26 Mich. 189; *Gavigan v. Evans*, 45 Mich. 597.

3. *Medina Tp. v. Perkins*, 48 Mich. 67; *Gillett v. Knowles*, 97 Mich. 77; *Hunt v. Order of Chosen Friends*, 64 Mich. 671; *Lange v. Perley*, 47 Mich. 352; *Pennsylvania Min. Co. v. Brady*, 16 Mich. 332; *Seligman v. Ten Eyck*, 49 Mich. 109; *Richardson v. Coddington*, 45 Mich. 338; *Missouri, etc., R. Co. v. Whitaker*, 11 Tex. Civ. App. 668; *Texas Land, etc., Co. v. Watson*, 3 Tex. Civ. App. 233; *Hauk v. Brownell*, 120 Ill. 161; *Gibbons v. Wisconsin Valley R. Co.*, 62 Wis. 546; *Spaulding v. Chicago, etc., R. Co.*, 33 Wis. 582; *Read v. Morse*, 34 Wis. 315; *Brusberg v. Milwaukee, etc., R. Co.*, 55 Wis. 106; *New York, etc., R. Co. v. Skinner*, 19 Pa. St. 298; *Marks v. Robinson*, 82 Ala. 69; *White v. Stillman*, 25 N. Y. 541; *Storey v. Brennan*, 15 N. Y. 524; *Small v. Smith*, 1 Den. (N. Y.) 583; *Harris v. Wilson*, 1 Wend. (N. Y.) 511; *Gale v. Wells*, 12 Barb. (N. Y.) 84; *Goodman v. Simonds*, 20 How. (U. S.) 359; *Michigan Ins. Bank v. Eldred*, 9 Wall. (U. S.) 553.

as to a matter of fact in issue,¹ it is erroneous to submit it as an open question to the jury, and that the proper course is for the court to assume that it was proved, and to charge on that theory; the view being taken that any other course is likely to confuse and mislead the jury,² and that the court should not assume a doubt as to matters about which there can be no doubt, nor assume a hypothesis at variance with a certain fact.³

Where Merely No Conflict. — It must not be understood, however, from anything said in this connection, that the court in its charge, or counsel in his request for instructions, is authorized to assume that a matter is proved merely because there is no conflict in the evidence with regard to it,⁴ as there may be a question as to the weight and credit which should be given to the testimony.⁵

h. ASSUMPTION OF MATTERS BY WAY OF ILLUSTRATION. — See *infra*, V. 17. *Assuming Facts by Way of Illustration.*

1. Wintz v. Morrison, 17 Tex. 372.

2. **Reason for Rule.** — Under such a state of proofs a charge which, in effect, tells the jury that it is competent for them to find either for or against the existence of the facts so proved is erroneous, as it assumes that there is evidence in the case tending as well to disprove such facts as to prove them. *Druse v. Wheeler*, 26 Mich. 189.

3. *Seligman v. Ten Eyck*, 49 Mich. 109; *Wintz v. Morrison*, 17 Tex. 372; *Bonner v. Green*, 6 Tex. Civ. App. 100.

4. *Saar v. Fuller*, 71 Iowa 425; *People v. Webster*, 111 Cal. 381; *Jonas v. Field*, 83 Ala. 449; *American Oak Extract Co. v. Ryan*, 112 Ala. 337; *Byers v. Wallace*, 87 Tex. 503; *Charleston Ins., etc., Co. v. Corner*, 2 Gill (Md.) 411; *Brown v. Ellicott*, 2 Md. 82; *Cumberland Coal, etc., Co. v. Scally*, 27 Md. 602; *Boyd v. McCann*, 10 Md. 122; *Barry v. Hoffman*, 6 Md. 86.

Illustrations of the Rule. — In *People v. Webster*, 111 Cal. 381, it was held in a prosecution for rape that it cannot be assumed that the prosecutrix was under the age of consent, even though her testimony to that effect was uncontradicted. In this case the court said: "A jury in a criminal case is not bound to believe the uncontradicted statement of a witness as to a fact. * * * They were not bound to take this witness's statement of her age as true. They had the right to disbelieve it, and were not accountable to any court for dereliction of duty in not believing it. * * * The conduct of this witness when upon the stand may have shown

her to have been lying. Her appearance may have shown her to have been of mature years. The inherent improbabilities of her testimony may have placed it beyond the pale of belief. Would such uncontradicted testimony be conclusive if the witness by her appearance was shown to be wrinkled and gray with age?"

In *Byers v. Wallace*, 87 Tex. 503, which was an action of trespass to try title, it was necessary for the plaintiffs, who claimed as descendants of an uncle, to show that he left no wife and children surviving him. There was no evidence to the contrary, and the court in its charge assumed that the deceased was a single man. The reviewing court held that this was error, saying: "It was a material fact to be proved affirmatively by the plaintiffs, by which we do not mean positively, but just like any other material fact, and it was not established by the absence of evidence to the contrary."

In *Barry v. Hoffman*, 6 Md. 86, it was held that the fact that all the evidence in relation to the delivery of a deed was offered on one side, to show its delivery on the day of its date, does not authorize the court to assume that the jury could not find the delivery on another day.

In *American Oak Extract Co. v. Ryan*, 112 Ala. 337, it was held that the value of property should not be assumed as a fact where it is shown by the evidence of only one party, though his testimony is not disputed.

5. *Saar v. Fuller*, 71 Iowa 427; *Rhodes v. Lowry*, 54 Ala. 4.

i. PRESUMPTIONS ON APPEAL. — Where the trial court in its instructions assumes the existence of certain facts, it will be presumed, on appeal, that such facts were admitted or conclusively proved.¹

j. HARMLESS ERROR. — An improper assumption of a fact in an instruction, if it could not have worked to the prejudice of the party complaining of it, will not be ground for reversal.²

V. ELEMENTS AND REQUISITES OF CHARGE — 1. In General —

a. AS TO STYLE. — A large discretion is vested in the trial judge in regard to the style and general manner of the charge.³ It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts.⁴

b. AS TO FOLLOWING PRECEDENTS. — In framing instructions it is always better to adhere to precedents long and well established.⁵ "It is always hazardous to travel out of the beaten path."⁶

c. INACCURACIES IN EXPRESSION. — Mere inaccuracies in expression, or verbal or clerical mistakes, in a charge will not in general be ground of reversal. If the charge is substantially correct a verbal criticism may be disregarded,⁷ unless it would

1. *Patchell v. Jaqua*, 6 Ind. App. 70; *Drinkout v. Eagle Mach. Works*, 90 Ind. 423; *Hinds v. Harbou*, 58 Ind. 121; *Walsh v. Aetna L. Ins. Co.*, 30 Iowa 133; *Wilson v. Atlanta, etc., R. Co.*, 82 Ga. 386. See also *Weekes v. Cottingham*, 58 Ga. 559.

It will be presumed that the trial court gave the jury correct instructions on all the material points in the case, and if the court assumes to state what the facts are, or upon what questions or issues evidence was introduced, the appellate court will presume, in the absence of a contrary showing, that such instructions were given because the facts were admitted by the parties, or were established by uncontradicted evidence. *Patchell v. Jaqua*, 6 Ind. App. 77.

2. *Ricards v. Wedemeyer*, 75 Md. 10; *Hardy v. Graham*, 63 Mo. App. 40; *Longley v. State*, 3 Tex. App. 612; *Alderson v. State*, 2 Tex. App. 10; *Gerke v. Fancher*, 158 Ill. 375; *Chicago v. Moore*, 139 Ill. 201; *Gaudette v. Travis*, 11 Nev. 149; *Bradley v. Lee*, 38 Cal. 362.

In an action of replevin the use of the word "owner," in an instruction, in referring to the plaintiff, is harmless error where he is entitled to the possession of the property as mortgagee. *Hardy v. Graham*, 63 Mo. App. 40.

3. *Mawich v. Elsey*, 47 Mich. 10;

Elliott v. Van Buren, 33 Mich. 49; *Keator v. People*, 32 Mich. 484; *Gulf, etc., R. Co. v. Dunlap*, (Tex. Civ. App. 1894) 26 S. W. Rep. 655; *Moffatt v. Tenney*, 17 Colo. 189.

4. *Continental Imp. Co. v. Stead*, 95 U. S. 166.

Method of Arrangement. — The want of orderly and logical arrangement of the propositions of law involved in a charge is not ground for new trial if all of the propositions fairly applicable to the case are given in such manner as fairly to inform the jury of the principles necessary for their guidance. *Atchison, etc., R. Co. v. Calvert*, 52 Kan. 547.

5. *State v. Stein*, 79 Mo. 330; *State v. Murray*, 91 Mo. 95; *State v. Kilgore*, 70 Mo. 557; *Turner v. State*, 4 Lea (Tenn.) 208; *Lawless v. State*, 4 Lea (Tenn.) 173; *Smith v. State*, 2 Leg. Rep. (Tenn.) 56.

6. *State v. Stein*, 79 Mo. 330. Any departure from the beaten track will inevitably lead to doubt and uncertainty. *Lawless v. State*, 4 Lea (Tenn.) 179.

7. *California*. — *O'Callaghan v. Bode*, 84 Cal. 489; *People v. Carroll*, 92 Cal. 568.

Georgia. — *Atlanta v. Champe*, 66 Ga. 659; *Huffman v. State*, 95 Ga. 469; *Wilson v. State*, 66 Ga. 591.

have misled a jury of ordinary intelligence.¹ In drafting instructions, the exactness of statement required in pleadings is not necessary.²

2. Must Be Direct and Certain. — Instructions should be definite, direct, and certain,³ and if defective in this respect, and calculated to mislead, will operate to reverse the judgment.⁴

Illinois. — *Nichols v. Mercer*, 44 Ill. 250; *McKenzie v. Remington*, 79 Ill. 388; *Green v. Lewis*, 13 Ill. 642.

Iowa. — *Galpin v. Wilson*, 40 Iowa 90.

Michigan. — *Davidson v. Kolb*, 95 Mich. 469.

Missouri. — *Lucas Market Sav. Bank v. Goldsoll*, 8 Mo. App. 596.

New York. — *Smedis v. Brooklyn, etc., R. Co.*, 88 N. Y. 13.

United States. — *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 270.

1. *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 270.

Using Word "Plaintiff" for "Defendant." — The use of the word "plaintiff" for the word "defendant," in an instruction, is not likely to mislead, and will not be ground of reversal. *Nichols v. Mercer*, 44 Ill. 250; *McKenzie v. Remington*, 79 Ill. 388; *Lucas Market Sav. Bank v. Goldsoll*, 8 Mo. App. 596.

Use of Word "Plaintiff" Instead of "Decedent." — A mistake in the use of the word "plaintiff" instead of the word "decedent" in an action for debt, caused by negligence which is a mere inadvertence and could not have misled the jury, will not warrant a new trial. *O'Callaghan v. Bode*, 84 Cal. 489.

Use of Word "Evidence" Instead of "Defendant." — Where the court properly instructed the jury that facts against the defendant must be proved beyond a reasonable doubt, a mistake in repetition of the same instructions, by substituting the word "evidence" for the word "defendant," is harmless error. *People v. Carroll*, 92 Cal. 568.

2. *Moore v. Missouri Pac. R. Co.*, 73 Mo. 438; *State v. Pullens*, 81 Mo. 387.

3. *Alabama.* — *Cothran v. Moore*, 1 Ala. 423; *Salomon v. State*, 28 Ala. 83; *Smith v. Collins*, 94 Ala. 394.

Florida. — *Union Bank v. Call*, 5 Fla. 409.

Georgia. — *Todd v. Fambro*, 62 Ga. 665.

Illinois. — *Peoria, etc., R. Co. v. Wagner*, 18 Ill. App. 598.

Indiana. — *Loeb v. Weis*, 64 Ind. 285.

Kentucky. — *Prather v. Naylor*, 1 B. Mon. (Ky.) 246.

Maryland. — *Giles v. Ebsworth*, 10 Md. 333; *Cook v. Duvall*, 9 Gill (Md.) 461; *Warner v. Hardy*, 6 Md. 525; *Penn v. Flack*, 3 Gill & J. (Md.) 369; *Butler v. State*, 5 Gill & J. (Md.) 511; *Kinsey v. Minnick*, 43 Md. 112; *Given v. Charon*, 15 Md. 502; *Hammond v. Inloes*, 4 Md. 138.

Michigan. — *Aikin v. Weckerly*, 19 Mich. 482; *Hyde v. Shank*, 77 Mich. 517.

Minnesota. — *Hocum v. Weitherick*, 22 Minn. 152.

Mississippi. — *Southern R. Co. v. Kendrick*, 40 Miss. 374.

Missouri. — *Cahn v. Reid*, 18 Mo. App. 115.

Montana. — *Perkins v. Davis*, 2 Mont. 474.

North Carolina. — *State v. Bailey*, 1 Winst. L. (N. Car.) 137.

Ohio. — *Adams v. State*, 29 Ohio St. 412.

Oregon. — *Salomon v. Cress*, 22 Oregon 177.

Texas. — *Welsh v. State*, 11 Tex. 368; *Martin Brown Co. v. Perrill*, 77 Tex. 199; *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 496.

West Virginia. — *Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104.

Wisconsin. — *Large v. Orvis*, 20 Wis. 696; *Corcoran v. Harran*, 55 Wis. 120.

4. *Gilmore v. McNeil*, 45 Me. 599; *Smith v. Overby*, 30 Ga. 241; *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1; *Cothran v. Moore*, 1 Ala. 423.

Instructions Held Vicious for Indefiniteness and Uncertainty. — A request for an instruction which leaves in doubt the question whether the jury are to find according to a preponderance of the evidence, or must be satisfied beyond a reasonable doubt, should be refused. *Hocum v. Weitherick*, 22 Minn. 152. An instruction that the jury may, from the manner and position of the witness giving testimony before them, attach whatever credit they may think proper to his statements, is too vague and indefinite to be given. *Welsh v. State*, 11 Tex. 368. So it is erroneous to instruct that one is disqualified to contract, when "from old age, infirmity, or

Leaving Jury Uncertain. — If an instruction is so worded as to leave the jury to uncertain conjecture as to its meaning, and hence is liable to lead the jury astray in their consideration of the case, this is good ground for a new trial.¹

Accurate, Clear, and Explicit. — Instructions should be so framed that they will be accurate,² clear, and explicit.³ A charge should

other misfortune [he] was reduced to a state of mental imbecility which disqualified him from the proper exercise of his reasoning faculties, and the ordinary prudential management of his affairs." *Prather v. Naylor*, 1 B. Mon. (Ky.) 245. So a request for instruction that "the authority offered in evidence by the avowant is insufficient to sustain the distress relied upon," is bad for uncertainty, since it does not clearly appear whether it relates to the warrant to distrain and the proceedings thereunder, or to the authority under which the avowant's agent acted, which was also given in evidence. *Giles v. Ebsworth*, 10 Md. 333. In an action against a railroad company, to recover for a failure to give the plaintiff, a passenger, an opportunity to get off at a station to which he held a ticket, the plaintiff claimed exemplary damages, and the court instructed that special damage need not be proven. It was held that this instruction was too indefinite. *Southern R. Co. v. Kendrick*, 40 Miss. 374. So the following charge was properly refused for uncertainty: "Where the proof of drunkenness is presented for the purpose of showing that the defendant's mind was clouded, frenzied, and disturbed by being drunk, proof as to the defendant being unable to distinguish between right and wrong need not be so clear as when it is presented for the purpose of showing a complete defense to the action." *Adams v. State*, 29 Ohio St. 412.

Request for Correction Held Necessary. — It has been held that if an instruction is indefinite and uncertain, the party objecting should ask for one that is more definite, or his exception will not avail on appeal. *Corcoran v. Harlan*, 55 Wis. 120.

When Not Ground for Reversal. — The want of precision of expression in charging a jury is not a sufficient ground for setting aside a verdict where there is no reason to believe that they were misled by it. *Dunbar v. Briggs*, 13 Neb. 332; *Mutual Hail Ins. Co. v. Wilde*, 8 Neb. 427; *Shinnabarger v. Shelton*,

41 Mo. App. 147; *Warson v. McElroy*, 33 Mo. App. 553. So an instruction will not be held bad for indefiniteness if in other instructions given by the court the omission complained of is distinctly set forth; some credit must be given to the ordinary intelligence of the jury. *Thornberry v. Thompson*, 18 Mo. App. 421.

1. *Crete v. Childs*, 11 Neb. 252; *Meyer v. Midland Pac. R. Co.*, 2 Neb. 319.

2. *Illinois*. — *Shaw v. People*, 81 Ill. 150; *Toledo, etc., R. Co. v. Moore*, 77 Ill. 217; *Volk v. Roche*, 70 Ill. 297; *Cushman v. Cogswell*, 86 Ill. 62; *Wabash R. Co. v. Henks*, 91 Ill. 406; *Singer Mfg. Co. v. Pike*, 12 Ill. App. 506; *Chicago, etc., R. Co. v. Harmon*, 12 Ill. App. 54; *St. Louis Coal R. Co. v. Moore*, 14 Ill. App. 510; *Kranz v. Thieben*, 15 Ill. App. 482; *Davis v. People*, 114 Ill. 86; *American Ins. Co. v. Crawford*, 89 Ill. 62; *Mendota v. Fay*, 1 Ill. App. 418; *Harvey v. Miles*, 16 Ill. App. 533; *Chicago, etc., R. Co. v. Dougherty*, 110 Ill. 521; *Missouri Furnace Co. v. Abend*, 9 Ill. App. 319; *Owen v. Chicago*, 10 Ill. App. 465; *Illinois Cent. R. Co. v. Maffit*, 67 Ill. 431; *Warren v. Wright*, 3 Ill. App. 602; *Peoria, etc., R. Co. v. Wagner*, 18 Ill. App. 598; *Toledo, etc., R. Co. v. Grable*, 88 Ill. 441; *Flaherty v. McCormick*, 7 Ill. App. 411; *Covert v. Nolan*, 10 Ill. App. 629; *Ruff v. Jarrett*, 94 Ill. 475; *Keyes v. Fuller*, 9 Ill. App. 528; *Bauchwitz v. Tyman*, 11 Ill. App. 186; *Neuerberg v. Gaulter*, 4 Ill. App. 348; *Chapin v. Thompson*, 7 Ill. App. 288; *Swan v. People*, 98 Ill. 610; *Chicago, etc., R. Co. v. Dvorak*, 7 Ill. App. 555.

Tennessee. — *Franklin Turnpike Co. v. Crockett*, 2 Sneed (Tenn.) 263; *Rutland v. Gleaves*, 1 Swan (Tenn.) 198.

3. *Alabama*. — *Wicks v. State*, 44 Ala. 398; *Ming v. State*, 73 Ala. 1; *Hughes v. Anderson*, 68 Ala. 280.

Arkansas. — *Sparks v. Mack*, 31 Ark. 666.

California. — *People v. Ramirez*, 13 Cal. 172.

Illinois. — *American Ins. Co. v. Craw-*

be so explicit as not to be misconstrued or misunderstood by the jury in the application of the law to the facts as they may find them from the evidence.¹ The law should be placed fairly before the jury in a few plain, forcible, pointed, and pithy instructions,² free from all doubt, and announcing correct legal principles, so that there can be no question as to what the law is.³

Technical Terms to Be Avoided. — In charging the jury the court should use language of ordinary significance and capable of being understood by persons of average intelligence. It is better to instruct juries in plain English, and to avoid altogether the use of technical terms.⁴ If this is done, there will be much less liability of misapprehension.⁵ If, however, it is a question in

ford, 7 Ill. App. 29; Warren *v.* Wright, 3 Ill. App. 602; Moshier *v.* Kitchell, 87 Ill. 18; Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347; Bauer *v.* Bell, 74 Ill. 223; Snyder *v.* Laframboise, 1 Ill. 343; Baxter *v.* People, 8 Ill. 368; Chicago West Div. R. Co. *v.* Haviland, 12 Ill. App. 561; Pope *v.* Lowitz, 14 Ill. App. 96.

Kentucky. — Forman *v.* Ambler, 2 Dana (Ky.) 110.

Michigan. — Aikin *v.* Weckerly, 19 Mich. 482; Kimball, etc., Mfg. Co. *v.* Vroman, 35 Mich. 310.

Mississippi. — Staten *v.* State, 30 Miss. 619; Cothran *v.* State, 39 Miss. 541; Payne *v.* Green, 10 Smed. & M. (Miss.) 507.

Missouri. — Crole *v.* Thomas, 17 Mo. 329; Otto *v.* Bent, 48 Mo. 23.

North Carolina. — George *v.* Smith, 6 Jones L. (N. Car.) 273.

Ohio. — Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110; Parmlee *v.* Adolph, 28 Ohio St. 10.

Tennessee. — Bates *v.* Fuller, 8 Lea (Tenn.) 644; East Tennessee, etc., R. Co. *v.* Fain, 12 Lea (Tenn.) 41; Lancaster *v.* State, 3 Coldw. (Tenn.) 339.

Where Evidence Is Evenly Balanced. — Where the evidence as to the facts in the case is evenly balanced the jury should be instructed as to the law with accuracy. Toledo, etc., R. Co. *v.* Moore, 77 Ill. 217. And it is important that their deliberations be not influenced by an improper instruction. Shaw *v.* People, 81 Ill. 150.

Where Evidence Is Conflicting. — Where there is a conflict of evidence, or where the evidence leaves it doubtful which way the jury should find, instructions should be accurate, clear, and perspicuous. They are to aid the jury in arriving at a correct conclusion, not to mislead or leave them in doubt as to the

law arising upon the evidence. Volk *v.* Roche, 70 Ill. 297.

Instructions Held Not Sufficiently Explicit. — An instruction that if the jury believed "that T. M. and those claiming under him were in possession of the land in controversy more than twenty years before they were divested," etc., is erroneous because not sufficiently explicit, as the possession must have been adverse and continual, and the instruction, omitting this qualification, might have misled the jury. Forman *v.* Ambler, 2 Dana (Ky.) 110. So on the trial of an indictment for perjury an instruction that if the prisoner swore falsely to the statement contained in the indictment, the jury will find him guilty "if the case is otherwise made out," is not sufficiently explicit. Cothran *v.* State, 39 Miss. 541.

1. Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110.

2. Talbot *v.* Mearns, 21 Mo. 427.

3. Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347.

4. Chappell *v.* Allen, 38 Mo. 213; Morgan *v.* Durfee, 69 Mo. 480; Bates *v.* Fuller, 8 Lea (Tenn.) 644; Morrison *v.* State, 76 Ind. 339; Aikin *v.* Weckerly, 19 Mich. 482.

5. **Using Term "Prima Facie."** — The use of this term in instructing the jury is condemned. Chappell *v.* Allen, 38 Mo. 222.

Comparisons of Legal Presumptions. — An instruction which attempts a comparison of a legal presumption may well be refused as "theoretical and impractical." Morrison *v.* State, 76 Ind. 339.

Using the Word "Malice" Without Defining It. — The court instructed that if there was reasonable ground to apprehend great personal injury from the deceased, "and the defendant struck

issue what certain words used in a technical sense mean, and evidence has been admitted to show what this meaning is, the question is properly submitted to the jury.¹

3. Must Not Be Obscure, Vague, or Involved. — It is scarcely more than a repetition of what was said in the last section, to state that instructions should not be vague, obscure, or involved, that the refusal of such instructions is proper,² and that the giving of them, if calculated to mislead the jury, will be reversible error;³ but that mere obscurity in an instruction,

him with the seal to avoid such injury, and not in a spirit of malice or revenge, he was justifiable." In commenting on this instruction the reviewing court said: "It will be observed that the term 'malice' is not defined; the jury were, therefore, left to construe it as they would." *Morgan v. Durfee*, 69 Mo. 480.

1. *Pollen v. Le Roy*, 30 N. Y. 563.

2. *Alabama*. — *Miller v. Garrett*, 35 Ala. 96; *Tillman v. Chadwick*, 37 Ala. 317; *Street v. State*, 67 Ala. 87.

Arkansas. — *Sparks v. Mack*, 31 Ark. 666.

California. — *People v. Best*, 39 Cal. 690; *People v. Carroll*, 92 Cal. 568.

Georgia. — *Central R. Co. v. Haslett*, 74 Ga. 59; *Chattanooga, etc., R. Co. v. Owen*, 90 Ga. 265.

Illinois. — *Roth v. Smith*, 54 Ill. 431; *Union Stock Yards, etc., Co. v. Monaghan*, 13 Ill. App. 148; *Perisker v. People*, 47 Ill. 382; *Freeport v. Isbell*, 83 Ill. 440.

Iowa. — *Perry v. Dubuque Southwestern R. Co.*, 36 Iowa 102.

Maine. — *Hunter v. Randall*, 69 Me. 183.

Maryland. — *Cumberland Coal, etc., Co. v. Scally*, 27 Md. 589; *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32.

Louisiana. — *State v. Lacombe*, 12 La. Ann. 195.

Minnesota. — *Hayward v. Knapp*, 23 Minn. 430.

Mississippi. — *Tucker v. Whitehead*, 59 Miss. 594.

Missouri. — *State v. Laurie*, 1 Mo. App. 371; *Greer v. St. Louis, etc., R. Co.*, 80 Mo. 555; *James v. Missouri Pac. R. Co.*, 107 Mo. 480.

Nevada. — *Colquhoun v. Wells*, 21 Nev. 459.

New York. — *Wilson v. Dickel*, 7 N. Y. App. Div. 175.

Pennsylvania. — *McKinney v. Snyder*, 78 Pa. St. 497.

Texas. — *Henry v. Sansom*, 2 Tex. Civ. App. 150; *Kalamazoo Nat. Bank v. Sides*, (Tex. Civ. App. 1894) 28 S. W. Rep. 918.

Virginia. — *Levasser v. Washburn*, 11 Gratt. (Va.) 572.

West Virginia. — *State v. Cain*, 20 W. Va. 679.

United States. — *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451.

3. *Thomas v. State*, 67 Ga. 767; *State v. Jones*, 20 W. Va. 764; *State v. Robinson*, 20 W. Va. 714; *Archer v. Sinclair*, 49 Miss. 343; *Preston v. State*, 25 Miss. 383; *Gordon v. Richmond*, 83 Va. 436; *Haskin v. Haskin*, 41 Ill. 197.

Voluminous Instructions. — If instructions are so voluminous as to mislead the jury, this may be ground for new trial. *Thatcher v. Quirk*, (Idaho 1894) 38 Pac. Rep. 652.

Instructions Held Erroneous for Obscurity. — An instruction that "you will assess to the plaintiff such damages as from all the evidence in this case you shall find he has sustained by reason of the illegal taking and detention of the personal property," is vague, and constitutes reversible error. *Morehead v. Adams*, 18 Neb. 569. So, also, the following instruction is vague and misleading: "If the jury believe from the evidence that the defendant * * * is guilty of an attempt, as charged in the second count, your verdict should be 'guilty.'" *Preisker v. People*, 47 Ill. 382. And so is an instruction that "the party dealing with an agent is bound to know at his peril whether the power of an agent is, and to understand its legal effect." *Colquhoun v. Wells*, 21 Nev. 459.

Necessity for Request for Correction. — It has been held that a charge which asserts a correct legal proposition, but is objectionable on account of generality or obscurity, is not ground of reversal, and that the adverse party should protect himself by asking a

not misleading, is not ground for reversal.¹

4. Must Not Be Ambiguous. — Instructions which are susceptible of two constructions, one of which is correct and the other not, are erroneous, and should not be given,² and the refusal of such instructions is always proper.³ If the giving of such an instruction has a tendency to mislead the jury to the prejudice of the party complaining, this amounts to a misdirection for which the judgment will be reversed.⁴

The Giving of an Ambiguous Instruction, however, will not operate to reverse if it is apparent that no prejudice could have resulted therefrom;⁵ and it has been held that if the charge is merely

qualifying or explanatory charge. *O'Donnell v. Rodiger*, 76 Ala. 222.

1. *Denton v. Jackson*, 106 Ill. 433; *Palmore v. State*, 29 Ark. 248; *Smith v. McDaniel*, 5 Ind. App. 581.

2. *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. (Va.) 230; *Gordon v. Richmond*, 83 Va. 436; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 371; *Comstock v. Smith*, 26 Mich. 306; *Dodge v. Brown*, 22 Mich. 446; *Furgeson v. Brown*, 1 Mo. App. Rep. 458; *Medlin v. Brooks*, 9 Mo. 106; *Legg v. Johnson*, 23 Mo. App. 590; *Farmers', etc., Bank v. Lonergan*, 21 Mo. 46; *State v. Estel*, 6 Mo. App. 6; *Young v. Ridenbaugh*, 67 Mo. 574; *Adams v. Reeves*, 68 N. Car. 134; *Chicago, etc., R. Co. v. Housh*, 12 Ill. App. 88.

3. *Alabama*. — *Cook v. Thornton*, 109 Ala. 523; *Robbins v. Harrison*, 31 Ala. 160; *Brewer v. Watson*, 71 Ala. 299; *Ross v. Ross*, 20 Ala. 105; *Louisville, etc., R. Co. v. Hall*, 87 Ala. 708; *Rolston v. Langdon*, 26 Ala. 660; *Duckworth v. Butler*, 31 Ala. 164; *Partridge v. Forsyth*, 29 Ala. 200.

Indiana. — *Loeb v. Weis*, 64 Ind. 285.

Maryland. — *Baltimore, etc., R. Co. v. Thompson*, 10 Md. 76.

Mississippi. — *Ellis v. Commercial Bank*, 7 How. (Miss.) 294.

Missouri. — *Wood v. White*, 6 Mo. App. 592; *Dunn v. Dunnaker*, 87 Mo. 597.

Ohio. — *Miller v. Florer*, 19 Ohio St. 356.

South Carolina. — *Knobeloch v. Germania Sav. Bank*, (S. Car. 1897) 27 S. E. Rep. 962.

West Virginia. — *Henry v. Davis*, 7 W. Va. 715.

United States. — *U. S. v. Jones*, 8 Pet. (U. S.) 399.

4. *Frederick v. Ballard*, 16 Neb. 559; *State v. McGinnis*, 5 Nev. 337; *People v. Maxwell*, 24 Cal. 14; *Belt v. Goode*,

31 Mo. 128; *McCracken v. Webb*, 36 Iowa 551; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Ocean Steamship Co. v. McAlpin*, 69 Ga. 440; *Wyatt v. Elam*, 19 Ga. 335; *Fain v. Cornett*, 25 Ga. 184; *Gougar v. Morse*, 66 Fed. Rep. 702.

An ambiguous instruction, correct only upon a construction inapplicable to the evidence, amounts to reversible error. *Black v. Duncan*, 60 Ind. 522.

Whenever the question is one of evidence only, and there is room for apprehension that the jury, on account of ambiguity of the language in the charge, may have been misled in considering and weighing the testimony, it is safest to send the case back for another trial. *Fain v. Cornett*, 25 Ga. 184.

Combining Requested Instructions of Both Parties Condemned. — Charges made up of selections from the requests of both parties, supplemented by general judicial observations, are disapproved as incoherent, obscure, and sometimes ambiguous. *Marquette, etc., R. Co. v. Marcott*, 41 Mich. 433.

5. *Little Miami Co. v. Hambleton*, 40 Ohio St. 496. In this case the only serious defect in the charge was a failure to define clearly the kinds of damage for which the defendants were jointly liable. The court said that no proper request to charge on that part of the case was made, but if the verdict was clearly supported by the evidence of joint liability, the judgment should not be set aside. *Sweeney v. Merrill*, 38 Kan. 217, where it was held that if an instruction is not entirely free from ambiguity, but does not by a reasonable construction state the law incorrectly, it will not be deemed reversible error when the correct rule of law is given in the instruction next following. *People v. Alsemi*, 85 Cal. 434, in which it was held that an instruction which, stand-

ambiguous, the party who is dissatisfied should ask the court to explain it before the jury retire, otherwise the objection will be considered waived.¹

5. Must Not Be Argumentative — *a. IMPROPRIETY OF GIVING ARGUMENTATIVE INSTRUCTIONS.* — Instructions should be concise, and briefly present the law on the case fairly and fully, on which alone the parties rely.² Courts should give such instructions only as present the issues in a clear, single, plain, and unencumbered manner.³ The purpose of the charge is to state and explain the law, not to carry on a process of general reasoning,⁴ and therefore the practice of injecting an argument into the instructions is considered a reprehensible one, and one which should not be encouraged,⁵ as it only tends to confuse the jury, protract the trial, and render more uncertain a fair and just dis-

ing alone, appears ambiguous because of grammatical errors, must be considered in the light of common understanding rather than by the strict rules of grammar, and also in connection with its context; and if the remainder of the charge upon the same subject is clear and correct, and free from ambiguity, and if the objectionable sentence, when properly corrected by grammatical rules, would be a correct exposition of the law, it will be presumed that the jury so understood it and were not misled thereby. *Fisher v. People*, 20 Mich. 135, in which it was held that where a request to charge is susceptible of two interpretations, and the charge is correct upon the theory that the most obvious of these interpretations is the true one, and the interpretation relied upon to show that the charge was erroneous was not specially brought to the attention of the court, and if it appears from the whole charge given that the subject involved in the request was fairly left to the jury, the charge will be sustained. See also *Burbridge v. Kansas City Cable R. Co.*, 36 Mo. App. 669.

1. *Schuyllkill, etc., Imp. Co. v. Munson*, 14 Wall. (U. S.) 442.

Duty of Court. — Whenever ambiguous instructions are given and the attention of the court is called to them, the court should, at any stage of the trial, before the instructions have been acted upon by the jury, remove the ambiguity and make the meaning of the instructions plain. *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32.

2. *Merrick v. Wallace*, 19 Ill. 486; *Merritt v. Merritt*, 20 Ill. 65; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Lud-*

wig v. Sager, 84 Ill. 99; *Bray v. Ely*, 105 Ala. 553.

3. *State v. Turner*, 19 Iowa 144.

4. *Hayes v. State*, 58 Ga. 36.

5. *Alabama*. — *Birmingham Fire-Brick Works v. Allen*, 86 Ala. 185; *Nelms v. Steiner*, (Ala. 1897) 22 So. Rep. 435.

California. — *People v. Choynski*, 95 Cal. 640; *Morris v. Lachman*, 68 Cal. 109.

Illinois. — *Merritt v. Merritt*, 20 Ill. 80; *Ludwig v. Sager*, 84 Ill. 99; *Chapman v. Cawrey*, 50 Ill. 512; *Merrick v. Wallace*, 19 Ill. 486; *Weyrich v. People*, 89 Ill. 90; *Elston, etc., Grave Road Co. v. People*, 96 Ill. 584; *Reynolds v. Phillips*, 13 Ill. App. 557; *Munford v. Miller*, 7 Ill. App. 62; *Thorp v. Goewey*, 85 Ill. 611; *Roe v. Taylor*, 45 Ill. 485; *Chittenden v. Evans*, 48 Ill. 52.

Iowa. — *State v. Turner*, 19 Iowa 144.

Louisiana. — *State v. Ardoin*, 49 La. Am. 1145.

Michigan. — *People v. Hull*, 86 Mich. 449; *People v. Crawford*, 48 Mich. 498.

Instructions Held Argumentative. — The following instructions have been held argumentative: "If two witnesses testify about a transaction, and one of the said witnesses was immediately at the scene of the transaction, and the other witness was some distance off, then the jury may look to this in determining which witness they will believe." *Jones v. Alabama Mineral R. Co.*, 107 Ala. 400. "If the jury believe the evidence in the case they are bound to believe that the defendant's servants in charge of the train were competent and fit to perform their re-

position of the cause.¹ It is, of course, proper for the court to refuse to give such an instruction.²

spective duties; and they cannot consider arguments of counsel for the plaintiff to the contrary." *Georgia Pac. R. Co. v. Propst*, 30 Ala. 1. "In determining the question as to whether the slanderous words charged were spoken about or concerning the plaintiff, it is proper for you to consider whether at this time, when these words were alleged to have been spoken, Lachman knew the person of the plaintiff or not; and if he did not know the person of the plaintiff at this time, how could he have referred to her? and how could he have pointed her out as the subject of his accusation?" *Morris v. Lachman*, 68 Cal. 112. That the jury may find the defendant not guilty without finding whether the prosecutrix testified falsely. *Carter v. State*, 103 Ala. 93. "Positive fraud or undue influence is hard to prove; is generally done by proving facts and circumstances to which the jury may look to infer fraud or undue influence." *Johnson v. Armstrong*, 97 Ala. 731. "An opprobrious epithet conveying the idea of a lack of chastity would to a woman cause no pain, while applied to a pure and gentle wife, no tongue can tell the anguish, the shame, the sense of humiliation it would bring." *Hanna v. Hanna*, 3 Tex. Civ. App. 51. That "there is no fact that is not the subject of proof by circumstantial evidence;" that "as the fraud vitiating a transaction, at the instance of creditors, lies in the intention of the parties to it, it is not generally susceptible of proof otherwise than by evidence of circumstances." *Teague v. Lindsey*, 106 Ala. 266. That it was the duty of the person operating the train "to slow up the speed of the said train as it approached the point at which" the deceased was killed; and that the jury are instructed that the defendant "had a right to believe that the train would be slowed up, and to act upon such belief, unless, from the conduct of such employees or servants it was apparent to him that the speed of the train would not be slackened." *McDonald v. International, etc., R. Co.*, 86 Tex. 1. That in weighing their evidence the jury might take into consideration the fact that certain witnesses were under indictment for the offense with which the defendant was charged. *Mathews v.*

State, 100 Ala. 46. "If you find good character established by the evidence, you should consider it and allow it such weight as you believe it fairly entitled to, as tending to show that men of such character would not be likely to commit the crime charged in this case." *Dorsey v. State*, 110 Ala. 38. In an action against a street-car company for personal injuries, a charge that the fact that a driver might have been at other times careless or imprudent would not render the company liable in this action, unless such driver was careless, reckless, or imprudent on the occasion of the injury sued for. *Hays v. Gainesville St. R. Co.*, 70 Tex. 602.

Instructions Held Not Argumentative. — Where the issue was whether the plaintiff designedly drove off the bank of a highway to recover damages of the town, and a witness testified to parts of conversation which she overheard between her husband and the plaintiff, an instruction that in order to make this evidence "the jury must be satisfied that it had reference to this transaction" is not objectionable as argumentative. *Whitcomb v. Fairlee*, 43 Vt. 671. So, where a charge on circumstantial evidence was necessary, a charge that great jurists have pronounced circumstantial evidence "of a nature equally satisfactory with positive evidence, and less liable to proceed from perjury," is not argumentative. *State v. Ward*, 61 Vt. 153.

1. *State v. Turner*, 19 Iowa 149.

In commenting on the practice of asking argumentative instructions, an *Ohio* judge has said: "Without intending to refer to this case, we may say that it seems as if this objectionable practice has arisen from two purposes on the part of those who adopt it; first, a determination to lose the cause before the jury, and next, to reverse the result. The first always succeeds, the other rarely." *Bates v. Benninger*, 2 Cinc. Super. Ct. Rep. 568.

2. *Alabama*. — *Smith v. Collins*, 94 Ala. 394; *Adams v. Thornton*, 82 Ala. 260; *McQueen v. State*, 94 Ala. 50; *Brantley v. State*, 91 Ala. 47; *Wisdom v. Reeves*, 110 Ala. 418; *Brassell v. State*, 91 Ala. 45; *Mitchell v. State*, 94 Ala. 68; *East Tennessee, etc., R. Co. v. Thompson*, 94 Ala. 636; *Potter v. State*, 92 Ala. 37; *Little v. State*, 89

b. **WHETHER GROUND FOR REVERSAL.** — The giving of argumentative instructions, it is believed, though manifestly improper, will not in general be ground for reversal if the instructions contain a correct proposition of law, and are otherwise unobjectionable; and it has been said in a few decisions that it is within the discretion of the court to give an argumentative instruction.¹

Harmless Error. — According to some decisions, an argumentative charge will not be ground for reversal unless it plainly appears that injury resulted therefrom.²

Stating Law Correctly. — If, on the whole, the charge states the law correctly, the fact that it is argumentative will not operate to reverse.³

Ala. 99; Chatham *v.* State, 92 Ala. 47; Steiner *v.* Ellis, (Ala. 1890) 7 So. Rep. 803; Birmingham Union R. Co. *v.* Hale, 90 Ala. 8; Birmingham Mineral R. Co. *v.* Wilmer, 97 Ala. 165; Steed *v.* Knowles, 97 Ala. 573; Alabama G. S. R. Co. *v.* Richie, 99 Ala. 346; Fowler *v.* State, 100 Ala. 96; Horn *v.* State, 102 Ala. 144; Jefferson *v.* State, 110 Ala. 89; Trufant *v.* White, 99 Ala. 536; Murphy *v.* State, 55 Ala. 252; Cooper *v.* State, 88 Ala. 107; Cleveland *v.* State, 86 Ala. 1; Birmingham *v.* Starr, 112 Ala. 98; Georgia Pac. R. Co. *v.* Propst, 90 Ala. 1; Karr *v.* State, 106 Ala. 1; Bray *v.* Ely, 105 Ala. 553; Bell *v.* Kendall, 93 Ala. 489; Jackson *v.* Robinson, 93 Ala. 159; Pellum *v.* State, 89 Ala. 32; James *v.* State, (Ala. 1897) 22 So. Rep. 565; Bames *v.* State, 111 Ala. 56; Riddle *v.* Webb, 110 Ala. 599; Hundley *v.* Chadick, 109 Ala. 575; Downey *v.* State, 110 Ala. 99.

Arkansas. — Bolling *v.* State, 54 Ark. 588.

California. — People *v.* McNamara, 94 Cal. 509.

Georgia. — Miles *v.* State, 93 Ga. 117; Beck *v.* State, 76 Ga. 452.

Illinois. — Thompson *v.* Force, 65 Ill. 370; Pyle *v.* Pyle, 158 Ill. 289; American Bible Soc. *v.* Price, 115 Ill. 623.

Missouri. — State *v.* Orr, 64 Mo. 339; Flannery *v.* St. Louis, etc., R. Co., 44 Mo. App. 396.

Ohio. — Bates *v.* Benninger, 2 Cinc. Super. Ct. Rep. 568; Mutual Ben. L. Ins. Co. *v.* French, 2 Cinc. Super. Ct. Rep. 321.

Texas. — McDonald *v.* International, etc., R. Co., 86 Tex. 1; Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73; Mitchell *v.* Mitchell, 80 Tex. 101; Bonham *v.* Crider, (Tex. Civ. App. 1894) 27 S. W. Rep. 419.

Wisconsin. — Wieting *v.* Millston, 77 Wis. 523.

The jury are to decide for themselves what facts are established, and what conclusions, under the law, result from them. The mental convictions of the judge, in respect to the facts, should neither be declared nor intimated. Hayes *v.* State, 58 Ga. 35.

The court should not permit a case to be argued through instructions, but is bound to prohibit it. Keeler *v.* Stuppe, 86 Ill. 309.

1. Karr *v.* State, 106 Ala. 1; Bray *v.* Ely, 105 Ala. 553. See also Cesure *v.* State, 1 Tex. App. 19, in which it is said that however much we may deprecate the practice of interpolating lengthy arguments purely upon questions of law into charges given to the jury, we cannot say that to do so was, or would be, a violation of law.

2. Trufant *v.* White, 99 Ala. 536; Payne *v.* Crawford, 102 Ala. 388; McQueen *v.* State, 94 Ala. 50; Jones *v.* State, 65 Ga. 621.

3. Baldwin *v.* State, 111 Ala. 11; Hurley *v.* State, 29 Ark. 17.

Request for Correction Necessary. — It has been held that if a party considers that an argumentative instruction may mislead, it is his duty to ask any modification or qualification necessary to prevent its apprehended misleading tendency. Schaungut *v.* Udell, 93 Ala. 302.

Instances of Misleading Instructions Held Not Ground of Reversal. — In a trial for the murder of a six-year-old child the court charged as follows: "You will look to the evidence and see what was the provocation for the deed; what circumstances of alleviation, palliation, or justification are in the case; if the circumstances are not shown does it not follow that the killing shows an

Reversal for Argumentativeness. — There are cases, however, in which the judgment has been reversed on the ground that an instruction is argumentative,¹ or where the instruction is also vicious in other respects.²

6. Must Not Be Contradictory or Inconsistent — *a.* **STATEMENT OF RULE.** — Instructions should be so framed that they will not only state the law correctly, but be entirely in harmony with each other,³ in order that the jury may be aided and not misled in arriving at their verdict.⁴ Instructions which are inconsistent or contradictory, when asked, should, of course, be refused,⁵ and

abandoned and malignant heart?" This was held no ground for reversal. *Jones v. State*, 65 Ga. 621.

Instructions Giving Reason for Rule of Law. — An instruction argumentative only in the way of giving a reason for a rule of law is not ground for reversal. *Carleton v. State*, 43 Neb. 418.

1. *Chisum v. Chesnutt*, (Tex. Civ. App. 1896) 36 S. W. Rep. 758. In this case the court said: "An analysis of the testimony bearing upon the issue as to whether the land included in the deed from Preston to Chisum includes the strip in controversy causes us now to think that the statement of the same proposition in these two instructions, following its announcement in the general charge, probably seriously influenced the jury in reaching their verdict. Hence the argumentative character of the instructions will require a reversal of the judgment."

2. *Young v. Merkel*, 163 Pa. St. 513; *Dingman v. State*, 48 Wis. 485; *Ludwig v. Sager*, 84 Ill. 99.

3. *Hoben v. Burlington, etc., R. Co.*, 20 Iowa 562; *Chicago, etc., R. Co. v. Payne*, 49 Ill. 499; *Nichols v. Jones*, 32 Mo. App. 657.

"The only safe rule * * * is to harmonize the instructions before they are given to the jury. If this is not done, the instructions, which should be a guide to the jury, only serve to confuse." *Quinn v. Donovan*, 85 Ill. 196.

Conflicting Evidence. — Where the evidence in a case is very conflicting it is especially important that there should be no conflict in the instructions. *Chapman v. Copeland*, 55 Miss. 476.

Interpretation of Instruction. — Instructions to a jury are always and only given by the court and should be consistent, though not giving the whole of the law in every part. They must never be considered separately, but each as limiting and interpreting

other portions, and if the law is correctly stated, when the instructions are thus considered, the verdict and judgment will not be disturbed. *Kennon v. Gilmer*, 5 Mont. 257.

Instructions Founded on Different Hypotheses. — "Where prayers granted on the same hypotheses of fact are so inconsistent that conformity with one necessarily implies disregard of the other, they are calculated to mislead, and therefore erroneous; but instructions founded upon different hypotheses are not liable to that objection. Moreover, it must appear not only that the instruction was erroneous, but that the appellant was prejudiced by the error." *Young v. Mertens*, 27 Md. 114; *Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277.

4. *Chicago, etc., R. Co. v. Payne*, 49 Ill. 499.

Instructions Held Not Contradictory. — An instruction that a person of mature age, in order to ratify a contract made by him during infancy, must know that he is not bound by such contract is not inconsistent with another instruction that every person of sound mind and mature age is presumed to know the law. *Ogborn v. Hoffman*, 52 Ind. 439.

There is no inconsistency between instructions which on the one hand require a user to be shown, and on the other hand explain the character of the user referred to. *State v. Bradley*, 31 Mo. App. 308. For other instances of instructions held not conflicting, see *Rieger v. Swan*, 1 Misc. Rep. (N. Y. City Ct.) 484; *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa 364; *Larkin v. Burlington, etc., R. Co.*, 91 Iowa 654; *White v. Adams*, 77 Iowa 295; *Church v. Chicago, etc., R. Co.*, 119 Mo. 203; *Hannah v. Baylor*, 27 Mo. App. 302.

5. *Miller v. Florer*, 19 Ohio St. 356; *Baltimore, etc., R. Co. v. Lafferty*, 2

the giving of such instructions is erroneous, and almost invariably held a ground of reversal.¹ It is not for the jury to select

W. Va. 104; *Palmer v. People*, 138 Ill. 356; *Achenbach v. Fesser*, 55 Ill. App. 580; *Clark v. Pearson*, 53 Ill. App. 310; *McLean County Bank v. Mitchell*, 88 Ill. 52; *Cumberland Coal, etc., Co. v. Tilghman*, 13 Md. 74; *May v. State*, 35 Tex. 650; *Straat v. Hayward*, 37 Mo. App. 585; *Seymour v. Seymour*, 67 Mo. 303.

A party cannot present two inconsistent propositions, and induce the court to grant one of them, and then complain because it did not grant the other also. *Groff v. Hansel*, 33 Md. 161.

1. *California*. — *Haight v. Vallet*, 89 Cal. 249; *People v. Valencia*, 43 Cal. 552; *McCreery v. Everding*, 44 Cal. 246; *Chidester v. Consolidated People's Ditch Co.*, 53 Cal. 56; *People v. Wong Ah Ngow*, 54 Cal. 154; *Aguirre v. Alexander*, 58 Cal. 26; *Black v. Sprague*, 54 Cal. 266; *Sappenfield v. Main St., etc., R. Co.*, 91 Cal. 48; *People v. Campbell*, 30 Cal. 312; *Cunningham's Estate*, 52 Cal. 465; *People v. Elliott*, 90 Cal. 586; *Harrison v. Spring Valley Hydraulic Gold Co.*, 65 Cal. 376; *Brown v. McAllister*, 39 Cal. 573; *Clark v. McElvy*, 11 Cal. 154; *People v. Ah Luck*, 62 Cal. 503; *People v. Higgins*, (Cal. 1886) 12 Pac. Rep. 301.

Colorado. — *Denver v. Capelli*, 4 Colo. 25; *Boulder v. Niles*, 9 Colo. 421; *Clare v. People*, 9 Colo. 122; *Mackey v. People*, 2 Colo. 13; *Ritchey v. People*, 23 Colo. 314.

Idaho. — *Holt v. Spokane, etc., R. Co.*, (Idaho 1893) 35 Pac. Rep. 39.

Illinois. — *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Quinn v. Donovan*, 85 Ill. 196; *Leyenberger v. Paul*, 12 Ill. App. 635; *Knowlton v. Fritz*, 5 Ill. App. 217; *Litchfield v. Ward*, 32 Ill. App. 392; *Kankakee Stone, etc., Co. v. Kankakee*, 128 Ill. 173; *Grim v. Murphy*, 110 Ill. 271.

Indiana. — *McCole v. Loehr*, 79 Ind. 432; *McEntire v. Brown*, 28 Ind. 347; *Somers v. Pumphrey*, 24 Ind. 231; *Kirland v. State*, 43 Ind. 146; *Bradley v. State*, 31 Ind. 492; *Smith v. Rodecap*, 5 Ind. App. 81; *State v. Sutton*, 99 Ind. 307; *Summerlot v. Hamilton*, 121 Ind. 91; *Fowler v. Wallace*, 131 Ind. 355; *Anderson v. Oscamp*, (Ind. App. 1893) 35 N. E. Rep. 707; *Wenning v. Teeple*, 144 Ind. 189.

Iowa. — *Conway v. Illinois Cent. R.*

Co., 50 Iowa 465; *Price v. Mahoney*, 24 Iowa 582; *Hamilton v. State Bank*, 22 Iowa 306; *Hoben v. Burlington, etc., R. Co.*, 20 Iowa 562; *State v. Hartzell*, 58 Iowa 520; *Hart v. Chicago, etc., R. Co.*, 56 Iowa 166; *Moore v. Des Moines, etc., R. Co.*, 69 Iowa 491; *Vanslyck v. Mills*, 34 Iowa 375; *Davis v. Stohm*, 17 Iowa 421; *Hawes v. Burlington, etc., R. Co.*, 64 Iowa 315; *State v. Shelton*, 64 Iowa 333; *Pumphrey v. Walker*, 75 Iowa 408; *State v. Keasling*, 74 Iowa 528.

Kentucky. — *Tate v. Parrish*, 7 T. B. Mon. (Ky.) 325; *Hawkins v. Robinson*, 3 T. B. Mon. (Ky.) 143; *Clay v. Miller*, 3 T. B. Mon. (Ky.) 149; *Ferguson v. Fox*, 1 Metc. (Ky.) 83.

Massachusetts. — *Moor v. Harvey*, 125 Mass. 574.

Michigan. — *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274; *Comstock v. Smith*, 26 Mich. 306; *Hyde v. Shank*, 77 Mich. 517.

Minnesota. — *McCormick v. Kelly*, 28 Minn. 135.

Mississippi. — *Whitfield v. Westbrook*, 40 Miss. 311; *Cunningham v. State*, 56 Miss. 269; *Mississippi Cent. R. Co. v. Miller*, 40 Miss. 45; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Herndon v. Henderson*, 41 Miss. 584; *Solomon v. City Compress Co.*, 69 Miss. 319.

Missouri. — *Otto v. Bent*, 48 Mo. 23; *Henschen v. O'Bannon*, 56 Mo. 289; *Jones v. Talbot*, 4 Mo. 279; *Jones v. Chicago, etc., R. Co.*, 59 Mo. App. 137; *Buel v. St. Louis Transfer Co.*, 45 Mo. 562; *Wood v. The Steamboat Fleetwood*, 19 Mo. 529; *Pond v. Wyman*, 15 Mo. 175; *Hickam v. Griffin*, 6 Mo. 37; *Fink v. Algermissen*, 25 Mo. App. 186; *Martinowsky v. Hannibal*, 35 Mo. App. 70; *Stone v. Hunt*, 94 Mo. 475; *Frank v. Grand Tower, etc., R. Co.*, 57 Mo. App. 181; *St. Louis Type Foundry v. Union Printing, etc., Co.*, 3 Mo. App. 142; *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439; *Hickman v. Link*, 116 Mo. 123; *Price v. Hannibal, etc., R. Co.*, 77 Mo. 508; *Lampert v. Laclede Gas-Light Co.*, 12 Mo. App. 576; *Stevenson v. Hancock*, 72 Mo. 612; *Carder v. Primm*, 1 Mo. App. 167; *Union Bank v. First Nat. Bank*, 2 Mo. App. Rep. 990; *Spillane v. Missouri Pac. R. Co.*, 111 Mo. 555; *Frederick v. Allgaier*, 88 Mo. 598.

from contradictory instructions those which correctly express the law. Where an instruction is clearly and fully withdrawn, no harm results, but where it is simply contradicted by another instruction it is otherwise.¹ To warrant a reversal for contradictory instructions it is enough to know that error may have intervened,² and it has been said that a reversal cannot be refused merely because the record does not show affirmatively that injury has been done.³

Montana. — *Kelley v. Cable Co.*, 7 Mont. 70; *Territory v. Owings*, 3 Mont. 137; *Keene v. Welsh*, 8 Mont. 305.

Nebraska. — *Wasson v. Palmer*, 13 Neb. 376; *School Dist. v. Foster*, 31 Neb. 501; *Fitzgerald v. Meyer*, 25 Neb. 77; *Ballard v. State*, 19 Neb. 610.

New York. — *People v. Levalie*, 6 N. Y. App. Div. 230.

Ohio. — *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1.

Pennsylvania. — *Selin v. Snyder*, 11 S. & R. (Pa.) 319; *Gearing v. Lacher*, 146 Pa. St. 397; *House v. Fultz*, 13 Smed. & M. (Miss.) 39; *Wolf v. Wolf*, 158 Pa. St. 621; *Livingston v. Stevenson*, 163 Pa. St. 262.

Texas. — *Baker v. Ashe*, 80 Tex. 356; *Kraus v. Haas*, 6 Tex. Civ. App. 665.

Vermont. — *Bovee v. Danville*, 53 Vt. 183.

West Virginia. — *McMechen v. McMechen*, 17 W. Va. 683; *Hess v. Johnson*, 3 W. Va. 645.

Wisconsin. — *Sears v. Loy*, 19 Wis. 96; *Imhoff v. Chicago, etc., R. Co.*, 20 Wis. 344.

United States. — *Bank of Metropolis v. New England Bank*, 6 How. (U. S.) 212.

Instances of Instruction Held Inconsistent and Contradictory. — In an action for malicious prosecution, to instruct that if the defendant sincerely designed to reform the manners of the plaintiff, but in pursuing that design wilfully inflicted a wrong not warranted by law, such wrong is malicious, is contradictory and therefore erroneous. *Whitfield v. Westbrook*, 40 Miss. 311. An instruction at the instance of the plaintiff that the jury could not consider the defendant an indorser merely, unless they find that at the time of signing the note, and before its delivery to the plaintiff, an agreement had been made between him and the defendant that he should be considered an indorser, and an instruction given at the instance of the defendant that if they found that

the defendant put his name on the note with the understanding that he was to be treated as an indorser, and the plaintiff knew this when he received it, they must find for the defendant, are contradictory. *Otto v. Bent*, 48 Mo. 23. In an action on a promissory note, where the defense was the statute of limitations, and on the trial the issue was whether the defendant had been residing out of the commonwealth, instructions that if he resided out of the commonwealth his intention was immaterial, and that if the jury were in doubt as to his residence they might consider his intention as matter of evidence, are contradictory and insufficient. *Moorar v. Harvey*, 125 Mass. 574. So where in one part of the charge the jury were instructed that the plaintiff may recover without reference to the truth or falsity of the representations, and in another that he cannot recover unless the representations are false, such instructions are inconsistent and calculated to confuse. *Baker v. Ashe*, 80 Tex. 356. Where an indictment charged that whiskey was drunk with defendant's permission, an instruction that although the jury should believe from the evidence that the purchaser drank the whiskey in the defendant's store, as charged in the indictment, yet if they believe that he drank it without the knowledge or consent of the defendant they will find him not guilty, is contradictory. *May v. State*, 35 Tex. 650.

1. *McCole v. Loehr*, 79 Ind. 430.

2. *Boulder v. Niles*, 9 Colo. 421.

Instance. — Thus on a trial for murder, where two parts of the charge are contradictory, and one is correct and the other not, the judgment of conviction will be reversed even though the appellate court may be satisfied from the evidence that the jury ought to have found the defendant guilty. *People v. Valencia*, 43 Cal. 552.

3. *Adams v. Capron*, 21 Md. 187

b. REASON FOR RULE. — The reason for the rule is obvious, for where the instructions on a material point are contradictory it is impossible for the jury to decide which should prevail,¹ and it is equally impossible after verdict to ascertain what instructions the jury did follow.²

c. WHETHER ERRONEOUS INSTRUCTION CURED BY SUBSEQUENT CORRECT INSTRUCTIONS. — It is clear, then, from what has been said, that an error in an instruction is not cured by a subsequent contradictory instruction laying down a correct rule,³ unless the erroneous instruction is expressly withdrawn,⁴ and if the court gives a correct instruction and afterwards gives another

1. *Haight v. Vallet*, 89 Cal. 249; *Wasson v. Palmer*, 13 Neb. 376; *Ballard v. State*, 19 Neb. 609; *McCole v. Loehr*, 79 Ind. 430.

2. *California.* — *Haight v. Vallet*, 89 Cal. 249; *Chidester v. Consolidated Peoples' Ditch Co.*, 53 Cal. 56; *McCreery v. Everding*, 44 Cal. 246; *Black v. Sprague*, 54 Cal. 266; *Sappenfield v. Main St., etc.*, R. Co., 91 Cal. 48.

Colorado. — *Macky v. People*, 2 Colo. 13; *Denver v. Capelli*, 3 Colo. 235; *Boulder v. Niles*, 9 Colo. 421.

Illinois. — *Leyenberger v. Paul*, 12 Ill. App. 635; *Quin v. Donovan*, 85 Ill. 194.

Indiana. — *McCole v. Loehr*, 79 Ind. 430.

Iowa. — *Hawes v. Burlington, etc.*, R. Co., 64 Iowa 315; *Conway v. Illinois Cent. R. Co.*, 50 Iowa 465; *State v. Keasling*, 74 Iowa 528.

Missouri. — *Fink v. Algermissen*, 25 Mo. App. 186; *Henschen v. O'Bannon*, 56 Mo. 289; *State v. Herrell*, 97 Mo. 105.

Montana. — *Keene v. Welsh*, 8 Mont. 305.

Nebraska. — *School Dist. v. Foster*, 31 Neb. 501.

West Virginia. — *McMechen v. McMechen*, 17 W. Va. 683.

It is impossible after verdict to know that the jury was not influenced by that instruction which was erroneous, as the one or the other must necessarily be where the two are repugnant. *Haight v. Vallet*, 89 Cal. 249.

3. *Illinois.* — *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Wilbur v. Wilbur*, 129 Ill. 392; *Wabash, etc., R. Co. v. Shacklet*, 105 Ill. 364; *Chicago, etc., R. Co. v. Catholic Bishop*, 119 Ill. 525; *Counselman v. Collins*, 35 Ill. App. 68.

Indiana. — *McEntire v. Brown*, 28 Ind. 347; *McDougal v. State*, 88 Ind. 24.

Iowa. — *State v. Keasling*, 74 Iowa 528.

Kentucky. — *Clay v. Miller*, 3 T. B. Mon. (Ky.) 149.

Mississippi. — *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Herndon v. Henderson*, 41 Miss. 584.

Missouri. — *Jones v. Talbot*, 4 Mo. 279; *Fink v. Algermissen*, 25 Mo. App. 186; *Safety Fund Nat. Bank v. Westlake*, 21 Mo. App. 565; *Hickman v. Griffin*, 6 Mo. 37; *State v. Clevenger*, 25 Mo. App. 653; *Welch v. Hannibal, etc., R. Co.*, 20 Mo. App. 477; *Goetz v. Hannibal, etc., R. Co.*, 50 Mo. 472; *Flynn v. Union Bridge Co.*, 42 Mo. App. 529; *George v. Wabash Western R. Co.*, 40 Mo. App. 433; *State v. Nauert*, 2 Mo. App. 295.

Nebraska. — *Wasson v. Palmer*, 13 Neb. 376; *Fitzgerald v. Meyer*, 25 Neb. 77; *McCleneghan v. Omaha, etc., R. Co.*, 25 Neb. 523.

Pennsylvania. — *Gearing v. Lacher*, 146 Pa. St. 397; *Catasuqua Mfg. Co. v. Hopkins*, 141 Pa. St. 30.

Texas. — *Baker v. Ashe*, 80 Tex. 356.

Wisconsin. — *Imhoff v. Chicago, etc., R. Co.*, 20 Wis. 344.

Error in Opponent's Instructions. — The giving of a correct instruction upon a point will not obviate an error in an instruction on the other side where they are entirely variant, and there is nothing to show the jury which to adopt. *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Jones v. Talbot*, 4 Mo. 279; *Baker v. Ashe*, 80 Tex. 356.

4. *Imhoff v. Chicago, etc., R. Co.*, 20 Wis. 344; *Baker v. Ashe*, 80 Tex. 361; *San Antonio, etc., R. Co. v. Robinson*, 73 Tex. 277; *Gulf, etc., R. Co. v. White*, (Tex. Civ. App. 1895) 32 S. W. Rep. 322; *Lufkins v. Collins*, 2 Idaho 136; *Jones v. Talbot*, 4 Mo. 279; *McCole v. Loehr*, 79 Ind. 432; *Heyl v. State*, 109 Ind. 589.

nullifying it the error will operate to reverse.¹ A contradiction between two instructions, so far from correcting the evils of either, multiplies them in both.²

d. WHEN CONTRADICTORY INSTRUCTIONS HARMLESS. — It has been said that a judgment will not be reversed because of contradictory instructions where it is clear to the court that the erroneous instructions did not mislead the jury,³ and that "circumstances might possibly occur" where such inconsistent instructions might not work confusion in the mind of the jury.⁴ While it is not easy for the ordinary mind to conceive how it could be made clear to a reviewing court that a jury were not misled by contradictory instructions,⁵ it is nevertheless true that the giving of such instructions will not always work a reversal. This exception to the rule is exemplified by the giving of contradictory instructions, the one least favorable to the party complaining being correct, and the one most favorable to him being incorrect.⁶

1. *People v. Campbell*, 30 Cal. 312.

2. *State v. Nauert*, 2 Mo. App. 295.

3. *Imhoff v. Chicago*, etc., R. Co., 20 Wis. 344. See also *Union Pac. R. Co. v. Milliken*, 8 Kan. 647.

4. *Bovee v. Danville*, 53 Vt. 183.

5. In *Union Pac. R. Co. v. Milliken*, 8 Kan. 651, a case where contradictory instructions were given, the court quoted as follows from *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 193: "There was error in this, unless we can see clearly that it was neutralized by what preceded it. How is it possible to ascertain this? Can we suppose it made no impression? The jury heard it; it had meaning, and was given to guide them to what principles they were bound to apply the facts, and it was almost the last words that fell on their ears in closing this part of the instructions. It will not do to hope or conjecture that a false rule will do no evil because a true one was also given. To a court it would have been harmless, but how was a jury to say which was right and which was wrong?"

6. *St. Joseph*, etc., R. Co. *v. Grover*, 11 Kan. 302; *Carroll v. People*, 136 Ill. 456; *Williams v. Southern Pac. R. Co.*, 110 Cal. 457; *Reardon v. Missouri Pac. R. Co.*, 114 Mo. 384; *Lobdell v. Hall*, 3 Nev. 515, in which the court said: "The rule that a case must be reversed where instructions on a material point are contradictory is not as unqualified as appellant contends for. If one party asks for an instruction

which is given by the court, laying down a rule of law in language too broad and unqualified, and the other side then asks an instruction, which is also given, which qualifies and limits the former instruction, and in some respects contradicts it, if the second instruction contains only sound law, the conflict between the two instructions is not an error of which the party can complain who obtained the instruction which was too broad and unqualified. It might be that this was error injurious to the other side, for the jury might not understand that one instruction was a modification of the other, and might be misled by the too broad language of the first. But they could not do wrong by being governed by the modification. The error could not be complained of by the party who got the wrong instruction, or the instruction not properly qualified and guarded."

Error Favorable to Party Complaining.

— In an action upon certain promissory notes, where the defense was an agreement for an extension of time made by the agent of the plaintiff, and no claim was made by the pleadings of a subsequent ratification of such agreement by the plaintiff, it was held that while an instruction which submitted the question of subsequent ratification to the jury might have been erroneous, it was without prejudice to the defendants. *Miller v. Root*, 77 Iowa 545.

Instructions Apparently Conflicting. —

Unless a party is prejudiced or the jury misled by apparently conflicting in-

c. APPELLATE REVIEW. — If on appeal it is assigned as error that the instructions were contradictory, but no contradiction is pointed out, and none is apparent to the reviewing court, and no exceptions were taken upon the trial, the assignment will not be available.¹

7. As to Length and Number of Instructions — *a.* PRACTICE OF ASKING AND GIVING NUMEROUS AND LENGTHY INSTRUCTIONS CONDEMNED. — The practice of asking or giving large numbers of instructions, or instructions drawn out to a great length,² especially when argumentative in form,³ has been repeatedly condemned by reviewing courts as a pernicious practice, tending to confuse and mislead the jury by obscuring the real points in issue. The practice is further condemned because it entails unnecessary labor both on the trial and reviewing courts,⁴ and because the chances of error getting into the record are largely increased.⁵

structions, there is no ground of reversal. *Witherby v. Thomas*, 55 Cal. 9.

1. *Emerson v. Ross*, 17 Fla. 122.

2. *Arkansas*. — *Haney v. Caldwell*, 43 Ark. 184; *Sweeney v. State*, 35 Ark. 585; *Hanger v. Evins*, 38 Ark. 338.

Illinois. — *Dunn v. People*, 109 Ill. 646; *Springdale Cemetery Assoc. v. Smith*, 24 Ill. 480; *Citizens' Gaslight, etc., Co. v. O'Brien*, 19 Ill. App. 231; *Chicago, etc., R. Co. v. Kelly*, 25 Ill. App. 19.

Iowa. — *McCaleb v. Smith*, 22 Iowa 244.

Maryland. — *Cumberland Coal, etc., Co. v. Scally*, 27 Md. 603.

Mississippi. — *Mabry v. State*, 71 Miss. 716; *Clarke v. Edwards*, 44 Miss. 778.

Missouri. — *Crews v. Kansas City, etc., R. Co.*, 19 Mo. App. 302; *Desberger v. Harrington*, 28 Mo. App. 636.

On a trial of a criminal case in Mississippi the court said: "We commend the discretion and the just conception of official duty which combined all the law necessary for the prosecution in the case in four brief and simple instructions." *Moriarty v. State*, 62 Miss. 661.

Instructions Held Not Too Numerous. —

On the trial of a criminal case it was held that five instructions, each of which was made into matter pertaining to the case, and stated the law fairly to the jury, were not so numerous or perplexing as to work a reversal. *Scolf v. Com.*, (Ky. 1887) 5 S. W. Rep. 361.

3. *Roe v. Taylor*, 45 Ill. 485; *Rockford Ins. Co. v. Nelson*, 75 Ill. 548; *Merritt v. Merritt*, 20 Ill. 80; *Mutual*

Ben. L. Ins. Co. v. French, 2 Cinc. Super. Ct. Rep. 321; *Hannibal v. Richards*, 35 Mo. App. 22.

4. *Gelvin v. Kansas City, etc., R. Co.*, 21 Mo. App. 280. See *Chicago, etc., R. Co. v. Kelly*, 25 Ill. App. 19; *Adams v. Smith*, 58 Ill. 418; *Mabry v. State*, 71 Miss. 716.

5. *Ingram v. State*, 62 Miss. 142; *Mabry v. State*, 71 Miss. 716; *Deering v. Collins*, 38 Mo. App. 73; *Citizens' Gaslight, etc., Co. v. O'Brien*, 19 Ill. App. 231; *Chicago, etc., R. Co. v. Kelly*, 25 Ill. App. 19; *Adams v. Smith*, 58 Ill. 418.

In *Ingram v. State*, 62 Miss. 142, the court said that the frequent commission of error in instructions in criminal cases suggests the opinion that it would promote the just administration of the law and advance the interests of the state if it were the practice in circuit courts to give fewer instructions; that in many cases it would be wise to give no instructions at all for the state; and that in none is it prudent to give many; that by the adoption of such a course, convictions would be as numerous and reversals would be rare. In *Citizens' Gaslight, etc., Co. v. O'Brien*, 19 Ill. App. 234, forty-two instructions, covering thirteen pages of the printed abstract, were presented to the court by the appellant. The court said: "To launch such a mass of legal conundrums upon a court, which can never enlighten a jury, but are generally drawn with the real, if not avowed, purpose of getting error into the record and entangling the court in some technical contradiction that may

Instructions Ought to Be as Few as Practicable in view of the evidence; couched in plain, simple language, addressed, as they usually are, to common understanding; and where they are so, and conform to the principles and policy of the law, it is enough.¹

b. JURY NOT TO BE LEFT UNINSTRUCTED BECAUSE OF TOO NUMEROUS REQUESTS. — It is not to be understood, however, from anything said, that the court may refuse instructions on account of their length or number, and leave the jury uninstructed *in toto*.² The court should either select so many of the instructions as the party asking is reasonably entitled to,³ or take the instructions asked by counsel "and embody the law contained in them and applicable to the case in a concise, perspicuous charge."⁴

Contrary Doctrine. — In one state alone are there any decisions which seem to maintain a contrary doctrine. In *Missouri* it is said, in a number of decisions, that the court would have been justified in refusing the instructions on the ground of their number alone; but an examination of these decisions will show that in each case the trial court either selected such of the instructions

be used in a higher court, is a perversion of the law of instructing jurors."

1. *Parrish v. State*, 14 Neb. 62; *Hanger v. Evins*, 38 Ark. 338; *Citizens' Gaslight, etc., Co. v. O'Brien*, 19 Ill. App. 231; *Roe v. Taylor*, 45 Ill. 485; *People v. Ah Fung*, 17 Cal. 377; *People v. Gibson*, 17 Cal. 283.

A Few Plain Propositions embracing the law upon the facts of the case are greatly to be preferred in every case to a long string of instructions running into each other and involved in intricacies, requiring as much elucidation as the facts of the case themselves. *State v. Mix*, 15 Mo. 159; *State v. Ward*, 19 Nev. 297.

2. *Andrews v. Runyon*, 65 Cal. 629; *Chicago West Div. R. Co. v. Haviland*, 12 Ill. App. 561; *Lowry v. Beckner*, 5 B. Mon. (Ky.) 42; *Mabry v. State*, 71 Miss. 716, in which it was said: "The first thirty-two instructions asked by the accused were given, and the next seven were refused. We draw the line far this side of thirty-two instructions on one side. Life is too short and time too precious to be expended in dealing with fifty-three instructions, or any such number in one case; and as all terrestrial things have limits, we have determined to announce that where the court, in any case, has given the first six, eight, or ten instructions asked by a party, and refused any more, we

will not consider errors assigned as to such refused instructions, unless it shall appear that the jury was not furnished a sufficient guide for their proper determination of the case."

3. *Chicago West Div. R. Co. v. Haviland*, 12 Ill. App. 561.

4. *Bank v. Gallup*, 111 Ill. 487; *Hanger v. Evins*, 38 Ark. 334; *Steamboat Blue Wing v. Buckner*, 12 B. Mon. (Ky.) 246; *Lowry v. Beckner*, 5 B. Mon. (Ky.) 42; *Murphy v. Chicago, etc., R. Co.*, 38 Iowa 539; *McCaleb v. Smith*, 22 Iowa 244. In this case it is said that the practice of refusing to give instructions because they were unnecessarily lengthy and numerous would be a most dangerous one, and ought not to receive the sanction of an appellate tribunal.

Where numerous and complicated instructions are asked by counsel, calculated, in the opinion of the judge, to embarrass the jury, he has a right to refuse all, and to give such prepared by himself as may illustrate the principles of the law involved in the controversy and asked for by the parties. But whenever this course is taken, the judge should be careful to include in his instructions all the principles of law embraced in the instructions asked on both sides which should be given. *Lowry v. Beckner*, 5 B. Mon. (Ky.) 43.

asked as were necessary to present the case to the jury, or sufficiently instructed the jury of its own motion.¹

8. Framing Instructions Hypothetically. — As a general rule, instructions to the jury should be hypothetical in form.²

1. *Doan v. St. Louis, etc., R. Co.*, 43 Mo. App. 450; *Kinney v. Springfield*, 35 Mo. App. 97; *Hannibal v. Richards*, 35 Mo. App. 15; *McAllister v. Barnes*, 35 Mo. App. 668; *Desberger v. Harrington*, 28 Mo. App. 636; *Renshaw v. Fireman's Ins. Co.*, 33 Mo. App. 394; *Norton v. St. Louis, etc., R. Co.*, 40 Mo. App. 646.

In *Hannibal v. Richards*, 35 Mo. App. 15, we find the following statement by Judge Thompson: "In *Andrews v. Runyon*, 65 Cal. 634, it was held error to refuse to give *any* instructions merely because of the number and length of those requested. But contrary to this view, it has been held by our Supreme Court and by this court that where the issues are simple and few, and a multitude of instructions is presented to the court, the court is justified in refusing them all by reason of their number alone. *Crawshaw v. Sumner*, 56 Mo. 521; *Desberger v. Harrington*, 28 Mo. App. 636." It may be reasonably inferred from this quotation that Judge Thompson thinks that the trial court may properly refuse to give any instructions at all in behalf of a party whose requests for instructions are too lengthy and numerous. But neither of the cases thus cited nor any of the other Missouri decisions support this doctrine. In *Desberger v. Harrington*, 28 Mo. App. 636, the court, relying on the authority of *Crawshaw v. Sumner*, 56 Mo. 521, said that "as the issues were simple and few, and a multitude of instructions could only tend to confound the jury, the court would have been fully justified * * * to refuse all the instructions asked by the plaintiff, on account of their number alone," but it appears that in this case the court gave some of the instructions asked — presumably as many as were necessary to present the case fully to the jury. In *Crawshaw v. Sumner*, 56 Mo. 521, we find this statement: "The plaintiffs asked twenty-five instructions, which were refused. We think it unnecessary to transcribe them, as the number of them alone is sufficient to justify a court in refusing them. Such a multiplicity of instructions

would only tend to confuse the jury. The points of law in the case were few — indeed substantially only two — and twenty-five instructions could only be comments on particular parts of the testimony or repetitions of a principle of law, neither of which it is the duty of a court to give if the instructions given cover the whole ground of dispute." Although the first part of this quotation may give color to the dicta of the later Missouri decisions, the whole statement should be taken together, and if this is done it is very clear that the court meant to limit the doctrine to cases where the court gave other instructions sufficient to cover the whole case. In this case, also, it appears that the instructions given fully presented the case to the jury. What has been said here in criticism of Judge Thompson's dictum is further supported by *State v. Ott*, 49 Mo. 326, in which it was held that "where counsel insist upon offering such a multitude of verbose instructions, the obvious tendency of which is to confuse the jury rather than enlighten or guide them, it would conduce to the administration of justice for the courts to refuse them altogether, and to give of their own motion a few clear, precise, and intelligent instructions, covering the law in the case."

2. *Chiles v. Booth*, 3 Dana (Ky.) 566; *Bucklin v. Thompson*, 1 J. J. Marsh. (Ky.) 226; *Stout v. Cloud*, 5 Litt. (Ky.) 207; *St. Louis, etc., R. Co. v. Vincent*, 36 Ark. 451; *People v. Levison*, 16 Cal. 98. See also *Baltimore, etc., R. Co. v. Skeels*, 3 W. Va. 556; *Bundy v. McKnight*, 48 Ind. 502; *Gowen v. Kehoe*, 71 Ill. 66.

"Every instruction asked for should be hypothetical, that is, predicated upon the supposition that the jury find certain facts to be proved or disproved; then the legal consequence resulting therefrom is one way or the other." *State Bank v. McGuire*, 14 Ark. 530.

The court should, as a general rule, instruct the jury hypothetically, and not assign a conclusive effect to circumstances, or assume that such circumstances were proven. In the absence of opposing proof they are

If There Is Any Conflict in the Evidence the court should instruct the jury hypothetically, stating the law applicable to such facts as there is evidence tending to prove, and leaving the jury to apply the law laid down in the instruction, in case they find the facts in accordance with the hypothesis.¹

If There Is Nothing to Counteract the Evidence and it would be the duty of the court to set aside the verdict contrary thereto, it would seem that the court may properly assume the facts as proved and instruct accordingly.²

Form of Hypothesis. — A charge presenting a hypothetical case should embrace all the circumstances in evidence bearing on the subject.³

9. Statement of Issues — a. DUTY OF COURT TO STATE ISSUES WITHOUT REFERRING JURY TO PLEADINGS — (1) *Statement*

sometimes conclusive, but not generally; and it should always be left to the jury to determine whether those circumstances are established. *People v. Levison*, 16 Cal. 98.

1. *Alabama*. — *Carlisle v. Hill*, 16 Ala. 398.

Arkansas. — *Britt v. Aylett*, 11 Ark. 475.

Illinois. — *Irwin v. Atkins*, 12 Ill. App. 431; *Sherman v. Dutch*, 16 Ill. 283; *Hopkinson v. People*, 18 Ill. 266; *Wall v. Goodenough*, 16 Ill. 415; *Eames v. Blackhart*, 12 Ill. 195.

Kentucky. — *Smith v. Roberson*, 5 J. J. Marsh. (Ky.) 636; *Bucklin v. Thompson*, 1 J. J. Marsh. (Ky.) 226.

Mississippi. — *Wilson v. Williams*, 52 Miss. 487.

Missouri. — *Watson v. Musick*, 2 Mo. 29; *Linville v. Welch*, 29 Mo. 203.

Nebraska. — *Bartling v. Behrends*, 20 Neb. 211.

New York. — *Doughty v. Hope*, 3 Den. (N. Y.) 594.

Pennsylvania. — *Bartley v. Williams*, 66 Pa. St. 329; *Sweitzer v. Hummel*, 3 S. & R. (Pa.) 228; *Pennsylvania R. Co. v. McTighe*, 46 Pa. St. 316.

South Carolina. — *Devereux v. Champion Cotton Press Co.*, 17 S. Car. 72.

Inconsistent Defenses. — Inconsistent defenses may be submitted to the jury with instructions that if either is sustained the plaintiff cannot recover. *Stewart v. Dougherty*, 12 Leg. Int. (Pa.) 183.

Request for Instructions. — Where a point is put to the court upon oral testimony it must always state the evidence hypothetically, leaving it to the jury to determine what the fact is and then to apply it to the instruction of

the court as given upon the supposed state of the fact. *Bartley v. Williams*, 66 Pa. St. 329.

If a party wishes to obtain instructions on a given hypothesis he must state the facts hypothetically, if they are controverted, and if disputed facts are assumed in a point propounded by one of the parties it may properly be refused. *Pennsylvania R. Co. v. McTighe*, 46 Pa. St. 316.

It is not error to refuse to charge that if the jury believe certain witnesses they must find for the party in whose favor they testify; and the facts should be hypothetically stated, leaving the jury to decide whether they were proved. *Chapman v. Erie R. Co.*, 55 N. Y. 579.

2. *Chiles v. Booth*, 3 Dana (Ky.) 566; *Bucklin v. Thompson*, 1 J. J. Marsh. (Ky.) 226; *Doughty v. Hope*, 3 Den. (N. Y.) 594. See also *supra*, IV. 2. *What May Be Assumed in Instructions and Requests.*

A defendant may successfully move the court for peremptory instructions to the jury, where he does so on the plaintiff's evidence alone, and admits every fact that the plaintiff's evidence conduces to prove, or he may himself mingle record evidence or undisputed evidence. But it is error to give peremptory instructions on motion of the defendant when he has introduced evidence of a parol character; the plaintiff has a right to controvert this, and the instructions should be hypothetical. *Dallam v. Handley*, 2 A. K. Marsh. (Ky.) 418.

3. *Meyer v. Blackmore*, 54 Miss. 570; *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607; *Dean v. Tucker*, 58 Miss. 487.

of Rule. — Although there are some decisions which hold that it is not error to read the pleadings to the jury, or to refer them to the jury in order that they may determine what are the issues in the case,¹ and other decisions holding that though not erroneous such practice is not commendable,² the clear weight of authority is to the effect that it is the province and duty of the court to state specifically to the jury what issues are raised by the pleadings, and that it is erroneous to refer the jury to the pleadings to ascertain for themselves what the issues were; that the construction of the pleadings and the issues raised thereby are questions for the court alone to determine, and not for the jury.³

Reason for Rule. — The difficulty which even learned judges often encounter in defining the issues as joined in the pleadings is argument sufficient in support of the rule. It would not conduce to a full and fair trial, that jurors, inexperienced in such matters, were left to determine the issues from the pleadings.⁴

1. *North Chicago City R. Co. v. Gastka*, 27 Ill. App. 518, *affirmed* in 128 Ill. 613; *Clouser v. Ruckman*, 104 Ind. 588; *Sturgeon v. Sturgeon*, 4 Ind. App. 232; *Baltzer v. Chicago, etc., R. Co.*, 89 Wis. 257.

2. *Ohio, etc., R. Co. v. Smith*, 5 Ind. App. 560; *Texas, etc., R. Co. v. Tankersley*, 63 Tex. 57.

The better practice is to make a charge complete in and of itself, instead of instructing the jury to predicate their verdict on facts pleaded in such a way as to require the jury to refer to the pleadings in order to understand the instructions. *Texas, etc., R. Co. v. Tankersley*, 63 Tex. 57.

3. *Iowa.* — *Hall v. Carter*, 74 Iowa 366; *McKinney v. Hartman*, 4 Iowa 154; *Beebe v. Stutsman*, 5 Iowa 271; *Potter v. Wooster*, 10 Iowa 334; *Reid v. Mason*, 14 Iowa 541; *Pharo v. Johnson*, 15 Iowa 560; *Hempstead v. Des Moines*, 52 Iowa 303; *Fitzgerald v. McCarty*, 55 Iowa 702; *Bryan v. Chicago, etc., R. Co.*, 63 Iowa 464; *Little v. McGuire*, 43 Iowa 447; *West v. Moody*, 33 Iowa 137; *Porter v. Knight*, 63 Iowa 367; *Gorman v. Minneapolis, etc., R. Co.*, 78 Iowa 509; *Hollis v. State Ins. Co.*, 65 Iowa 454; *Lindsay v. Des Moines*, 68 Iowa 368; *Keatley v. Illinois Cent. R. Co.*, 94 Iowa 685. Compare *Fannon v. Robinson*, 10 Iowa 275, in which the court says: "Because this [a statement of the issues] is the proper province of the court, it by no means follows that directions are to be given upon the subject of denials

and admissions in every case. In a proper and necessary case the court is to inform the jury specifically as to the issues involved, and not leave it to them to determine what they are. When the necessity for such a course does not exist, no such directions can be asked as a matter of right."

Kansas. — *Myer v. Moon*, 45 Kan. 580.

Kentucky. — *Tipton v. Triplett*, 1 Metc. (Ky.) 570.

Michigan. — *Wilbur v. Stoepel*, 82 Mich. 344.

Missouri. — *Remmler v. Shenuit*, 15 Mo. App. 192; *Hayes v. St. Louis, R. Co.*, 15 Mo. App. 584; *Cocker v. Cocker*, 2 Mo. App. 451; *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503; *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399; *Gessley v. Missouri Pac. R. Co.*, 26 Mo. App. 156; *Fleischmann v. Miller*, 38 Mo. App. 177; *Procter v. Loomis*, 35 Mo. App. 482; *Dassler v. Wisley*, 32 Mo. App. 498; *Butcher v. Death*, 15 Mo. 271; *Grant v. Hannibal, etc., R. Co.*, 25 Mo. App. 227.

North Carolina. — *Faircloth v. Isler*, 75 N. Car. 551.

Tennessee. — *East Tennessee, etc., R. Co. v. Lee*, 90 Tenn. 570.

Texas. — *Barkley v. Tarrant County*, 53 Tex. 251.

4. "The necessity of the judge defining the issues is too apparent to be questioned and, however pressing the demands may be upon the time of the court, a plain and concise statement of

How Issues Are Stated. — The court should instruct the jury as to what questions of fact are to be tried under the plead-

the issues should always be given to the jury." *Burns v. Oliphant*, 78 Iowa 456.

What Are Issues Within the Rule. — Matters of dispute arising upon the law of the evidence are not issues which the court must specifically present to the jury. *State v. Nadal*, 69 Iowa 478.

Instances of Instructions Held Erroneous Under This Rule. — Instructions should not tell the jury that if they find that the act was done, "as charged in the petition," etc., *Grant v. Hannibal*, etc., R. Co., 25 Mo. App. 227; or make a statement of this nature: "For a more precise and exact statement of the allegations of the parties and the issues in the case, see the pleadings themselves," *Lindsay v. Des Moines*, 68 Iowa 368; or say to the jury that the injuries complained of "are set out in plaintiff's declaration, which you will have out with you, and which you will read. In the defendant's plea, * * * which you will read, these wrongs and injuries are denied. * * * These pleadings form the issue which you * * * were sworn to well and truly try," *East Tennessee, etc., R. Co. v. Lee*, 90 Tenn. 570; or direct the jury to the petition for the "particular statement of fact upon which the plaintiff must recover, if he is entitled to recover at all," *Keatley v. Illinois Cent. R. Co.*, 94 Iowa 685.

Instructions Held Not Erroneous as Referring Jury to Pleadings for Issues. — The following instructions have been held not erroneous as referring the jury to the pleadings to ascertain the issues: An instruction that if the excavation "mentioned in plaintiff's petition" was made by the defendant contractor by permission of the city, and was made in the alley, "in the petition mentioned," *Britton v. St. Louis*, 120 Mo. 437; that upon the issue of contributory negligence raised by the defendant's answer, the burden of proof is upon the defendant, *Sherwood v. Grand Ave. R. Co.*, 132 Mo. 339; an instruction containing the following words: "as charged in the indictment," "as mentioned in the indictment," *State v. Scott*, 109 Mo. 226; an instruction containing the words: "in direct consequence of the acts herein complained of," it appearing that the

words quoted referred to acts complained of and specified in other instructions, *Taylor v. Scherpe*, etc., *Architectural Iron Co.*, 133 Mo. 349. See also *Jenks v. Lansing Lumber Co.*, (Iowa 1896) 66 N. W. Rep. 234, in which the court said: "In the first paragraph of the charge to the jury it was said that plaintiff claimed to be the owner of certain lots 'in said petition described,' and the property is not more definitely referred to in the instructions, but is throughout named as 'said premises, or property.' This is claimed to be error, because the jury was referred to the petition for the description of the property. We do not understand that the jury was referred to the petition to ascertain the numbers of lots, or the description of the property. The property was so designated by the evidence that a technical description was wholly unnecessary. The court stated the description in a general way, and this was sufficient. The instructions clearly and plainly stated the issues, and the jury was not directed to the pleadings to ascertain the issues."

Effect of Statute Forbidding an Expression of Opinion upon the Issues. — A statute (Maine Laws 1874, c. 212) which forbids the expression of opinion upon the issues of fact does not prohibit the judge from stating to the jury the questions upon which they are called to determine, or matters of fact which are not in dispute but appear in the case as admitted. *McLellan v. Wheeler*, 70 Me. 285.

Repetition Unnecessary. — Where the issues in the third division of an answer were substantially embraced in the second, it was held that the statement of the third division was unnecessary. *Richmond v. Sundburg*, 77 Iowa 255.

How Correctness of Instructions as to Issues Tested. — The correctness of an instruction must be determined by considering it in connection with the issues presented to the jury, but not with issues pleaded but not presented in the instructions. *Warbasse v. Card*, 74 Iowa 306.

Submitting Issue Not Raised by Pleadings — How Error Cured. — Where an instruction submitted one question which did not arise under the plead-

ings,¹ and should tell the jury what facts are denied and what facts stand admitted thereby.² It is erroneous to leave to the jury to determine whether a cause of action or defense has been stated,³ or to determine whether the evidence varies from the pleadings under which it is offered.⁴ The court may, however, properly omit to state an issue in support of which there is no evidence.⁵

Issue Withdrawn. — It is not necessary to instruct the jury as to an issue which has been withdrawn,⁶ even though there is some evidence in support of it.⁷

(2) *Limitations of Rule.* — Where, however, the pleadings contain a plain and simple statement of the matters in controversy, it has been held a sufficient statement of the issues to set out the pleadings and adopt them as a part of the instruction;⁸ and it has also been held that where references to the pleadings in the instruction are made for the purpose of shortening the instructions, and are not to the essential questions in the case, which

ings, but by other instructions the issues were properly submitted, and it was clear that the very question upon which the rights of the party depended was before the jury, it was held that this did not constitute reversible error. *Newton v. Ritchie*, 75 Iowa 91.

1. *Procter v. Loomis*, 35 Mo. App. 482; *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399; *Tipton v. Triplett*, 1 Metc. (Ky.) 570.

2. *Tipton v. Triplett*, 1 Metc. (Ky.) 570; *Butcher v. Death*, 15 Mo. 271.

3. *People v. Jackson County*, 92 Ill. 441; *Bradshaw v. Mayfield*, 24 Tex. 482. See also *Hall v. Renfro*, 3 Metc. (Ky.) 51, in which it was held erroneous to instruct that the jury are to construe and determine the effect of the pleadings.

Instructions Not Obnoxious to This Rule. — An instruction that if the plaintiff has made out his case as laid in his declaration the jury must find for the plaintiff, does not make the jury the judges of the effect of the averments of the declaration, but merely empowers them to determine whether the evidence introduced sustains the issues made by the pleadings in the case. *People v. Jackson County*, 92 Ill. 441. So an instruction directing a verdict for the plaintiff "if the jury believe * * * that the plaintiff has proven his declaration, or any one count thereof, in manner and form as therein set forth," does not require the jury to determine whether the cause of action is stated. *Illinois Cent. R. Co. v. Harris*, 162 Ill. 200.

4. *Oxley v. Storer*, 54 Ill. 159.

5. *Whalen v. Chicago, etc., R. Co.*, 75 Iowa 563; *Dupuy v. Burkitt*, 78 Tex. 338; *Carter v. Carusi*, 112 U. S. 478.

Thus where but one issue is made by the testimony, although others are made by the pleadings, it is proper that the charge be confined to the issues made by the evidence, and to refuse charges as to other issues not so made. *Dupuy v. Burkitt*, 78 Tex. 338.

6. *Stanford v. Murphy*, 63 Ga. 410; *Bugbee v. Kendrick*, 132 Mass. 349. *Fry v. Leslie*, 87 Va. 269; *New Haven Lumber Co. v. Raymond*, 76 Iowa 225. A refusal to give an instruction upon a count in a declaration which is not submitted to the jury is no ground of exception. *Bugbee v. Kendrick*, 132 Mass. 349. So where a plea of the statute of limitations has been stricken out a failure of the court to instruct as to its effect is no ground of complaint. *Fry v. Leslie*, 87 Va. 269; *Stanford v. Murphy*, 63 Ga. 410.

7. *Stanford v. Murphy*, 63 Ga. 410.

Withdrawing Evidence. — Where an issue has been withdrawn, the evidence bearing on that issue should be taken from the jury. *Hammer v. Chicago, etc., R. Co.*, 70 Iowa 623. But it has been held that where the court expressly charges the jury to consider only the issues submitted, a refusal to withdraw from the jury all the testimony bearing on such issues is not error. *Gulf, etc., R. Co. v. Shieder*, (Tex. Civ. App. 1894) 26 S. W. Rep. 509.

8. *Crawford v. Nolan*, 72 Iowa 673.

are apparent in the instructions, they are not objectionable.¹ So it has been held not erroneous to refer the jury to the pleadings to ascertain a narrative of the facts therein contained.²

Where Other Instructions Correctly State Issues.— While it is improper to direct the jury to the pleadings for the purpose of ascertaining what the issues are, such reference will not work a reversal if the issues are clearly stated in other instructions without regard to such reference.³

Reference to Pleadings by Agreement.— So, if the parties agree that the pleadings shall form part of the instruction, a failure to state the issues is no ground of complaint, although erroneous.⁴

Approval of Statement Given.— And if the statement of the issues is submitted to and approved by the parties before being given, they cannot be heard to complain of any imperfections therein.⁵

6. MANNER OF STATING ISSUES.— It is not necessary that the issues should all be stated in a single paragraph of the charge. It is sufficient if they are fully stated to the jury in some part of the charge, in such a manner as to be understood.⁶

1. *Corrister v. Kansas City, etc., R. Co.*, 25 Mo. App. 619.

2. *Marion v. Chicago, etc., R. Co.*, 64 Iowa 568; *Lanning v. Chicago, etc., R. Co.*, 68 Iowa 502.

3. *Dorr v. Simerson*, 73 Iowa 89; *Hall v. Carter*, 74 Iowa 364; *Helt v. Smith*, 74 Iowa 667; *Fuhs v. Osweiler*, 59 Iowa 431; *Probert v. Anderson*, 77 Iowa 60; *Morrison v. Burlington, etc., R. Co.*, 84 Iowa 663; *Hollis v. State Ins. Co.*, 65 Iowa 454; *Myer v. Moon*, 45 Kan. 580. See also *Lake Shore, etc., R. Co. v. McIntosh*, 140 Ind. 261.

4. *Burns v. Oliphant*, 78 Iowa 456.

5. *Sprague v. Atlee*, 81 Iowa 1, where the Supreme Court upheld an instruction which did not specifically refer to the issue presented by an amendment to the answer.

6. *Timins v. Chicago, etc., R. Co.*, 72 Iowa 94; *Muelhausen v. St. Louis R. Co.*, 91 Mo. 332. See also *Chicago, etc., R. Co. v. Groves*, 56 Kan. 611.

It is not improper to state in one instruction the issues as joined, and in another, if such be the fact, that the defendant has admitted the truth of the complaint in certain particulars. The two propositions are not inconsistent. *Haymond v. Saucer*, 84 Ind. 3.

Where the defense pleaded and the issues thereon are fairly and fully presented in an instruction, "it is as well presented in that connection as though it had been found in the statement of the pleadings and issues preceding the

instructions." *Siltz v. Hawkeye Ins. Co.*, 71 Iowa 710.

Stating Issues in Terms Raised by Pleadings.— There can be no error in submitting the issue to the jury in terms in which it is raised. *Planters Bank v. Alexandria Bank*, 10 Gill & J. (Md.) 346; *Hess v. Newcomer*, 7 Md. 342.

There can be no valid objection to a statement of the issues in the form in which they are made by the pleadings, even though an issue is thus presented on which, as a matter of law, there can be no recovery. *Fleming v. Shenandoah*, 71 Iowa 456.

Instructions Held Not Erroneous as Misstating Issues.— Where the petition charged negligence on the part of the engineer in backing up his train unusually fast, an instruction stating such cause of complaint referred to this allegation as being that "the parties in charge of the engine moved the train at an unusually fast rate of speed." The instruction was not erroneous in not properly stating the plaintiff's cause of action. *Beems v. Chicago, etc., R. Co.*, 58 Iowa 150.

Iowa—Statement of Issues to Be in Writing.— A statement of the issues should be in writing, and it is error to make such statement by reading from the pleadings portions which are not incorporated in the writings. *Hall v. Carter*, 74 Iowa 364; *State v. Birmingham*, 74 Iowa 407.

Ultimate Facts. — In stating the issues it will be sufficient to state the ultimate facts pleaded, where the pleadings contain matters of evidence instead of ultimate facts.¹

c. **EFFECT OF MISSTATEMENT.** — A misstatement of the issues in a case is, in general, reversible error.² But of course if it is apparent that no prejudice could have resulted, the judgment will not be reversed.³

d. **EFFECT OF IMPERFECT STATEMENT.** — In one jurisdiction it has been held that if the issues are imperfectly stated the party desiring a more specific instruction must call the attention of the court thereto by a request for a correct instruction, in order to secure a review by the Supreme Court,⁴ but in some states it is the duty of the court to instruct fully on all the issues presented by the pleading.⁵

10. Limiting Instructions to Pleadings and Evidence — *a.* **IN GENERAL** — (1) *Instructions to Be Based on Pleadings and Evidence.* — Instructions to a jury must be based upon, and be

1. *Murphey v. Virgin*, 47 Neb. 692.

2. *Howell v. Wilcox Sewing Mach. Co.*, 12 Neb. 177; *Klosterman v. Alcott*, 27 Neb. 685; *Reed v. Gould*, 93 Mich. 359; *Marquette, etc., R. Co. v. Marcott*, 41 Mich. 433; *Harley v. Merrill Brick Co.*, 83 Iowa 73. See also *Stafford v. Oskaloosa*, 57 Iowa 748, in which it was held that when the court, in stating the issues to the jury, stated that the amount claimed by the plaintiff was a certain amount, basing this statement upon both the original and the amended petitions, whereas the amount stated in the amended petition was not in addition to that stated in the original petition, such statement constituted error, but whether under the circumstances it was error without prejudice was not determined.

3. *Stark v. Willetts*, 8 Kan. 203, in which it was held that where the judge in charging the jury instructs them correctly as to the questions which they are called upon to consider and decide, under the pleadings and the evidence, he does not commit an error for which the judgment will be reversed, even if he misconstrues one of the pleadings in giving such an instruction. *Brown v. Hendrickson*, 69 Iowa 749, where it was held that the fact that the court in stating the issues to the jury confounds the action of trespass with trespass on the case does not constitute such error as will warrant a reversal.

4. *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578.

5. *Potter v. Chicago, etc., R. Co.*, 46 Iowa 399; *Hill v. Aultman*, 68 Iowa 630; *Gamble v. Mullin*, 74 Iowa 99; *State v. Brainerd*, 25 Iowa 572. See also *Galloway v. Hicks*, 26 Neb. 531.

If the court undertakes to state the issues it should do so fully, and give the jury such instructions in reference thereto as will enable them to apply the evidence understandingly to the principles of law contained in the charge of the court. *Potter v. Chicago, etc., R. Co.*, 46 Iowa 402.

The Rule in Indiana. — "An instruction which purports to set out all the material averments necessary to be proven in order to entitle the plaintiff to recover must be correct and complete," and an omission of any such material averment is fatal. *Jackson School Tp. v. Shera*, 8 Ind. App. 330. Thus in an action by an employee against his employer for injuries resulting from unsafe appliances, while in the line of his duty, the essential elements necessary to be established, in addition to the injury, before there can be a recovery, are (1) that the appliance was defective; (2) that the employer had notice thereof, or by reasonable diligence ought to have known it; (3) that the employee did not know of the defect, and did not have equal means of knowing with the employer; and if, in instructing the jury, any of these essential elements is omitted, such omission will constitute reversible error. *Kentucky, etc., Bridge Co. v. Eastman*, 7 Ind. App. 514.

applicable to, the pleadings and evidence.¹ Instructions should be neither broader² nor narrower³ than the pleadings, but should be predicated of all the issues raised by the pleadings and supported by the evidence,⁴ and they are equally faulty whether they enlarge or restrict the issues.⁵

It is **Erroneous to Submit to the Jury** an issue which is not warranted by the pleadings and evidence.⁶ Instructions should not divert

1. *Herron v. Cole*, 25 Neb. 692; *Dorsey v. McGee*, 30 Neb. 657; *Rayson v. Trumbo*, 52 Mo. 35; *Wright v. Fonda*, 44 Mo. App. 634; *Wilhelm v. Fimple*, 31 Iowa 131.

Instructions should correctly state the law applicable to the issues, and should submit all questions of fact arising in the case. *Grim v. Robinson*, 31 Neb. 540.

A charge ought not only to be correct as an abstract enunciation of the law, but to be so explicitly adapted to the pleadings and the proof as not to be misunderstood by the jury in their application of the law to the facts in evidence. *Reardon v. State*, 4 Tex. App. 602.

Harmless Error. — If the court charged the jury erroneously upon a proposition of law which does not arise in the case, either upon the pleadings or the evidence, and which could not affect the result, the error is immaterial and will not cause a reversal of the judgment. *Satterlee v. Bliss*, 36 Cal. 489.

Where an instruction given was upon a matter not properly in controversy, and there was a special finding thereupon in the verdict, but in the judgment entered both the matter of the instruction and the finding were wholly ignored and treated as surplusage, there is no weight in an objection either that the court did not strike out so much of the verdict, or that the judgment did not conform to the verdict; and there was no prejudicial error which would justify an interference with the judgment. *Kearney v. Wurdeman*, 33 Mo. App. 447.

Presumptions on Appeal. — Where an instruction is given narrower than the issues made by the pleadings, and yet assuming to cover the whole question in dispute, the Supreme Court will presume, the record not showing the contrary, that the parties, on the trial, had limited their controversy to the ground covered by the instruction; so that in its application to the case it was right, if asserting no incorrect

principle of law. *Legget v. Harding*, 10 Ind. 415; *Cory v. Silcox*, 6 Ind. 39.

2. *Waddingham v. Hulett*, 92 Mo. 528; *George v. Wabash Western R. Co.*, 40 Mo. App. 434; *Rapp v. Kester*, 125 Ind. 79.

3. *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Crews v. Lackland*, 67 Mo. 621.

4. *Beauchamp v. Higgins*, 20 Mo. App. 514; *Griffith v. Conway*, 45 Mo. App. 574; *Fitzgerald v. Hayward*, 50 Mo. 516; *Biester v. Evans*, 59 Ill. App. 181.

5. *Iron Mountain Bank v. Murdock*, 62 Mo. 70.

6. *California*. — *Sargent v. Linden Min. Co.*, 55 Cal. 204.

Colorado. — *Gibbs v. Wall*, 10 Colo. 153.

Florida. — *Judge v. Moore*, 9 Fla. 269.

Illinois. — *Chicago, etc., R. Co. v. Bragonier*, 119 Ill. 51; *East St. Louis Packing, etc., Co. v. Hightower*, 92 Ill. 139; *Chicago, etc., R. Co. v. Robinson*, 106 Ill. 142; *Miller v. Craig*, 16 Ill. App. 133.

Iowa. — *Cressy v. Postville*, 59 Iowa 62; *Sioux City, etc., R. Co. v. Walker*, 49 Iowa 273; *Schrader v. Hoover*, 87 Iowa 654; *Fisk v. Chicago, etc., R. Co.*, 74 Iowa 424; *Negley v. Cowell*, 91 Iowa 256; *Schier v. Dankwardt*, 88 Iowa 750; *George v. Swafford*, 75 Iowa 491; *Whitsett v. Chicago, etc., R. Co.*, 67 Iowa 150.

Kansas. — *Western Home Ins. Co. v. Thorpe*, 40 Kan. 255.

Maine. — *Snow v. Penobscot River Ice Co.*, 77 Me. 55.

Michigan. — *Pettibone v. Smith*, 37 Mich. 579; *Comstock v. Norton*, 36 Mich. 278.

Minnesota. — *Wilcox v. Chicago, etc., R. Co.*, 24 Minn. 269.

Mississippi. — *Miles v. Myers*, Walk. (Miss.) 379.

Missouri. — *Storms v. White*, 23 Mo. App. 31; *Rayson v. Trumbo*, 52 Mo. 35; *Budd v. Hoffheimer*, 52 Mo. 297; *Givens v. Van Studdiford*, 4 Mo. App. 499; *Kenney v. Hannibal, etc., R. Co.*,

the attention of the jury to issues not presented thereby. And it is, of course, proper to refuse such an instruction.¹

70 Mo. 252; *Home Bank v. Towson*, 2 Mo. App. Rep. 614; *Mackin v. People's St. R., etc., Co.*, 45 Mo. App. 82; *Haynes v. Trenton*, 108 Mo. 123.

Nebraska. — *Esterly v. Van Slyke*, 21 Neb. 611; *Tootle v. Maben*, 21 Neb. 617; *Frederick v. Kinzer*, 17 Neb. 367; *Dunbier v. Day*, 12 Neb. 596; *Herron v. Cole*, 25 Neb. 692; *Dorsey v. McGee*, 30 Neb. 657; *Union Pac. R. Co. v. Ogilvy*, 18 Neb. 638.

New Jersey. — *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441.

New York. — *Partridge v. Gildermeister*, 6 Bosw. (N. Y.) 57.

North Carolina. — *Johnson v. Bell*, 74 N. Car. 355.

Texas. — *Dallas Rapid Transit R. Co. v. Campbell*, (Tex. Civ. App. 1894) 26 S. W. Rep. 884; *Ballew v. State* (Tex. Crim. App. 1896) 34 S. W. Rep. 616; *Galveston, etc., R. Co. v. Sweeney*, 6 Tex. Civ. App. 173; *Love v. Wyatt*, 19 Tex. 312; *Cannon v. Cannon*, 66 Tex. 682; *People's Bldg., etc., Assoc. v. Elliott*, (Tex. Civ. App. 1895) 33 S. W. Rep. 545; *Galveston, etc., R. Co. v. Herring*, (Tex. Civ. App. 1896) 36 S. W. Rep. 129; *Missouri, etc., R. Co. v. Rodgers*, (Tex. Civ. App. 1896) 35 S. W. Rep. 412; *Robertson v. Gourley*, 84 Tex. 575; *Hartford F. Ins. Co. v. Josey*, 6 Tex. Civ. App. 290; *Texas, etc., R. Co. v. French*, 86 Tex. 96; *Galveston, etc., R. Co. v. Silegman*, (Tex. Civ. App. 1893) 23 S. W. Rep. 298; *Duffard v. Herbert*, 2 Tex. App. Civ. Cas., § 613; *Ross v. Hawley*, 3 Tex. App. Civ. Cas., § 108; *Dodd v. Arnold*, 28 Tex. 97; *Reardon v. State*, 4 Tex. App. 602; *Gulf, etc., R. Co. v. Courtney*, (Tex. Civ. App. 1893) 23 S. W. Rep. 226; *Missouri, etc., R. Co. v. Meyers*, (Tex. Civ. App. 1896) 35 S. W. Rep. 421.

United States. — *Thorwegan v. King*, 111 U. S. 549.

Illustrations. — Where there is no allegation that the injury was caused by a failure on the part of the defendant to adopt rules and regulations for the protection of its employees, and nothing in the law or evidence calling for a charge on that subject, it should not be given. *Galveston, etc., R. Co. v. Sweeney*, 6 Tex. Civ. App. 173. So, in an action brought by a husband to recover for personal injuries to his wife, it is error for the court to submit to the

jury the question whether damages should be allowed for the plaintiff's mental anguish, where there is no claim made in the petition for damages on that ground, and no evidence to support such a claim. *Dallas Rapid Transit R. Co. v. Campbell*, (Tex. Civ. App. 1894) 26 S. W. Rep. 884. In a trial of an action for negligence resulting in an injury, the defendant asked an instruction that the omission of certain acts or duties did not constitute such misconduct as the law would recognize as wanton or wilful. Such negligence was not alleged in the pleadings or claimed on the trial, and it was held that the refusal of such an instruction was proper, there being no such issue in the case. *Louisville, etc., R. Co. v. Shires*, 108 Ill. 617. An instruction directing the attention of the jury to an element of liability not shown by the pleadings or evidence in the case is calculated to mislead, and should not be given. *Chicago, etc., R. Co. v. Robinson*, 106 Ill. 142.

It is error to instruct the court as to a clause of the contract not presented in the pleadings. *Barber v. Wheeling F. & M. Ins. Co.*, 16 W. Va. 658.

1. *Georgia*. — *Johnson v. Worthy*, 17 Ga. 420.

Illinois. — *Louisville, etc., R. Co. v. Shires*, 108 Ill. 617; *Biester v. Evans*, 59 Ill. App. 181.

Indiana. — *Rapp v. Kester*, 125 Ind. 79.

Iowa. — *Van Winkle v. Chicago, etc., R. Co.*, 93 Iowa 509; *Cutter v. Fanning*, 2 Iowa 580; *Gover v. Dill*, 3 Iowa 337; *Conger v. Dean*, 3 Iowa 463; *Oliver v. Depew*, 14 Iowa 490; *Packer v. Cockayne*, 3 Greene (Iowa) 111; *State v. Gibbons*, 10 Iowa 117; *Borland v. Chicago, etc., R. Co.*, 78 Iowa 94.

Massachusetts. — *Phillips v. Cornell*, 133 Mass. 546; *Drake v. Curtis*, 1 Cush. (Mass.) 395.

Michigan. — *Henry C. Hart Mfg. Co. v. Mann's Boudoir Car Co.*, 65 Mich. 564.

Missouri. — *Bender v. Dungan*, 99 Mo. 126; *St. Louis, etc., R. Co. v. Cleary*, 77 Mo. 634; *Home Bank v. Towson*, 64 Mo. App. 97; *Clews v. Lackland*, 67 Mo. 621; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Beauchamp v. Higgins*, 20 Mo. App. 514; *George v. Wabash Western R. Co.*, 40

(2) *Instructions Not Based on Pleadings and Evidence*—When Ground for Reversal. — An instruction vicious in this regard will be ground for reversal if it has a tendency to mislead.¹

b. LIMITING INSTRUCTIONS TO PLEADINGS — (1) *In Civil Cases* — (a) *Introductory Statement*. — A large number of decisions²

Mo. App. 434; *Waddingham v. Hulett*, 92 Mo. 528; *Fitzgerald v. Hayward*, 50 Mo. 516; *Griffith v. Conway*, 45 Mo. App. 574.

Nevada. — *Schafer v. Gilmer*, 13 Nev. 330; *Schissler v. Cheshire*, 7 Nev. 427; *Longabaugh v. Virginia City*, etc., R. Co., 9 Nev. 271.

North Carolina. — *McMillan v. Baxley*, 112 N. Car. 578.

Ohio. — *Stewart v. Southard*, 17 Ohio 406.

Pennsylvania. — *Covert v. Irwin*, 3 S. & R. (Pa.) 283.

Texas. — *Taylor v. Felder*, 5 Tex. Civ. App. 417; *Ware v. Shafer*, (Tex. Civ. App. 1894) 27 S. W. Rep. 764; *Missouri Pac. R. Co. v. Mitchell*, 75 Tex. 77; *Breneman v. Kilgore*, (Tex. Civ. App. 1896) 35 S. W. Rep. 202; *Gulf, etc., R. Co. v. Kizziah*, 4 Tex. Civ. App. 356.

United States. — *Atlas Nat. Bank v. Holm*, 34 U. S. App. 472.

1. *Esterly v. Van Slyke*, 21 Neb. 611; *Love v. Wyatt*, 19 Tex. 312; *Cressy v. Postville*, 59 Iowa 62; *Thorwegan v. King*, 111 U. S. 549.

2. *Myers v. Moore*, 3 Ind. App. 226; *Browning v. Hight*, 78 Ind. 257; *Wayne, etc., Turnpike Co. v. Moore*, 82 Ind. 208; *Batman v. Snoddy*, 132 Ind. 480; *Henry v. Hinds*, 18 Mo. App. 497; *Gulf, etc., R. Co. v. Scott*, (Tex. Civ. App. 1894) 27 S. W. Rep. 827; *Lytle v. Boyer*, 33 Ohio St. 506.

Instructions Held Justified by Pleadings.

— A declaration in an action for personal injuries alleged, in respect to the character of the injury received, that the plaintiff "then and there became and was sick, lame and disordered, and so remained for a long time, to wit, hitherto," etc. This was held to warrant an instruction that the jury might award to the plaintiff damages for such permanent injury as the evidence showed he had sustained, the question of permanency of the injury being one resting on the evidence and which need not be averred in the declaration. *Eagle Packet Co. v. Defries*, 94 Ill. 598. So, where a declaration alleges that the defendant "falsely, wilfully, voluntarily, knowingly, and corruptly" testi-

fied, on a former trial between the parties, to the material facts, which defeated the plaintiff's recovery, an instruction that unless a jury believe from the evidence that the defendant falsely, wilfully, etc., committed perjury they should find for the defendant is not erroneous as being variant from the allegation in the declaration. *Bell v. Senneff*, 83 Ill. 122. And where a declaration in an action for damages caused by the falling of a pile of barrels alleges that the plaintiff was working for the defendant near the barrels, and that it was the defendant's duty to keep them from falling, it was proper to instruct that it was the defendant's duty to use ordinary care in furnishing a reasonably safe place for the plaintiff to work and to use all reasonable precautions to that end. *Libby v. Scherman*, 146 Ill. 540. Where a complaint alleged that the defendant negligently overloaded a truck and placed it so as to obstruct a public sidewalk, and that the truck could not be passed without taking hold of it, and that while the plaintiff was passing along the sidewalk the truck fell on her without her fault, it was held that there was not a variance between the complaint and the instruction sufficient to warrant a reversal, though the court charged that if the truck was carelessly loaded by another company and brought to the employees of the defendant, and was received by the defendant's employees in that condition and suffered to remain, and the plaintiff in passing touched the truck, which caused it to fall, then the defendant was liable. *Louisville, etc., R. Co. v. Shanks*, 132 Ind. 395. In assumpsit, where the plaintiff alleges title and right of possession, and that the defendant converted the property into money, and the plaintiff offered evidence tending to show an absolute gift, and a gift in expectation of death, the court may instruct not only as to what constitutes an absolute gift, but also as to what constitutes a *donatio mortis causa*. *Pryor v. Morgan*, 170 Pa. St. 568. A charge that, under the facts adduced in evidence, does not correctly construe a

lay down the broad doctrine that the instructions must be applicable and limited to the issues raised by the pleadings, and that it is error to give an instruction which does not conform to this rule.¹ Of course, if the giving of such an instruction constitutes

contract involved in the issue, is not to be considered erroneous if it express the same idea as that conveyed by the plea, which sets it up as a defense. *Fort v. Barnett*, 23 Tex. 460. Where the plaintiff seeks to avoid a contract pleaded by the defendant, on account of undue influence and unfair advantage taken of weakness of mind, he is not required to plead such matter of avoidance in order to prove the same, and an instruction on that subject, if based upon evidence sufficient to warrant it, is not outside of the issues. *Rankin v. Sisters of Mercy*, 82 Cal. 88.

Limiting Recovery to Amount Prayed.

—An instruction should limit the amount of recovery to that asked. *Crews v. Lackland*, 67 Mo. 619; *Fort Worth, etc., R. Co. v. Measles*, 81 Tex. 474; *Wright v. Jacobs*, 61 Mo. 19. And where damages are asked they should be allowed; the instruction should not authorize the jury to consider any other grounds than those stated. *Payne v. Francis*, 37 Tex. 75; *Taylor v. Kansas City Cable R. Co.*, 28 Mo. App. 552; *Winney v. Sandwich Mfg. Co.*, 86 Iowa 608; *Holt v. Spokane, etc., R. Co.*, (Idaho 1893) 35 Pac. Rep. 39; *Edmundson v. Pollock*, 5 Ohio Cir. Ct. Rep. 185; *Gardner v. Burlington, etc., R. Co.*, 68 Iowa 588; *Farrell v. Farmers' Mut. F. Ins. Co.*, 2 Mo. App. Rep. 1297. Thus it is error to instruct the jury that they may allow for loss of time and expenses for medicine, where there is no allegation in the pleadings as to loss of time. *Gardner v. Burlington, etc., R. Co.*, 68 Iowa 588. So, where a petition prays damages for making an embankment in the street in front of the plaintiff's property, thereby raising the grade, it is erroneous for the court, in instructing, to include a further cause of action and to direct the jury to assess damages sustained by reason of either or both. *Taylor v. Kansas City Cable R. Co.*, 28 Mo. App. 552. In an action against a physician for damages arising out of his unskilful treatment of a patient, an instruction that if the jury believe that the plaintiff was injured by the unskilful treatment, ignorance, carelessness, and neglect of the defendant as a physician, they should

find for the plaintiff, is erroneous where no damages were sought on the ground of carelessness or neglect. *Payne v. Francis*, 37 Tex. 75.

Issues Tendered by Opposite Party's Pleadings. — The defendant is entitled to an instruction as to the effect of a condition of a policy of insurance when not specially set up as a defense, if an issue as to its breach has been tendered in the complaint. *Ellsworth v. Aetna Ins. Co.*, 89 N. Y. 186.

Instructions Asked by Party Complaining. — The objection that instructions pertain to an issue not in the case cannot be considered if the party objecting has asked instructions upon that issue. *Hahn v. Miller*, 60 Iowa 96; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265.

1. *California*. — *Williams v. Southern Pac. R. Co.*, 110 Cal. 457.

Colorado. — *Jackson v. Ackroyd*, 15 Colo. 583.

Connecticut. — *Baldwin v. Walker*, 21 Conn. 184.

Florida. — *Porter v. Ferguson*, 4 Fla. 102; *Hooker v. Johnson*, 10 Fla. 198.

Georgia. — *Hambricht v. Stover*, 31 Ga. 300; *Smith v. Odom*, 63 Ga. 504.

Illinois. — *Leach v. Nichols*, 55 Ill. 273; *Shackelton v. Lawrence*, 65 Ill. 175; *Johnson v. Johnson*, 114 Ill. 611; *McClory v. Lancaster*, 44 Ill. App. 212; *Grim v. Murphy*, 110 Ill. 271; *Mosher v. Rogers*, 117 Ill. 446.

Indiana. — *Jeffersonville, etc., R. Co. v. Lyon*, 55 Ind. 477; *Union Cent. L. Ins. Co. v. Huyck*, 5 Ind. App. 474; *Lindley v. Sullivan*, 133 Ind. 588; *Lake Erie, etc., R. Co. v. Ziebarth*, 6 Ind. App. 228; *Howe Mach. Co. v. Reber*, 66 Ind. 498; *Evans v. Gallantine*, 57 Ind. 367.

Iowa. — *Bernhard v. Washington L. Ins. Co.*, 40 Iowa 442; *Storrs v. Emerson*, 72 Iowa 390; *Benton v. Chicago, etc., R. Co.*, 55 Iowa 496; *Duncombe v. Powers*, 75 Iowa 185; *Fisk v. Chicago, etc., R. Co.*, 74 Iowa 424; *Miller v. Chicago, etc., R. Co.*, 76 Iowa 318.

Kentucky. — *Doysner v. Adams*, (Ky. 1895) 29 S. W. Rep. 348.

Michigan. — *Denman v. Johnston*, 85 Mich. 387.

Minnesota. — *Morrow v. St. Paul City R. Co.*, 65 Minn. 382.

error, it is always proper for the court to refuse it when requested so to charge.¹

Missouri. — Rapp v. Vogel, 45 Mo. 524; Macke v. Davis, 61 Mo. App. 524; Taylor v. Kansas City Cable R. Co., 28 Mo. App. 552; Rothschild v. Frensdorf, 21 Mo. App. 318; Fairgrieve v. Moberly, 29 Mo. App. 142; Wade v. Hardy, 75 Mo. 394; Melvin v. St. Louis, etc., R. Co., 89 Mo. 106; Hassett v. Rust, 64 Mo. 325; Kennedy v. Klein, 19 Mo. App. 15; St. Louis, etc., R. Co. v. Cleary, 77 Mo. 634; Benson v. Chicago, etc., R. Co., 78 Mo. 504; Stottlemeyer v. Bobb, 7 Mo. App. 578; Smith v. Eno, 15 Mo. App. 576; Ferneau v. Whitford, 39 Mo. App. 311; Wright v. Fonda, 44 Mo. App. 634; Hartman v. McCrary, 59 Mo. App. 571; Stones v. Richmond, 21 Mo. App. 17.

Nebraska. — Farmers', etc., Bank v. Upham, 37 Neb. 417; Wigton v. Smith, 46 Neb. 461.

New Jersey. — Martinez v. Runkle, 57 N. J. L. 111.

New York. — Murphy v. Kron, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 259; Dieckerhoff v. Alder, 12 Misc. Rep. (N. Y. C. Pl.) 445.

Oregon. — Pearson v. Dryden, 28 Oregon 350; Marx v. Schwartz, 14 Oregon 177.

Texas. — Galveston, etc., R. Co. v. Johnson, (Tex. Civ. App. 1895) 29 S. W. Rep. 428; Burleson v. Lindsey, (Tex. Civ. App. 1893) 23 S. W. Rep. 729; San Antonio, etc., R. Co. v. Jazo, (Tex. Civ. App. 1894) 25 S. W. Rep. 712; Houston, etc., R. Co. v. Terry, 42 Tex. 451; Markham v. Carothers, 47 Tex. 22; Loving v. Dixon, 56 Tex. 75; Hall v. Johnston, 6 Tex. Civ. App. 116; Texas, etc., R. Co. v. Sims, (Tex. Civ. App. 1894) 26 S. W. Rep. 634; Waters-Pierce Oil Co. v. Cook, 6 Tex. Civ. App. 573; Galveston, etc., R. Co. v. Sweeney, 6 Tex. Civ. App. 173; Edwards v. Campbell, 12 Tex. Civ. App. 237; Dillingham v. Brown, (Tex. 1891) 17 S. W. Rep. 45; Gulf, etc., R. Co. v. Cash, 8 Tex. Civ. App. 569; Island City Boating, etc., Assoc. v. New York, etc., Steamship Co., 80 Tex. 375; Equitable L. Ins. Co. v. Hazlewood, 75 Tex. 338; Houston, etc., R. Co. v. Gilmore, 62 Tex. 391; Stringer v. Singleterry, (Tex. Civ. App. 1893) 23 S. W. Rep. 1117; Gulf, etc., R. Co. v. Younger, 10 Tex. Civ. App. 141; Dallas, etc., El. R. Co. v. Harvey, (Tex. Civ. App. 1894) 27 S. W. Rep. 423; Hall v. Johnston, 6 Tex.

Civ. App. 110; Watts v. Johnson, 4. Tex. 311. See also Smith v. Sherwood, 2 Tex. 460.

Utah. — Holt v. Pearson, 12 Utah 63. *Vermont.* — Bean v. Bunker, 68 Vt. 72.

West Virginia. — Barber v. Wheeling F. & M. Ins. Co., 16 W. Va. 658.

Error Favorable to Defendant in giving an instruction outside the issues is harmless. Miller v. Root, 77 Iowa 545.

1. *California.* — Marriner v. Dennison, 78 Cal. 202; Knight v. Pacific Coast Stage Co., (Cal. 1893) 34 Pac. Rep. 868; Dreyfuss v. Tompkins, 64 Cal. 448; Thompson v. Lee, 8 Cal. 275.

Connecticut. — Davis v. Kingsley, 13 Conn. 295.

Georgia. — Wilkinson v. Thigpen, 71 Ga. 497.

Illinois. — Fred. Miller Brewing Co. v. Utz, 46 Ill. App. 443.

Iowa. — Worden v. Humeston, etc., R. Co., 72 Iowa 201; Stein v. Seaton, 51 Iowa 18; Miles v. Wikel, 74 Iowa 712; Trulock v. Donahue, 85 Iowa 748.

Maryland. — Pawson v. Donnell, 1 Gill & J. (Md.) 1.

Minnesota. — Coit v. Waples, 1 Minn. 134.

Mississippi. — Brown v. Walker, (Miss. 1892) 11 So. Rep. 724.

Missouri. — N. O. Nelson Mfg. Co. v. Mitchell, 38 Mo. App. 322; Mound City Paint, etc., Co. v. Conlon, 92 Mo. 221; Fulkerson v. Thornton, 68 Mo. 468; Nall v. Wabash, etc., R. Co., 97 Mo. 68; Merrett v. Poulter, 96 Mo. 237; Larimore v. Legg, 23 Mo. App. 645; Kauffman v. Harrington, 23 Mo. App. 572; Quinlivan v. English, 44 Mo. 46; Aultman, etc., Co. v. Smith, 52 Mo. App. 351; Nugent v. Curran, 77 Mo. 323.

Nebraska. — Webster v. O'Shee, 13 Neb. 428.

New York. — Kane v. New York, etc., R. Co., 132 N. Y. 160.

Ohio. — Queen Ins. Co. v. Leonard, 9 Ohio Cir. Ct. Rep. 46.

Texas. — Ellis v. Ellis, 5 Tex. Civ. App. 46; Gilmour v. Heinze, 85 Tex. 76; Clay County Land, etc., Co. v. Montague County, 8 Tex. Civ. App. 575; Newton v. Newton, 77 Tex. 508; Flint v. Van Hall, 4 Tex. Civ. App. 404.

Wisconsin. — Austin v. Moe, 68 Wis. 458.

Ground for Reversal. — The decisions further hold that the giving of such an instruction, if calculated to mislead, will operate to reverse,¹ but that if it is apparent that such an instruction did not operate to the prejudice of the party complaining, the judgment will not be reversed.²

Instruction Applicable to Incompetent Evidence. — An examination of the reports of these decisions discloses few, if any, in which it appears definitely whether or not incompetent evidence to which such instructions might have been applicable was admitted. It would, therefore, be improper to cite these decisions as sustaining the proposition that an instruction should be limited to the issues raised by the pleadings, notwithstanding the admission of evidence inapplicable to the issues raised thereby. There are, however, many decisions bearing directly on this question, but they do not seem to be entirely harmonious.

(b) **Rule that Instructions Must Be Strictly Limited to Issues Raised by Pleadings.** — In some decisions it is said that a recovery can be had only on the case made by the pleadings, and that the issues cannot be changed by the instructions;³ that instructions should not be given unless there is evidence on which to base them, and that there can be no evidence on which to base them if that evidence overthrows the pleadings of the party who introduces it.⁴ These decisions and a number of others hold that even though evidence on which such instructions might be based is admitted, it is none the less error to give an instruction based thereon,⁵ and it is proper to refuse it.⁶ Only a few of these decisions show

United States. — *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190; *Washington Bank v. Triplett*, 1 Pet. (U. S.) 25.

1. *Loving v. Dixon*, 56 Tex. 75; *Flint v. Van Hall*, 4 Tex. Civ. App. 404; *Houston, etc., R. Co. v. Terry*, 42 Tex. 451; *Farmers', etc., Bank v. Upham*, 37 Neb. 417; *Lindley v. Sullivan*, 133 Ind. 588.

2. *Wayne, etc., Turnpike Co. v. Moore*, 82 Ind. 208; *Lindley v. Sullivan*, 133 Ind. 588; *Miller v. Root*, 77 Iowa 545.

3. *Glass v. Gelvin*, 80 Mo. 297; *Moffatt v. Conklin*, 35 Mo. 453; *Iron Mountain Bank v. Murdock*, 62 Mo. 73; *Camp v. Heelan*, 43 Mo. 591; *Capital Bank v. Armstrong*, 62 Mo. 59; *Frederrick v. Kinzer*, 17 Neb. 366.

4. *Capital Bank v. Armstrong*, 62 Mo. 65.

5. *California.* — *Gulf of California Nav., etc., Co. v. State Invest., etc., Co.*, 70 Cal. 586.

Iowa. — *Roberts v. Richardson*, 39 Iowa 290.

Kansas. — *Atchison, etc., R. Co. v. Miller*, 39 Kan. 419.

Missouri. — *Capital Bank v. Armstrong*, 62 Mo. 65; *Bruce v. Sims*, 34 Mo. 246; *Safety Fund Nat. Bank v. Westlake*, 21 Mo. App. 565; *Moffatt v. Conklin*, 35 Mo. 453; *Wade v. Hardy*, 75 Mo. 394; *Matson v. Frazer*, 48 Mo. App. 302; *Glass v. Gelvin*, 80 Mo. 302; *Iron Mountain Bank v. Murdock*, 62 Mo. 73. *Nebraska.* — *McCready v. Phillips*, 44 Neb. 790.

Oregon. — *Coos Bay R. Co. v. Siglin*, 26 Oregon 387; *Buchtel v. Evans*, 21 Oregon 309; *Woodward v. Oregon R., etc., Co.*, 18 Oregon 289.

Texas. — *McKinney v. Fort*, 10 Tex. 220.

"Instructions must be applicable to the pleadings and evidence, and it is not sufficient that there is evidence to support them when there is no issue under the pleadings to which they are applicable." *Matson v. Frazer*, 48 Mo. App. 302.

6. *Whitman v. Keith*, 18 Ohio St. 134. See also *Doggett v. Sims*, 79 Ga. 254, where it was held that where a complainant desires a bill to be construed as presenting three aspects for relief,

definitely whether an objection was taken to the admission of the evidence on which the instructions held erroneous were based. In one of them it was held that the fact that an objection was not taken made no difference.¹

(c) **Rule that Instructions May Be Based on Incompetent Evidence Admitted Without Objection** — *aa.* STATEMENT OF RULE. — If the decisions cited in the notes of the preceding section, in which decisions it does not appear whether an objection was taken to the evidence or not, intend to lay down the rule that an instruction based on evidence improperly admitted is erroneous whether a proper objection to their admission was taken or not, they are against the weight of authority in cases involving this precise question and in cases involving similar questions; for while it is undoubtedly true that an instruction based on evidence incompetent under the pleadings and improperly admitted over objection is erroneous,² and a refusal of such instruction proper,³ unless an amendment is moved and made at the proper time,⁴ there are many decisions holding that if no objection is made to the admission of evidence incompetent under the pleadings, the error will be disregarded or an amendment permitted, and that the court

such as actual fraud, constructive fraud, and mistake, the bill should suggest all three and not one only; that the court is not bound to charge the jury on a wider case than that made by the bill, though the evidence might warrant it were the bill amended; *Marx v. Schwartz*, 14 Oregon 177, where a requested instruction was refused, the court saying that an instruction which directs the attention of the jury to a fact not in issue and makes the finding on that fact decisive against the plaintiffs is erroneous, although, under proper issues, the question presented might become material and possibly decisive of the rights of the parties.

Harmless Error. — Where evidence is admitted at the trial, upon which instructions are given, both evidence and instructions being competent if founded upon proper pleadings, but no such issue is raised by the pleadings, such evidence and instructions are erroneous; but if from the whole record it is apparent that the verdict could not have been affected thereby, such error will not operate to reverse. *Atchison, etc., R. Co. v. Miller*, 39 Kan. 419.

1. *Coos Bay R. Co. v. Siglin*, 26 Oregon 387.

In Another Case, where no objection

was taken, it was said that while the plaintiff, not having objected to the admission of the evidence, could not be heard to complain on that account, still the introduction of the evidence without objection did not enlarge the issues. *Safety Fund Nat. Bank v. Westlake*, 21 Mo. App. 572, in which the court further said that no issue of a waiver by the plaintiff of the performance by the defendant of the condition of the warranty was raised by the pleadings; therefore the plaintiff had a right to ask the court to submit the case to the jury without regard to such issue, and it was error for the court to refuse so to submit the case when asked by the plaintiff to do so.

2. *Willits v. Chicago, etc., R. Co.*, 80 Iowa 531; *Dickinson v. Johnson*, 24 Ark. 251; *Illinois Cent. R. Co. v. McKee*, 43 Ill. 119; *Shrimpton v. Dworsky*, 2 Misc. Rep. (N. Y. C. Pl.) 123.

Instructions Against Party Introducing Evidence. — Where improper testimony has been admitted against objection, the party introducing it cannot complain of an instruction based thereon. *Bowen v. Carolina, etc., R. Co.*, 34 S. Car. 217.

3. *Weaver v. Hendrick*, 30 Mo. 502.

4. *Shrimpton v. Dworsky*, 2 Misc. Rep. (N. Y. C. Pl.) 123.

may instruct the jury in relation to the whole field of inquiry covered by the evidence.¹

Issues Mutually Disregarded. — So it has been held that where the issues presented by the pleadings are mutually disregarded and evidence not competent under the pleadings is admitted, it is erroneous to refuse an instruction based on such evidence.²

1. *California*. — *Boyce v. California State Co.*, 25 Cal. 460.

Georgia. — *Savannah, etc., R. Co. v. Barber*, 71 Ga. 648; *Harris v. Central R., etc., Co.*, 78 Ga. 525; *Central R., etc., Co. v. Attaway*, 90 Ga. 656; *Middlebrooks v. Mayne*, 96 Ga. 450; *Georgia R. Co. v. Lawrence*, 74 Ga. 534; *Ratterce v. Chapman*, 79 Ga. 577; *Ocean Steamship Co. v. Williams*, 69 Ga. 252.

Iowa. — *Collins v. Collins*, 46 Iowa 60.

Missouri. — *Madison v. Missouri Pac. R. Co.*, 60 Mo. App. 599; *Brown v. Hannibal, etc., R. Co.*, 31 Mo. App. 673.

Texas. — *Blum v. Whitworth*, 66 Tex. 350.

Washington. — *Fox v. Utter*, 6 Wash. 299.

Wisconsin. — *Stetler v. Chicago, etc., R. Co.*, 49 Wis. 609; *Flanders v. Cottrell*, 36 Wis. 564; *Marschuetz v. Wright*, 50 Wis. 175.

See also *Giles v. Fauntleroy*, 13 Md. 126; *Dorsey v. Dashiell*, 1 Md. 207; *Brooke v. Waring*, 7 Gill (Md.) 5; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341, where it was held that when a request for an instruction neither points to nor refers to the pleadings, the correctness of its being rejected or granted depends not upon the state of the pleadings, but upon the evidence to which it alone refers. So in *Stockton v. Frey*, 4 Gill (Md.) 421, it was held that if a party desires the opinion of the court upon the evidence, in connection with the pleadings, he should frame his prayer accordingly; "as, for example, that the plaintiff is or is not entitled to recover under the pleadings."

Instances. — In an action for commissions claimed to have accrued to N. on a sale of a printing press to C. A. & Co., the complaint alleged that N. "sold" the press for the defendants and at their request. There was no evidence of such sale by N., but the question of fact fully litigated at the trial and submitted to the jury at the instance of the defendants was whether N. was instrumental in enabling them to sell the press. It was held that the

complaint might be amended at any time to conform to facts proven, or the variance might be wholly disregarded. *Flanders v. Cottrell*, 36 Wis. 564.

Where the declaration alleged that the plaintiff was injured by the defendant's negligence in using certain defective tools, the court was authorized to charge in regard to negligence in using them in an unskilful manner, especially when the plaintiff was permitted to introduce evidence on this point without objection. *Central R., etc., Co. v. Attaway*, 90 Ga. 656.

The declaration, among other things, distinctly claimed damages because of an increase in the height of the dam, alleged to have been made by the defendants, which they denied; and although the plaintiff's evidence may have been insufficient to establish the truth of their contention upon this issue, yet as it appears to have remained in the case, both under the pleadings and the evidence, until the end of the trial, the court did not err in charging upon the same. *Middlebrooks v. Mayne*, 96 Ga. 450.

Amendment Held Necessary. — If the evidence shows a different state of facts from that contained in the pleadings, and the party to the suit desires instructions in accordance with those facts, he must first amend his pleadings by leave of court. *Budd v. Hoffheimer*, 52 Mo. 297.

2. *Brusie v. Peck*, 135 N. Y. 622, 48 N. Y. St. Rep. 439. In this case, which was an action for breach of contract whereby the defendants acquired exclusive right to manufacture and sell a machine patented by the plaintiff, the complaint alleged the fraudulent practice by the defendants of competing with and underselling the plaintiff upon the market by a machine resembling the plaintiff's, but inferior to the plaintiff's. The answer denied fraud, and alleged that the machine made and sold by the defendant did not infringe on the plaintiff's. On the trial the plaintiff proceeded for a recovery of royalties on the machines sold, abandoning the grounds alleged in the complaint, and

Variance Not Objected to. — There are a great number of decisions to the effect that a variance between the pleadings and proof, if not objected to at the trial, cannot be objected to for the first time on appeal, provided the variance is not such as to leave the allegations of the pleadings unproved in their entire scope and meaning.¹ Under these decisions it would be proper to instruct as to the effect of evidence not properly admissible under the pleadings, if no objection was taken to its admission.

bb. LIMITATION OF RULE. — It is not to be understood, however, from anything here said, that the court may base an instruction on evidence constituting a cause of action entirely different from the one pleaded, as a pleading cannot be so amended as to state a new cause of action.²

(2) *In Criminal Cases.* — In criminal cases the rule is more strict than in civil cases. A charge must meet and be strictly limited by the case set forth in the indictment; it must not go outside and beyond the allegations. Before the jury can convict, the crime charged or one of lesser grade must be proved.³

evidence was admitted without objection tending to show the rescission of the contract. It was held erroneous to refuse to submit the question of rescission to the jury. *Compare* *Kenyon v. Kenyon*, 72 Wis. 234, where it was held that a failure to instruct on a point as to which there was evidence inadmissible under the pleadings was not erroneous where there was no request for such an instruction.

1. See article EXCEPTIONS AND OBJECTIONS, vol. 8, pp. 247, 248, 249.

2. See article AMENDMENTS, vol. 1, pp. 583, 586.

3. *Tooney v. State*, 5 Tex. App. 163; *McGee v. State*, 5 Tex. App. 492; *Bacchus v. State*, 18 Tex. App. 15; *Mason v. State*, 7 Tex. App. 623; *Coney v. State*, 43 Tex. 414; *State v. Walton*, 74 Mo. 271; *People v. Mulkey*, 65 Cal. 501.

Illustrations. — It is erroneous to instruct the jury, on the trial of one charged with an aggravated assault, to return a verdict of guilty if they find that the defendant inflicted a serious bodily injury on the party assaulted, when that was not alleged in the indictment as a ground of aggravation. *Coney v. State*, 43 Tex. 414. Where the defendant was charged with the crime of feloniously entering a certain dwelling-house with intent to commit larceny, it was erroneous to instruct that if the jury believed from the evidence that the defendant entered the

house with intent to commit grand or petit larceny, or "any felony," they should find him guilty. *People v. Mulkey*, 65 Cal. 501. Where an indictment for murder by poison did not charge an attempt to rob, it was error to instruct the jury to consider whether such was the intent, and thus submit an issue not presented in the indictment. *Tooney v. State*, 5 Tex. App. 163. Where an information charged the playing of cards at a house for retailing spirituous liquors, an instruction to convict the defendant if the jury found that the playing was done at any other place was erroneous. *Bacchus v. State*, 18 Tex. App. 15. On a trial for conveying into a jail articles useful to aid prisoners in escaping, it is error to charge as to the law against aiding a prisoner to escape from an officer. *Mason v. State*, 7 Tex. App. 623.

Charge on Theory Consistent with Facts Proper. — Neither judge nor jury is strictly confined to the theory of either the prosecution or the defense in a criminal case if other theories are consistent with the facts. And a casual suggestion in the charge, involving a different theory and implying the possible guilt of some other person, is not clearly prejudicial to the respondent, and ought not to be made the subject of an exception unless objection is made to it at once, so that the judge can correct it if he sees fit. *People v. Wallin*, 55 Mich. 497.

c. LIMITING INSTRUCTIONS TO EVIDENCE — (1) *Introductory Statement*. — In charging the jury the court should limit its instructions to the facts in evidence.¹ The court is not called

1. *Alabama*. — *Robinson v. Bullock*, 66 Ala. 548; *Street v. State*, 67 Ala. 87; *Wise v. Falkner*, 51 Ala. 359; *Boddie v. State*, 52 Ala. 395; *McAlpine v. State*, 47 Ala. 78; *Tennessee, etc., R. Co. v. Danforth*, 112 Ala. 80; *Knight v. Clements*, 45 Ala. 89; *Ross v. Pearson*, 21 Ala. 473; *Eastis v. Montgomery*, 95 Ala. 486.

Arkansas. — *Little Rock, etc., R. Co. v. Townsend*, 41 Ark. 382; *Smith v. Graves*, 25 Ark. 458.

California. — *People v. Byrnes*, 30 Cal. 206; *People v. Honshell*, 10 Cal. 85; *People v. Stonecipher*, 6 Cal. 405; *Dreyfuss v. Tompkins*, 64 Cal. 448; *Mecham v. McKay*, 37 Cal. 154; *People v. Hurley*, 8 Cal. 390; *People v. Juarez*, 28 Cal. 380; *Tompkins v. Mahoney*, 32 Cal. 231; *People v. Williams*, 32 Cal. 280; *People v. Williams*, 43 Cal. 344; *Bowers v. Cherokee Bob*, 45 Cal. 496; *People v. Murphy*, 47 Cal. 103; *People v. Atherton*, 51 Cal. 495; *People v. Ramirez*, 56 Cal. 533; *People v. Cochran*, 61 Cal. 548; *People v. Turcott*, 65 Cal. 126; *People v. Fine*, 77 Cal. 147; *Razzo v. Varni*, 81 Cal. 289; *People v. Daniels*, 70 Cal. 521; *People v. Hawes*, 98 Cal. 648; *Pearson v. Snodgrass*, 5 Cal. 478.

Colorado. — *Lawson v. Van Auker*, 6 Colo. 52; *Christian v. Tucker*, 1 Colo. 49; *Allen v. Eldridge*, 1 Colo. 288; *No. 5 Mining Co. v. Bruce*, 4 Colo. 293; *De Walt v. Hartzell*, 7 Colo. 601; *Dozenback v. Raymer*, 13 Colo. 451; *Rara Avis Gold, etc., Min. Co. v. Bouscher*, 9 Colo. 385.

Connecticut. — *Hill v. Hayes*, 38 Conn. 536; *Simpson v. Post*, 40 Conn. 321; *Miles v. Douglas*, 34 Conn. 395.

District of Columbia. — *Wright v. Welch*, 3 MacArthur (D. C.) 479.

Florida. — *Savannah, etc., R. Co. v. Tiedman*, (Fla. 1897) 22 So. Rep. 658.

Georgia. — *Mitchell v. Rome R. Co.*, 17 Ga. 574; *McCoy v. State*, 15 Ga. 205; *Central R., etc., Co. v. Hines*, 19 Ga. 203; *Pressley v. State*, 19 Ga. 192; *McDougald v. Bellamy*, 18 Ga. 411; *Lyon v. State*, 22 Ga. 399; *McBain v. Smith*, 13 Ga. 315; *Molyneaux v. Collier*, 13 Ga. 406; *Georgia Midland, etc., Co. v. Evans*, 87 Ga. 673; *Johnson v. Black*, 32 Ga. 396; *Jones v. State*, 63 Ga. 456; *Phillips v. Sewell*, 63 Ga. 650; *Newton Mfg. Co.*

v. White, 63 Ga. 697; *Americus v. Alexander*, 64 Ga. 447; *Williamson v. McLeod*, 64 Ga. 761; *Jones v. State*, 65 Ga. 506; *Peek v. Wright*, 65 Ga. 638; *Crine v. Tifts*, 65 Ga. 645; *Washington Bank v. Ellington*, 66 Ga. 280; *Millen v. Guerrard*, 67 Ga. 284; *Flournoy v. Williams*, 68 Ga. 707; *Bryant v. Southwestern R. Co.*, 68 Ga. 805; *Smith v. Dudley*, 69 Ga. 78; *Murchison v. Sergeant*, 69 Ga. 207; *Thomas v. Parker*, 69 Ga. 284; *Wylly v. Gazan*, 69 Ga. 507; *Wilkinson v. Thigpen*, 71 Ga. 497; *Day v. Case*, 71 Ga. 866; *Knorr v. Raymond*, 73 Ga. 751; *Torrance v. Boyd*, 63 Ga. 23; *Fleming v. Hill*, 65 Ga. 247; *Cox v. Prater*, 67 Ga. 589; *Gilreath v. Holston Salt, etc., Co.*, 67 Ga. 702; *Gordon v. Mitchell*, 68 Ga. 12; *Chapman v. Floyd*, 68 Ga. 455; *Carter v. Dixon*, 69 Ga. 82; *Bell v. State*, 69 Ga. 752; *Central R. Co. v. De Bray*, 71 Ga. 407; *Saul v. Buck*, 72 Ga. 254; *Collins v. Dixon*, 72 Ga. 475.

Idaho. — *Territory v. Evans*, 2 Idaho 391.

Illinois. — *Coughlin v. People*, 18 Ill. 266; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Herrick v. Gary*, 83 Ill. 85; *Geary v. O'Neil*, 73 Ill. 593; *McNay v. Stratton*, 9 Ill. App. 215; *Straus v. Minzesheimer*, 78 Ill. 492; *Featherstone v. Hendrick*, 59 Ill. App. 497; *Chicago, etc., R. Co. v. Fox*, 41 Ill. 106; *Weld v. Mutual L. Ins. Co.*, 61 Ill. App. 187; *Baker v. Robinson*, 49 Ill. 299.

Indiana. — *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 352.

Iowa. — *Van Vechten v. Smith*, 59 Iowa 173.

Kansas. — *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169; *Missouri Pac. R. Co. v. Johnson*, 44 Kan. 660; *State v. Lindgrove*, 1 Kan. App. 51.

Louisiana. — *State v. Stouderman*, 6 La. Ann. 286; *State v. Beck*, 41 La. Ann. 584.

Maine. — *Barney v. Norton*, 11 Me. 350; *Hunnewell v. Hobart*, 42 Me. 565.

Maryland. — *Hamilton v. State*, 32 Md. 348; *Edelin v. Sanders*, 8 Md. 118; *Key v. Dent*, 6 Md. 142; *Pierce v. Negro John*, 6 Md. 28; *Preston v. Leighton*, 6 Md. 88; *Hammond v. Inloes*, 4 Md. 138; *Casey v. Inloes*, 1 Gill (Md.) 430; *Vingling v. Kohlhas*, 18

upon to settle legal principles which have no relevancy to the case before it; it should confine itself to those questions of law

Md. 148; *Andre v. Bodman*, 13 Md. 241; *State v. Reigart*, 1 Gill (Md.) 1.

Massachusetts. — *Stearns v. Janes*, 12 Allen (Mass.) 582; *Shaughnessey v. Sewall*, etc., *Cordage Co.*, 160 Mass. 331.

Mississippi. — *Oliver v. State*, 39 Miss. 526.

Missouri. — *State v. Brady*, 87 Mo. 142; *State v. Gregory*, 14 Mo. App. 583; *Matthews v. St. Louis Grain Elevator Co.*, 59 Mo. 474; *Zwisler v. Storts*, 30 Mo. App. 164; *Hance v. Wabash*, etc., R. Co., 62 Mo. App. 60; *Uley v. Tol-free*, 77 Mo. 307; *State v. Donnelly*, 130 Mo. 642; *Best v. Kempf*, 64 Mo. App. 460.

Montana. — *Territory v. McAndrews*, 3 Mont. 158.

Nebraska. — *Walrath v. State*, 8 Neb. 80; *Billings v. McCoy*, 5 Neb. 188; *Milton v. State*, 6 Neb. 137; *Ballard v. State*, 19 Neb. 609; *Graves v. Damrow*, 28 Neb. 271; *Brumback v. German Nat. Bank*, 46 Neb. 540.

Nevada. — *Sherman v. Dilley*, 3 Nev. 21; *State v. Squaires*, 2 Nev. 226; *State v. Waterman*, 1 Nev. 543; *State v. Ah Loi*, 5 Nev. 99; *Lee v. McLeod*, 15 Nev. 158; *Fulton v. Day*, 8 Nev. 80; *Meyer v. Virginia*, etc., R. Co., 16 Nev. 341.

New Hampshire. — *Goodrich v. East-ern R. Co.*, 38 N. H. 390.

New York. — *Hope v. Lawrence*, 50 Barb. (N. Y.) 258; *Sheldon v. Western Union Tel. Co.*, 51 Hun (N. Y.) 591; *Smith v. Cowan*, 3 N. Y. App. Div. 230.

North Carolina. — *State v. Murph*, 1 Winst. L. (N. Car.) 129.

Ohio. — *Tracy v. Card*, 2 Ohio St. 444; *Lexington F., etc., Ins. Co. v. Paver*, 16 Ohio 324.

Oregon. — *Latshaw v. Territory*, 1 Oregon 140; *State v. Glass*, 5 Oregon 73; *Glaze v. Whitley*, 5 Oregon 164; *State v. Brown*, 7 Oregon 186.

Pennsylvania. — *Jordan v. Headman*, 61 Pa. St. 176.

South Carolina. — *State v. Aughtry*, 49 S. Car. 285.

Tennessee. — *Graham v. Fidelity Mut. L. Assoc.*, 98 Tenn. 48.

Texas. — *Sparks v. State*, 23 Tex. App. 447; *Jacobs v. Crum*, 62 Tex. 401; *Houston*, etc., R. Co. v. *Tierney*, 72 Tex. 312; *Goodbar v. City Nat. Bank*, 78 Tex. 461; *Fort Worth*, etc., R. Co. v. *Greathouse*, 82 Tex. 104; *International*, etc., R. Co. v. *Clark*, 81 Tex. 48; *Porter*

v. Metcalf, 84 Tex. 468; *Atchison*, etc., R. Co. v. *Grant*, 6 Tex. Civ. App. 674; *Western Union Tel. Co. v. Bruner*, (Tex. 1892) 19 S. W. Rep. 149; *Rousel v. Stanger*, 73 Tex. 670; *Currie v. Gunter*, 77 Tex. 490; *Drake v. State*, 5 Tex. App. 649; *Houston v. Houston Belt*, etc., R. Co., 84 Tex. 581.

Virginia. — *Roanoke Nat. Bank v. Hambrick*, 82 Va. 135; *Bartley v. McKinney*, 28 Gratt. (Va.) 750; *Philadelphia F. Assoc. v. Hogwood*, 82 Va. 342; *Hall v. Com.*, 89 Va. 171; *Hodges v. Com.*, 89 Va. 265; *Lewis v. Com.*, 90 Va. 843.

Washington. — *Doctor Jack v. Territory*, 2 Wash. Ter. 101.

West Virginia. — *Henry v. Davis*, 7 W. Va. 715; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 320; *State v. Poin-dexter*, 23 W. Va. 805.

Wisconsin. — *Rindskopf v. Myers*, 87 Wis. 80.

United States. — *Coffin v. U. S.*, 162 U. S. 664; *Texas*, etc., R. Co. v. *Thompson*, 30 U. S. App. 549; *New Orleans Ins. Co. v. Piaggio*, 16 Wall. (U. S.) 378; *Brooks v. Marbury*, 11 Wheat. (U. S.) 78; *Clarke v. Kownslar*, 10 Pet. (U. S.) 657; *Rhett v. Poe*, 2 How. (U. S.) 457; *Dwyer v. Dunbar*, 5 Wall. (U. S.) 318; *Carter v. Carusi*, 112 U. S. 478; *Boardman v. Reed*, 6 Pet. (U. S.) 328; *Northern Pac. R. Co. v. Paine*, 119 U. S. 561; *Schuyllkill*, etc., Imp. Co. v. *Munson*, 14 Wall. (U. S.) 442; *U. S. Bank v. Corcoran*, 2 Pet. (U. S.) 121; *Chirac v. Reinecker*, 2 Pet. (U. S.) 613; *Chesapeake*, etc., Canal Co. v. *Knapp*, 9 Pet. (U. S.) 541; *M'Niel v. Holbrook*, 12 Pet. (U. S.) 84; *Roach v. Hulings*, 16 Pet. (U. S.) 319; *U. S. v. Boyd*, 5 How. (U. S.) 29; *White v. Burnley*, 20 How. (U. S.) 235; *U. S. v. Breitling*, 20 How. (U. S.) 252; *Good-man v. Simonds*, 20 How. (U. S.) 343; *Chandler v. Von Roeder*, 24 How. (U. S.) 224; *Michigan Ins. Bank v. Eldred*, 9 Wall. (U. S.) 544; *Ward v. U. S.*, 14 Wall. (U. S.) 28; *Tweed's Case*, 16 Wall. (U. S.) 504; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610; *Chicago*, etc., R. Co. v. *Houston*, 95 U. S. 697; *Thatcher v. Kaucher*, 95 U. S. (L. ed.) 511; *Manning v. John Hancock Mut. L. Ins. Co.*, 100 U. S. 693; *Meguire v. Corwine*, 101 U. S. 108; *Jones v. Randolph*, 104 U. S. 108; *Thor-*

alone which arise from the facts and circumstances established by the testimony, and which properly belong to the case at bar.

The Fair Test of the propriety of a charge cannot be whether in the abstract it is right. It must be considered with reference to the evidence of the facts charged on which the jury is required to respond.¹

(2) *Impropriety of Instructions Not Based on Evidence* — **The Rule Stated.** — It follows, then, from what has been said, that it is improper to give an instruction where there is no evidence on which to base it, or to submit to the jury matters which there is no evidence tending to prove. There is a host of authorities enunciating and applying this rule.²

wegan v. King, 111 U. S. 549; *Fulkerson v. Holmes*, 117 U. S. 389; *Watts v. Southern Bell Telephone, etc.*, Co., 66 Fed. Rep. 453; *White v. Van Horn*, 159 U. S. 3; *Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. (U. S.) 159.

1. *Thompson v. Shannon*, 9 Tex. 536.

The instructions ought to have reference to the circumstances of the case, and to be so given as to secure the fair consideration of the judgment of the jury upon the points at issue. A charge which consists mainly of extracts or opinions in reported cases, having no special reference to the circumstances of the case on trial, is objectionable, and where from the consideration of the whole evidence it is reasonable to suppose that the jury may have been misled by such charge, a new trial ought to be granted. *Marietta, etc.*, R. Co. *v. Picksley*, 24 Ohio St. 654.

Proper Test of Instruction. — A charge, as to its sufficiency or insufficiency, is to be tested by its applicability to the facts adduced in the evidence. *Brown v. State*, 6 Tex. App. 286.

A charge is to be interpreted by the evidence, and it is sufficient that it be correct as applied to the evidence. *Warren v. Buckminster*, 24 N. H. 336.

2. *Alabama.* — *Henderson v. State*, 49 Ala. 20; *Crane v. State*, 111 Ala. 45; *Simon v. Johnson*, 108 Ala. 241; *Wisdom v. Reeves*, 110 Ala. 418; *Lehman v. Warren*, 53 Ala. 535; *Stewart v. Russell*, 38 Ala. 619; *Garrett v. Holloway*, 24 Ala. 376; *Allen v. Hamilton*, 109 Ala. 634.

Arkansas. — *State Bank v. Hubbard*, 8 Ark. 183; *Gaines v. Bard*, 57 Ark. 615; *Jones v. State*, 54 Ark. 371; *Beavers v. State*, 54 Ark. 336; *Felker v. State*, 54 Ark. 489; *Little Rock, etc.*, R. Co. *v. Cavenesse*, 48 Ark. 106; *Mc-*

Culloch v. Campbell, 49 Ark. 367; *Harris v. State*, 36 Ark. 127; *Burke v. Snell*, 42 Ark. 57; *Owens v. Chandler*, 16 Ark. 651; *Morton v. Scull*, 23 Ark. 289; *Thompson v. Bertrand*, 23 Ark. 730; *Sadler v. Sadler*, 16 Ark. 628; *Curtis v. State*, 36 Ark. 284; *Marshall v. Sloan*, 26 Ark. 513; *Dickinson v. Johnson*, 24 Ark. 251.

California. — *Whitman v. Steiger*, 46 Cal. 256; *Hirshberg v. Strauss*, 64 Cal. 272; *People v. Hong Tong*, 85 Cal. 171; *Castagnino v. Balletta*, 82 Cal. 250; *Calkins's Estate*, 112 Cal. 296; *Chisholm v. Keyfauber*, 110 Cal. 102; *People v. Sanchez*, 24 Cal. 17; *Holbert's Estate*, 57 Cal. 257; *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657; *Hanks v. Naglee*, 54 Cal. 51; *Perkins v. Eckert*, 55 Cal. 400.

Colorado. — *Williams v. Mellor*, 12 Colo. 1; *Ingols v. Plimpton*, 10 Colo. 535; *Fisk v. Greeley Electric Light Co.*, 3 Colo. App. 319; *Burnham v. Jackson*, 1 Colo. App. 237.

Connecticut. — *Lewis v. Phoenix Mut. L. Ins. Co.*, 44 Conn. 88.

District of Columbia. — *Fay v. Anglim*, 18 D. C. 216.

Florida. — *Tischler v. Kurtz*, 35 Fla. 323; *Levy v. Cox*, 22 Fla. 546; *Thalheim v. State*, 38 Fla. 169.

Georgia. — *McDonald v. McDonald*, 94 Ga. 675; *Richmond, etc.*, R. Co. *v. White*, 88 Ga. 805; *Akridge v. Atlanta, etc.*, R. Co., 90 Ga. 232; *Swift v. Tattner*, 89 Ga. 660; *Hart v. State*, (Ga. 1893) 18 S. E. Rep. 550; *Andrews v. Andrews*, 85 Ga. 276; *McLean v. Clark*, 47 Ga. 24; *Paschal v. Davis*, 3 Ga. 256; *Perkins v. Attaway*, 14 Ga. 27; *Gorman v. Campbell*, 14 Ga. 137; *Henderson v. Stiles*, 14 Ga. 135; *Byrne v. Doughty*, 13 Ga. 46; *Kyle v. Chattahoochee Nat. Bank*, 96 Ga. 693; *University Bank v.*

The Converse of This Rule is equally true and equally well supported by the cases. Decisions almost innumerable, from every jurisdic-

Tuck, 96 Ga. 456; Campbell *v.* Higginbotham, 87 Ga. 324; Hayden *v.* Burney, 89 Ga. 715; Montgomery *v.* Evans, 8 Ga. 178.

Illinois. — Pittsburgh, etc., R. Co. *v.* Shannon, 11 Ill. App. 222; Humphreys *v.* Collier, 2 Ill. 47; Stout *v.* McAdams, 3 Ill. 67; Denman *v.* Bloomer, 11 Ill. 177; McKinley *v.* Watkins, 13 Ill. 140; Baxter *v.* People, 8 Ill. 368; Coughlin *v.* People, 18 Ill. 266; Swift *v.* Raleigh, 54 Ill. App. 44; Barzynski *v.* Stolba, 51 Ill. App. 388; Seckel *v.* Scott, 66 Ill. 106; Shepherd *v.* People, 72 Ill. 480; Cable *v.* Grier, 45 Ill. App. 407; Ohio, etc., R. Co. *v.* Mueller, 46 Ill. App. 109; Springfield *v.* Griffith, 46 Ill. App. 246; Simpson *v.* Kincaid, 34 Ill. App. 521; Espen *v.* Roberts, 33 Ill. App. 268; Clapp *v.* Bullard, 23 Ill. App. 609; Wallace *v.* Wren, 32 Ill. 146; Leake *v.* Brown, 43 Ill. 372; Prescott *v.* Maxwell, 48 Ill. 82; Illinois Cent. R. Co. *v.* Benton, 69 Ill. 174; American *v.* Rimpert, 75 Ill. 228; Bradley *v.* Parks, 83 Ill. 169; Freeport *v.* Isbell, 83 Ill. 440; Martin *v.* Johnson, 89 Ill. 537; Howe Sewing Mach. Co. *v.* Layman, 88 Ill. 39; Palmer *v.* Marshall, 60 Ill. 289; Miller *v.* McManis, 57 Ill. 126; Riley *v.* Dickens, 19 Ill. 29; Alexander *v.* Mt. Sterling, 71 Ill. 366; Wenger *v.* Calder, 78 Ill. 275; Township 13, etc. *v.* Mis-enheimer, 78 Ill. 22; Nichols *v.* Bradsby, 78 Ill. 44; South Evanston *v.* Lynch, 1 Ill. App. 63; Baltimore, etc., R. Co. *v.* Pletz, 61 Ill. App. 161; Hansberg *v.* People, 120 Ill. 21; Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162; Covert *v.* Nolan, 10 Ill. App. 629; Hunting *v.* Baldwin, 6 Ill. App. 547; Moon *v.* Jennings, 8 Ill. App. 168; Germania F. Ins. Co. *v.* McKee, 94 Ill. 494; Hubner *v.* Feige, 90 Ill. 208; Stern *v.* People, 102 Ill. 540; Champion Iron Fence Co. *v.* Bradley, 10 Ill. App. 328; Evans *v.* George, 80 Ill. 51; Holly *v.* Augustine, 2 Ill. App. 108; Holcomb *v.* Davis, 56 Ill. 413; Pease *v.* Catlin, 1 Ill. App. 88; Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302; Oxley *v.* Storer, 54 Ill. 159; Hamilton *v.* Singer Mfg. Co., 54 Ill. 370; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 272; Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478; Lutterell *v.* Caldwell, 31 Ill. App. 30.

Indiana. — Blough *v.* Parry, 144 Ind. 463; McMahon *v.* Flanders, 64 Ind. 334; Jeffersonville R. Co. *v.* Swift, 26

Ind. 459; Swank *v.* Nichols, 24 Ind. 199.

Iowa. — Monroe Bank *v.* Anderson Bros. Min., etc., Co., 65 Iowa 692; Whitsett *v.* Chicago, etc., R. Co., 67 Iowa 150; White *v.* Spangler, 68 Iowa 222; State *v.* Myer, 69 Iowa 148; Johnson *v.* Miller, 69 Iowa 562; Herring *v.* Herring, 94 Iowa 56; Thompson *v.* Anderson, 86 Iowa 703; Banning *v.* Chicago, etc., R. Co., 89 Iowa 74; Gollobitsch *v.* Rainbow, 84 Iowa 567; Fisk *v.* Chicago, etc., R. Co., 74 Iowa 424; Lyman *v.* Lauderbaugh, 75 Iowa 481; Stein *v.* Council Bluffs, 72 Iowa 180; Aznoe *v.* Conway, 72 Iowa 568; Griffith *v.* Burlington, etc., R. Co., 72 Iowa 645; Deeds *v.* Chicago, etc., R. Co., 74 Iowa 154; State *v.* Porter, 74 Iowa 623; Everingham *v.* Lee, 78 Iowa 630; Trapnell *v.* Red Oak Junction, 76 Iowa 744; Elder *v.* Stuart, 85 Iowa 690; Moffitt *v.* Cressler, 8 Iowa 122; Farr *v.* Fuller, 8 Iowa 347; Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718; Murphy *v.* Chicago, etc., R. Co., 38 Iowa 539; Tisdale *v.* Connecticut Mut. L. Ins. Co., 28 Iowa 12; McCramer *v.* Thompson, 21 Iowa 244; Cedar Rapids First Nat. Bank *v.* Hurford, 29 Iowa 579; Byington *v.* McCadden, 34 Iowa 216; Case *v.* Illinois Cent. R. Co., 38 Iowa 581; Leffingwell *v.* Gilchrist, 40 Iowa 416; Howell *v.* Price, 40 Iowa 548; State *v.* Fraunburg, 40 Iowa 555; O'Laughlin *v.* Dubuque, 42 Iowa 539; Henderson *v.* Chicago, etc., R. Co., 43 Iowa 620; State *v.* Osborne, 45 Iowa 425; Clark *v.* Ralls, 58 Iowa 201; Hess *v.* Wilcox, 58 Iowa 380; Hall *v.* Wolff, 61 Iowa 559; Snyder *v.* Kurtz, 61 Iowa 593; Johnson *v.* Miller, 63 Iowa 529; State *v.* Archer, 69 Iowa 420; State *v.* Thompson, 45 Iowa 414; Allender *v.* Chicago, etc., R. Co., 37 Iowa 264; Moorehead *v.* Hyde, 38 Iowa 382; Hand *v.* Langland, 67 Iowa 185; Reed *v.* Chicago, etc., R. Co., 57 Iowa 23; Stafford *v.* Oskaloosa, 57 Iowa 748; Aultman *v.* Lee, 43 Iowa 404; State *v.* Bailey, 54 Iowa 414; Parkhurst *v.* Masteller, 57 Iowa 474.

Kansas. — Atchison, etc., R. Co. *v.* Wells, 56 Kan. 222; Chicago, etc., R. Co. *v.* Prouty, 55 Kan. 503; Willard *v.* Ostrander, 51 Kan. 481; Feineman *v.* Sachs, 33 Kan. 621; Chicago, etc., R. Co. *v.* Stewart, 47 Kan. 704; State *v.* Whitaker, 35 Kan. 731; Kinsley *v.*

tion, hold that a court does not commit error in declining a request to charge the jury upon a point as to which no evidence

Morse, 40 Kan. 578; Markland v. McDaniel, 51 Kan. 350; Lorie v. Adams, 51 Kan. 692; Dowell v. Williams, 33 Kan. 319.

Kentucky. — Newport News, etc., Co. v. Deuser, 97 Ky. 92; Sutton v. Menser, 6 B. Mon. (Ky.) 434; Mayes v. Farish, 11 B. Mon. (Ky.) 38; Bugg v. Com., (Ky. 1897) 38 S. W. Rep. 684.

Maine. — Kelton v. Hill, 58 Me. 114.

Maryland. — Gaither v. Myrick, 9 Md. 118, Keech v. Baltimore, etc., R. Co., 17 Md. 32; Whiteford v. Munroe, 17 Md. 135; Munroe v. Woodruff, 17 Md. 159; Morrison v. Welty, 18 Md. 169; Hagan v. Hendry, 18 Md. 177; Cecil Bank v. Snively, 23 Md. 253; Chesapeake Ins. Co. v. Allegré, 2 Gill & J. (Md.) 164; Barger v. Collins, 7 Har. & J. (Md.) 213; Riggins v. Patapsco Ins. Co., 7 Har. & J. (Md.) 295; Walter v. Alexander, 2 Gill (Md.) 204; Edelin v. Sanders, 8 Md. 118.

Massachusetts. — Com. v. Sargent, 129 Mass. 115; Wells v. Prince, 15 Gray (Mass.) 562; Com. v. Gilson, 128 Mass. 425.

Michigan. — Dondero v. Frumveller, 61 Mich. 440; Bulen v. Granger, 63 Mich. 311; Pigott v. Lilly, 55 Mich. 150; Hood v. Olin, 68 Mich. 165; Hart v. Firzlafl, 67 Mich. 514; Locke v. Priestly Express Wagon, etc., Co., 71 Mich. 263; Brown v. Metropolitan L. Ins. Co., 65 Mich. 306; Iler v. Baker, 82 Mich. 226; Wright v. Senn, 85 Mich. 191; Hewitt v. Flint, etc., R. Co., 67 Mich. 61; Campau v. North, 39 Mich. 607; Lacy v. Wilson, 24 Mich. 479; Edwards v. Edwards, 54 Mich. 347; Barnes v. Gardner, 60 Mich. 133; Hudnut v. Gardner, 59 Mich. 341; American Transp. Co. v. Moore, 5 Mich. 368; Stilson v. Gibbs, 53 Mich. 280; Dodge v. Brown, 22 Mich. 446; Leslie v. Smith, 32 Mich. 64; Hunt v. Strew, 33 Mich. 85; Folkerts v. Standish, 55 Mich. 463; Seligman v. Ten Eyck, 60 Mich. 267; Hewitt v. Begole, 22 Mich. 31; People v. Jones, 24 Mich. 215; Josselyn v. Bishop, 25 Mich. 397; Chadwick v. Butler, 28 Mich. 349; Moynahan v. Connor, 30 Mich. 136; Weaver v. Bromley, 65 Mich. 212; Trombly v. Trombly, 106 Mich. 227; Fletcher v. Post, 104 Mich. 424; Harris v. Woodford, 98 Mich. 147; Brussel v. Minneapolis, etc., R. Co., 101 Mich. 5.

Mississippi. — Clay v. Postal Telegraph-Cable Co., 70 Miss. 406; Layton v. State, 56 Miss. 791; Lavenburg v. Harper, 27 Miss. 299; Hogan v. State, 46 Miss. 274; Co-operative L. Assoc. v. McConnico, 53 Miss. 239; Kinnare v. Gregory, 55 Miss. 623; Adams v. Power, 48 Miss. 451; Prince v. Crawford, 50 Miss. 361; Fortenberry v. State, 55 Miss. 403; Parker v. State, 55 Miss. 414; Dix v. Brown, 41 Miss. 131; Burns v. Kelley, 41 Miss. 339; Barker v. Justice, 41 Miss. 240; Greenwade v. Mills, 31 Miss. 464; Garnett v. Kirkman, 33 Miss. 389; McIntyre v. Kline, 30 Miss. 361; Heirn v. M'Caughan, 32 Miss. 17; Clarke v. Edwards, 44 Miss. 778; Payne v. Green, 10 Smed. & M. (Miss.) 507; O'Reilly v. Hendricks, 2 Smed. & M. (Miss.) 388; Wiggins v. McGimpsey, 13 Smed. & M. (Miss.) 532; Hyde v. Finley, 26 Miss. 468; Wright v. Clark, 34 Miss. 116; Lombard v. Martin, 39 Miss. 147; Herndon v. Bryant, 39 Miss. 335; Dennis v. M'Laurin, 31 Miss. 606; Fairly v. Fairly, 38 Miss. 280; New Orleans, etc., R. Co. v. Statham, 42 Miss. 607; Garner v. Collins, Walk. (Miss.) 518; Ivy v. Walker, 58 Miss. 253; Oliver v. State, 39 Miss. 526; Cothran v. State, 39 Miss. 541.

Missouri. — Webster College v. Tyler, 35 Mo. 268; Sartin v. Saling, 21 Mo. 387; McKeon v. Citizens' R. Co., 42 Mo. 79; Chouteau v. Searcy, 8 Mo. 733; Ewing v. Gass, 41 Mo. 492; Franz v. Hilterbrand, 45 Mo. 121; O'Fallon v. Boismenu, 3 Mo. 405; Waddingham v. Gamble, 4 Mo. 465; Vaulx v. Campbell, 8 Mo. 224; Hays v. Bell, 16 Mo. 496; Rogers v. McCune, 19 Mo. 557; Harrison v. Cachelin, 27 Mo. 26; State v. Ross, 29 Mo. 32; Atkins v. Nicholson, 31 Mo. 488; Gelpke v. Pike, 33 Mo. 168; Goodall v. Tricky, 33 Mo. 340; M'Camant v. Busch, 33 Mo. 544; Winters v. Hannibal, etc., R. Co., 39 Mo. 468; Ryan v. Spalding, 40 Mo. 165; Turner v. Baker, 42 Mo. 13; Karriger v. Greb, 42 Mo. 44; Camp v. Heelan, 43 Mo. 591; Goerges v. Hufschmidt, 44 Mo. 179; Harper v. Indianapolis, etc., R. Co., 44 Mo. 488; Doebling v. Loos, 45 Mo. 150; Boatmen's Sav. Bank v. Overall, 16 Mo. App. 510; Skyles v. Bollman, 85 Mo. 35; Biglow v. Carney, 18 Mo. App. 534; Pipkin v. Haucke, 15

has been adduced at the trial. It is always proper to refuse a

Mo. App. 373; *State v. Tice*, 90 Mo. 112; *Miller v. St. Louis, etc.*, R. Co., 90 Mo. 389; *Conway v. Hannibal, etc.*, R. Co., 24 Mo. App. 235; *Rose v. Rubeling*, 24 Mo. App. 369; *Willis v. Stevens*, 24 Mo. App. 494; *Doty v. Steinberg*, 25 Mo. App. 328; *Brownfield v. Phoenix Ins. Co.*, 26 Mo. App. 390; *Gessley v. Missouri Pac. R. Co.*, 26 Mo. App. 156; *O'Connor, etc.*, Range, etc., Co. v. Alexe, 28 Mo. App. 184; *Huff v. Morton*, 94 Mo. 405; *Little v. Macadaras*, 29 Mo. App. 332; *Haegele v. Western Stove Mfg. Co.*, 29 Mo. App. 486; *Sturgess v. Crum*, 29 Mo. App. 644; *Zwisler v. Storts*, 30 Mo. App. 164; *Albert v. Seiler*, 31 Mo. App. 247; *Jones v. Missouri Pac. R. Co.*, 31 Mo. App. 614; *Patton v. Penquite*, 32 Mo. App. 595; *Harty v. St. Louis, etc.*, R. Co., 95 Mo. 368; *State v. Jackson*, 95 Mo. 623; *State v. Herrell*, 97 Mo. 105; *Rodney v. McLaughlin*, 97 Mo. 426; *Sawyers v. Drake*, 34 Mo. App. 472; *Henson v. St. Louis, etc.*, R. Co., 34 Mo. App. 636; *Procter v. Loomis*, 35 Mo. App. 482; *Cady v. Winters*, 35 Mo. App. 637; *Dearing v. Fletcher*, 37 Mo. App. 122; *Jones v. Berry*, 37 Mo. App. 125; *Newcomb v. Jones*, 37 Mo. App. 475; *O'Bryan v. Jones*, 38 Mo. App. 90; *Sweeney v. St. Louis, etc.*, R. Co., 38 Mo. App. 154; *Doan v. St. Louis, etc.*, R. Co., 38 Mo. App. 408; *State v. Wilson*, 39 Mo. App. 184; *Maddox v. German Ins. Co.*, 39 Mo. App. 198; *State v. Primm*, 98 Mo. 368; *Dunn v. Cass Ave., etc.*, R. Co., 98 Mo. 652; *Bender v. Dungan*, 99 Mo. 126; *Norton v. St. Louis, etc.*, R. Co., 40 Mo. App. 642; *Bobb v. Syenite Granite Co.*, 41 Mo. App. 642; *State v. Riley*, 100 Mo. 493; *Anchor Milling Co. v. Walsh*, 37 Mo. App. 567; *Fairgrieve v. City of Moberly*, 39 Mo. App. 31; *Fort Scott First Nat. Bank v. Lillard*, 55 Mo. App. 675; *Jones v. Grossman*, 59 Mo. App. 195; *Box v. Atchison, etc.*, R. Co., 58 Mo. App. 359; *Och v. Missouri, etc.*, R. Co., 130 Mo. 27; *Payne v. Chicago, etc.*, R. Co., 129 Mo. 405; *Hewitt v. Steele*, 118 Mo. 463; *Ivie v. McMunigal*, 2 Mo. App. Rep. 1345; *Craighead v. Wells*, 21 Mo. 404; *Wilson v. Rutherford*, 69 Mo. App. 304.

Montana. — *Purtle v. Casey*, 11 Mont. 229; *Territory v. Manton*, 7 Mont. 162; *Campbell v. Metcalf*, 1 Mont. 379; *Territory v. Whitcomb*, 1 Mont. 359.

Nebraska. — *Cropsey v. Averill*, 8

Neb. 152; *York v. Spellman*, 19 Neb. 357; *Walrath v. State*, 8 Neb. 81; *Kilpatrick v. Richardson*, 37 Neb. 731; *Farmers' L. & T. Co. v. Montgomery*, 30 Neb. 33; *Frederick v. Kinzer*, 17 Neb. 366; *Dayton v. Lincoln*, 39 Neb. 74; *Durrell v. Johnson*, 31 Neb. 796; *Morearty v. State*, 46 Neb. 652; *Camp v. Sturdevant*, 16 Neb. 694; *Omaha v. Coombe*, 48 Neb. 879.

New Hampshire. — *Moore v. Phoenix F. Ins. Co.*, 64 N. H. 140.

New York. — *Donahue v. New York Cent., etc.*, R. Co., 15 Misc. Rep. (Buffalo Super. Ct.) 256; *MacGowan v. Duff*, 14 Daly (N. Y.) 315; *Day v. Jameson*, 122 N. Y. 636, 33 N. Y. St. Rep. 375; *Weaver v. Grant*, 56 Hun (N. Y.) 103; *Gill v. Rochester, etc.*, R. Co., 37 Hun (N. Y.) 107.

North Carolina. — *Bond v. Hall*, 8 Jones L. (N. Car.) 14; *Jones v. Eason*, 2 Ired. L. (N. Car.) 331; *State v. Peace*, 1 Jones L. (N. Car.) 251; *Lee v. Williams*, 111 N. Car. 200; *Barringer v. Burns*, 108 N. Car. 606; *State v. Benton*, 2 Dev. & B. L. (N. Car.) 196; *Pollard v. Teel*, 3 Ired. L. (N. Car.) 470; *Burnett v. Fulton*, 1 Jones L. (N. Car.) 543; *Dula v. Cowles*, 4 Jones L. (N. Car.) 519; *Smith v. Sasser*, 5 Jones L. (N. Car.) 388; *State v. Sizemore*, 7 Jones L. (N. Car.) 206; *Beaufort v. Duncan*, 1 Jones L. (N. Car.) 234; *Newby v. Harrell*, 99 N. Car. 149; *Jordan v. Farthing*, 117 N. Car. 181; *State v. Harrison*, 5 Jones L. (N. Car.) 115.

Ohio. — *Morgan v. State*, 48 Ohio St. 371.

Oregon. — *Morris v. Perkins*, 6 Oregon 350; *Hayden v. Long*, 8 Oregon 244; *Marx v. Schwartz*, 14 Oregon 177; *Breon v. Henkle*, 14 Oregon 494; *Glenn v. Savage*, 14 Oregon 567.

Pennsylvania. — *Hasson v. Klee*, 168 Pa. St. 510; *Wheelock v. Fuellhart*, 158 Pa. St. 359; *Camden, etc.*, R. Co. v. Hoosey, 99 Pa. St. 499; *Morton v. Weaver*, 99 Pa. St. 51; *Selser v. Roberts*, 105 Pa. St. 242; *Dooner v. Delaware, etc.*, Canal Co., 164 Pa. St. 17; *Haines v. Stouffer*, 10 Pa. St. 363; *Sartwell v. Wilcox*, 20 Pa. St. 117; *Lower v. Clement*, 25 Pa. St. 63; *Bogle v. Kreitzer*, 46 Pa. St. 465; *Herdic v. Bilger*, 47 Pa. St. 60; *Switland v. Holgate*, 8 Watts (Pa.) 385; *Urket v. Corryell*, 5 W. & S. (Pa.) 60; *Jones v. Wood*, 16 Pa. St. 25; *Mahaffey v. Byers*, 151 Pa. St. 92; *Snyder v. Wilt*, 15 Pa. St. 59.

charge asserting even a correct legal proposition, when there is

South Dakota. — *Murphy v. Murphy*, 1 S. Dak. 316.

Tennessee. — *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711; *Croft v. State*, 6 Humph. (Tenn.) 317.

Texas. — *Houston, etc., R. Co. v. Rider*, 62 Tex. 267; *Wheeler v. Moody*, 9 Tex. 372; *Andrews v. Marshall*, 26 Tex. 212; *Thompson v. Shannon*, 9 Tex. 536; *Burrell v. State*, 18 Tex. 713; *Darnell v. State*, 43 Tex. 147; *Chamberlain v. State*, 25 Tex. App. 398; *Gulf, etc., R. Co. v. McGowan*, 73 Tex. 355; *Kelso v. Townsend*, 13 Tex. 140; *Missouri Pac. R. Co. v. Peay*, (Tex. 1892) 20 S. W. Rep. 57; *Gulf, etc., R. Co. v. Harriett*, 80 Tex. 73; *Western Union Tel. Co. v. Kendzora*, 77 Tex. 257; *Wootiers v. Kaufman*, 73 Tex. 395; *Houston, etc., R. Co. v. Tierney*, 72 Tex. 312; *Bigham v. McDowell*, 69 Tex. 100; *Box v. Word* 65 Tex. 159; *Altgelt v. Brister*, 57 Tex. 432; *International, etc., R. Co. v. Lock*, (Tex. Civ. App. 1892) 20 S. W. Rep. 855; *Dillingham v. Brown*, (Tex. 1891) 17 S. W. Rep. 45; *St. Louis, etc., R. Co. v. Crosnoe*, 72 Tex. 84; *Gulf, etc., R. Co. v. Gordon*, 70 Tex. 80; *Willis v. Morris*, 66 Tex. 628; *Houston, etc., R. Co. v. Gilmore*, 62 Tex. 391; *Belcher v. Fox*, 60 Tex. 527; *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 505; *Austin v. Talk*, 20 Tex. 167; *Yarborough v. Tate*, 14 Tex. 483; *Earle v. Thomas*, 14 Tex. 583; *Cox v. Harvey*, 1 Tex. Unrep. Cas. 268; *McGreal v. Wilson*, 9 Tex. 426; *Lee v. Yandell*, 69 Tex. 34; *Smith v. Redden*, 1 Tex. Unrep. Cas. 360; *Cain v. Thomas*, 26 Tex. 581; *Houston, etc., R. Co. v. Oram*, 49 Tex. 341; *March v. Walker*, 48 Tex. 372; *Hough v. Hill*, 47 Tex. 148; *Hampton v. Dean*, 4 Tex. 455; *Hutchins v. Masterson*, 46 Tex. 551; *Fore v. Hitson*, 70 Tex. 517; *Massey v. State*, 29 Tex. App. 159; *Galveston, etc., R. Co. v. Arispe*, 81 Tex. 517; *Gulf, etc., R. Co. v. Kizziah*, 86 Tex. 81; *Shultz v. State*, 5 Tex. App. 390; *Gose v. State*, 6 Tex. App. 121; *Sims v. State*, 4 Tex. App. 144; *Adamson v. Shiel*, (Tex. App. 1892) 18 S. W. Rep. 464; *Moore v. State*, (Tex. Crim. App. 1896) 33 S. W. Rep. 980; *Hayes v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 983; *Burgess v. State*, 33 Tex. Crim. Rep. 9; *Tittle v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 677; *Fordyce v. Chancey*, 2 Tex. Civ. App. 24; *Burns v. True*, 5 Tex. Civ. App.

74; *Galveston, etc., R. Co. v. Lewis*, 5 Tex. Civ. App. 638; *Fordyce v. Beecher*, 2 Tex. Civ. App. 29; *Pullman Palace Car Co. v. Fowler*, 6 Tex. Civ. App. 755; *Atchison, etc., R. Co. v. Click*, 5 Tex. Civ. App. 224; *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333; *Davis v. Bingham*, (Tex. Civ. App. 1895) 33 S. W. Rep. 1035; *International, etc., R. Co. v. Eason*, (Tex. Civ. App. 1896) 35 S. W. Rep. 208; *McCormick Harvesting Mach. Co. v. Mays*, (Tex. Civ. App. 1896) 33 S. W. Rep. 883; *Texas, etc., R. Co. v. Avery*, (Tex. Civ. App. 1895) 33 S. W. Rep. 704; *Galveston, etc., R. Co. v. Waldo*, (Tex. Civ. App. 1894) 26 S. W. Rep. 1004; *Nicholas v. Nicholas*, (Tex. Civ. App. 1894) 24 S. W. Rep. 1116; *Dallas, etc., R. Co. v. Day*, 3 Tex. Civ. App. 353; *Ledbetter v. First Nat. Bank*, (Tex. Civ. App. 1895) 31 S. W. Rep. 840; *Fergus v. Dodson*, (Tex. Civ. App. 1895) 33 S. W. Rep. 273; *Campbell v. Nicolini*, (Tex. Civ. App. 1896) 35 S. W. Rep. 74; *Harter v. Marshall*, (Tex. Civ. App. 1896) 36 S. W. Rep. 294; *Andrews v. Smithwick*, 20 Tex. 111; *Graham v. McCarthy*, 69 Tex. 323; *Texas, etc., R. Co. v. Reid*, 1 Tex. App. Civ. Cas., § 297; *Seligman v. Wilson*, 1 Tex. App. Civ. Cas., § 897; *Adamson v. Shiel*, 4 Tex. App. Civ. Cas., § 294.

Vermont. — *Good v. Knox*, 64 Vt. 97; *Manwell v. Briggs*, 17 Vt. 176.

Virginia. — *Priest v. Whitacre*, 78 Va. 151; *Birch v. Linton*, 78 Va. 584; *Moon v. Richmond, etc., R. Co.*, 78 Va. 745; *Rea v. Trotter*, 26 Gratt. (Va.) 585.

Washington. — *Miller v. Territory*, 3 Wash. Ter. 554.

West Virginia. — *McMechen v. McMechen*, 17 W. Va. 683; *Storrs v. Feick*, 24 W. Va. 606; *Vinal v. Core*, 18 W. Va. 1; *Lawson v. Dalton*, 18 W. Va. 766; *Winkler v. Chesapeake, etc., R. Co.*, 12 W. Va. 699; *Oliver v. Ohio River R. Co.*, 42 W. Va. 703.

United States. — *Ward v. U. S.*, 14 Wall. (U. S.) 28; *Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. (U. S.) 159; *Hicks v. U. S.*, 150 U. S. 442; *Roach v. Hulings*, 16 Pet. (U. S.) 319; *Michigan Ins. Bank v. Eldred*, 9 Wall. (U. S.) 544; *Tweed's Case*, 16 Wall. (U. S.) 504; *Chicago, etc., R. Co. v. Houston*, 95 U. S. 697; *Jones v. Van Benthuyssen*, 103 U. S. 87; *Keyser v. Hitz*, 133 U. S. 138; *Northern Pac. R. Co. v. Paine*, 119 U. S. 561; *U. S. v. Breitling*, 20 How.

no testimony on which to base it.¹

The Reason for This Rule Is Obvious: such an instruction is liable

(U. S.) 252; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Chicago v. Robbins*, 2 Black (U. S.) 418; *Blackburn v. Crawford*, 3 Wall. (U. S.) 175; *St. Louis, etc., R. Co. v. Spencer*, 71 Fed. Rep. 93; *Northwestern Mut. L. Ins. Co. v. Stevens*, 71 Fed. Rep. 258; *Williams v. Simons*, 70 Fed. Rep. 40.

1. *Alabama*.—*Louisville, etc., R. Co. v. Philyaw*, 88 Ala. 264; *Bostic v. State*, 94 Ala. 45; *Barnes v. State*, 111 Ala. 56; *Brown v. Isbell*, 11 Ala. 100; *Horsefield v. Adams*, 10 Ala. 9; *Yarborough v. Moss*, 9 Ala. 382; *Langford v. Cummings*, 4 Ala. 46; *Chamberlain v. Darrington*, 4 Port. (Ala.) 515; *Wilson v. Jackson, Minor* (Ala.) 399; *Knox v. Easton*, 38 Ala. 345; *Donohoo v. State*, 36 Ala. 281; *Memphis, etc., R. Co. v. Graham*, 94 Ala. 545; *Louisville, etc., R. Co. v. Baker*, 106 Ala. 624; *Englehardt v. Clanton*, 83 Ala. 336; *Taylor v. State*, 48 Ala. 157; *Gilliam v. State*, 50 Ala. 145; *Lyon v. Kent*, 45 Ala. 656; *Nothington v. Faber*, 52 Ala. 45; *Montgomery, etc., R. Co. v. Kolb*, 73 Ala. 396; *Allen v. Hamilton*, 109 Ala. 634; *Wadsworth v. Williams*, 101 Ala. 264; *Stewart v. Cole*, 46 Ala. 646; *McAlpine v. State*, 47 Ala. 78; *Molette v. State*, 49 Ala. 18; *Clark v. State*, 49 Ala. 37; *Roddy v. McGetrick*, 49 Ala. 159; *Stewart v. Sonnebourn*, 49 Ala. 178; *Noles v. Marable*, 50 Ala. 366; *Faulk v. State*, 51 Ala. 15; *Drake v. State*, 51 Ala. 30; *Crosby v. Hutchinson*, 53 Ala. 5; *Collins v. Mountain*, 53 Ala. 201; *Richardson v. State*, 54 Ala. 158; *Holly v. Flournoy*, 54 Ala. 99; *Prescott v. Jordan*, 57 Ala. 272; *Young v. O'Neal*, 57 Ala. 566; *Beasley v. State*, 59 Ala. 20; *Glenn v. State*, 60 Ala. 104; *Bain v. State*, 61 Ala. 75; *Leonard v. State*, 66 Ala. 461; *Robinson v. Bullock*, 66 Ala. 548; *Tyree v. Lyon*, 67 Ala. 1; *Talladega Ins. Co. v. Peacock*, 67 Ala. 253; *King v. State*, 71 Ala. 1; *Hubbard v. State*, 72 Ala. 164; *Morrow v. Parkman*, 14 Ala. 769; *Golding v. Merchant*, 43 Ala. 705; *Aikin v. State*, 35 Ala. 399; *Gunn v. Howell*, 35 Ala. 144; *Pool v. Pool*, 35 Ala. 12; *McGuire v. State*, 37 Ala. 161; *Stephen v. State*, 40 Ala. 67; *Leslie v. Langham*, 40 Ala. 524; *Jemison v. Dearing*, 41 Ala. 283; *Brown v. Cockrell*, 33 Ala. 38; *Dunlap v. Robinson*,

28 Ala. 100; *Stewart v. Bradford*, 26 Ala. 410; *Brister v. State*, 26 Ala. 107; *Garrett v. Holloway*, 24 Ala. 376; *Harrison v. State*, 24 Ala. 67; *Brown v. Jones*, 24 Ala. 463; *Hollinger v. Smith*, 4 Ala. 367; *McGehee v. Powell*, 8 Ala. 827; *Swift v. Fitzhugh*, 9 Port. (Ala.) 40; *Felix v. State*, 18 Ala. 720; *Murray v. State*, 18 Ala. 727; *Henry v. Allen*, 93 Ala. 197.

Arkansas.—*Tobin v. Jenkins*, 29 Ark. 151; *Little Rock, etc., R. Co. v. Townsend*, 41 Ark. 382; *Johnson v. State*, 36 Ark. 242; *Richardson v. Comstock*, 21 Ark. 69; *Worthington v. Curd*, 15 Ark. 492; *Thompson v. Bertrand*, 23 Ark. 730; *Burke v. Snell*, 42 Ark. 57; *Obermeier v. Core*, 25 Ark. 562; *Robins v. Fowler*, 2 Ark. 133; *Howell v. Webb*, 2 Ark. 360; *State Bank v. Williams*, 6 Ark. 161; *State Bank v. Hubbard*, 8 Ark. 186; *Johnston v. Ashley*, 7 Ark. 470; *Stanton v. State*, 13 Ark. 318; *Collier v. State*, 13 Ark. 676; *Owens v. Chandler*, 16 Ark. 651; *Morton v. Scull*, 23 Ark. 289; *Carlock v. Spencer*, 7 Ark. 12; *State v. Jones*, 22 Ark. 331; *McNeill v. Arnold*, 22 Ark. 477; *Lawrence County v. Coffman*, 36 Ark. 641.

California.—*People v. Hawes*, 98 Cal. 648; *People v. Davis*, 47 Cal. 93; *Fowler v. Smith*, 2 Cal. 39; *Benham v. Rowe*, 2 Cal. 387; *Aguirre v. Alexander*, 58 Cal. 30; *Conlin v. San Francisco, etc., R. Co.*, 36 Cal. 404; *People v. Best*, 39 Cal. 690; *Shepherd v. Jones*, 71 Cal. 223; *Stevens v. San Francisco, etc., R. Co.*, 100 Cal. 554; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15; *People v. Roberts*, 6 Cal. 214.

Colorado.—*Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535; *Cowell v. Colorado Springs Co.*, 3 Colo. 82.

Connecticut.—*Allen v. Rundle*, 50 Conn. 33; *Cowles v. Bacon*, 21 Conn. 466; *Miles v. Douglas*, 34 Conn. 396; *Burnham v. Sherwood*, 56 Conn. 232; *State v. Smith*, 49 Conn. 388.

District of Columbia.—*Woods v. Trinity Parish*, 21 D. C. 540.

Florida.—*Robinson v. Barnett*, 19 Fla. 670; *McMurray v. Basnett*, 18 Fla. 609; *Mayer v. Wilkins*, 37 Fla. 244; *Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.*, 27 Fla. 1, 157; *Proctor v. Hart*, 5 Fla. 465; *Whitner v. Hamlin*, 12 Fla. 18; *Dibble v. Truluck*, 11 Fla. 135; *Heinberg v. Cannon*, 36

to impress the jury with the belief that there is evidence tending

Fla. 601; *Whitner v. Hamlin*, 12 Fla. 18; *Judge v. Moore*, 9 Fla. 269.

Georgia. — *Irby v. State*, 95 Ga. 467; *Georgia R., etc., Co. v. Berry*, 78 Ga. 744; *Rives v. Jordan*, 99 Ga. 80, 24 S. E. Rep. 857; *Beach v. Netherland*, 93 Ga. 233; *Jackson v. State*, 91 Ga. 271; *Robinson v. State*, 84 Ga. 674; *Boyd v. State*, 17 Ga. 194; *Long v. State*, 12 Ga. 293; *Klink v. Boland*, 72 Ga. 485; *Southwestern R. Co. v. Papot*, 67 Ga. 676; *Bigham v. Coleman*, 71 Ga. 176; *Pace v. Payne*, 73 Ga. 670; *Doe v. Gullatt*, 10 Ga. 218; *McBain v. Smith*, 13 Ga. 315; *Mitchell v. Western, etc., R. Co.*, 30 Ga. 22; *Guernsey v. Greenwood*, 88 Ga. 446; *Augusta, etc., R. Co. v. Randall*, 79 Ga. 304.

Idaho. — *Henry v. Jones*, 1 Idaho 48; *Johnson v. Fraser*, 2 Idaho 371.

Illinois. — *Chicago, etc., R. Co. v. George*, 19 Ill. 510; *Hosley v. Brooks*, 20 Ill. 115; *Calhoun County v. Buck*, 27 Ill. 440; *Pfund v. Zimmerman*, 29 Ill. 269; *Rice v. People*, 38 Ill. 435; *Murphy v. People*, 37 Ill. 447; *Harris v. Miner*, 28 Ill. 135; *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221; *Lawrence v. Jarvis*, 32 Ill. 304; *Hessing v. McCloskey*, 37 Ill. 341; *Mason v. Jones*, 36 Ill. 212; *Chicago, etc., R. Co. v. Fox*, 41 Ill. 106; *Leake v. Brown*, 43 Ill. 372; *Nichols v. Mercer*, 44 Ill. 250; *Hite v. Blanford*, 45 Ill. 9; *Prescott v. Maxwell*, 48 Ill. 82; *Sprague v. Hazenwinkle*, 53 Ill. 419; *Hamilton v. Singer Mfg. Co.*, 54 Ill. 370; *Oxley v. Storer*, 54 Ill. 159; *Goodwin v. Durham*, 56 Ill. 239; *Weaver v. Rylander*, 55 Ill. 529; *Cossitt v. Hobbs*, 56 Ill. 231; *Holcomb v. Davis*, 56 Ill. 413; *Toledo, etc., R. Co. v. Ingraham*, 58 Ill. 120; *St. Louis, etc., R. Co. v. Manly*, 58 Ill. 300; *Means v. Lawrence*, 61 Ill. 137; *Mitchell v. Fond du Lac*, 61 Ill. 174; *Holden v. Hulburd*, 61 Ill. 280; *Paulin v. Howser*, 63 Ill. 312; *Greenwood v. Jenkle*, 68 Ill. 319; *Wray v. Chicago, etc., R. Co.*, 86 Ill. 424; *King v. Haley*, 86 Ill. 106; *Vanderslice v. Mumma*, 1 Ill. App. 434; *Hubner v. Feige*, 90 Ill. 208; *Guill v. Hanny*, 1 Ill. App. 490; *Amend v. Murphy*, 69 Ill. 337; *Straus v. Minzesheimer*, 78 Ill. 492; *Russell v. Whiteside*, 5 Ill. 7; *Andreas v. Ketcham*, 77 Ill. 377; *Indianapolis, etc., R. Co. v. Birney*, 71 Ill. 391; *East v. Crow*, 70 Ill. 91; *Plummer v. Rigdon*, 78 Ill. 222; *Rolfe v. Rich*, 46 Ill. App. 406; *Doyle v. People*,

147 Ill. 394; *Pennsylvania Co. v. Marshall*, 119 Ill. 399; *Reinback v. Crabtree*, 77 Ill. 182; *Toledo, etc., R. Co. v. Ingraham*, 77 Ill. 309; *Bartlett v. Cunningham*, 85 Ill. 22; *Hewett v. Johnson*, 72 Ill. 513; *Bissell v. Curran*, 69 Ill. 20; *Hill v. Ward*, 7 Ill. 285; *McNair v. Platt*, 46 Ill. 211; *South Evanston v. Lynch*, 1 Ill. App. 63; *Parker v. Fergus*, 52 Ill. 419; *Devlin v. People*, 104 Ill. 504; *Pate v. People*, 8 Ill. 644; *Rock Island v. Cuinely*, 126 Ill. 408; *Hutchinson Furnace, etc., Co. v. Lyford*, 123 Ill. 300; *Chicago Dredging, etc., Co. v. McMahon*, 30 Ill. App. 358; *Secor v. Pestana*, 37 Ill. 525; *Diversy v. Kellogg*, 44 Ill. 114; *Platt v. People*, 29 Ill. 54; *Amos v. Sinnott*, 5 Ill. 440; *Nealy v. Brown*, 6 Ill. 10; *Sterling v. Merrill*, 124 Ill. 522; *Borwell v. Schultz*, 50 Ill. App. 161.

Indiana. — *Epps v. State*, 102 Ind. 539; *Spence v. Owen County*, 117 Ind. 573; *Trentman v. Wiley*, 85 Ind. 33; *Leary v. Meier*, 78 Ind. 393; *Ohio, etc., R. Co. v. Voight*, 122 Ind. 288; *Sherman v. Hogland*, 73 Ind. 472; *Simpkins v. Smith*, 94 Ind. 470; *Newby v. Vestal*, 6 Ind. 412; *Goodbar v. Lidikey*, 136 Ind. 1; *Dale v. Jones*, 15 Ind. App. 420; *Musselman v. Pratt*, 44 Ind. 126; *Fuller v. Wilson*, 6 Blackf. (Ind.) 403; *Linville v. Earlywine*, 4 Blackf. (Ind.) 469; *Grover v. Sims*, 5 Blackf. (Ind.) 498; *Amick v. O'Hara*, 6 Blackf. (Ind.) 258; *Wayne County Turnpike Co. v. Berry*, 5 Ind. 286; *Rice v. Rice*, 6 Ind. 100; *Chandler v. Schoonover*, 14 Ind. 324; *Miller v. Gorman*, 5 Blackf. (Ind.) 112; *Tucker v. Call*, 45 Ind. 31; *Kavanaugh v. Taylor*, 2 Ind. App. 502; *Citizens' St. R. Co. v. Willooby*, 134 Ind. 563.

Iowa. — *State v. Aikin*, 94 Iowa 50; *Connors v. Burlington, etc., R. Co.*, 74 Iowa 383; *McDermott v. Iowa Falls, etc., R. Co.*, (Iowa 1891) 47 N. W. Rep. 1037; *Flanagan v. Baltimore, etc., R. Co.*, 83 Iowa 639; *State v. Phipps*, 95 Iowa 487; *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa 364; *Eckelund v. Talbot*, 80 Iowa 569; *Scott v. Chicago, etc., R. Co.*, 78 Iowa 199; *Norris v. Kipp*, 74 Iowa 444; *State v. Corrette*, 12 Iowa 358; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601; *Messer v. Reginnitter*, 32 Iowa 312; *Cross v. Garrett*, 35 Iowa 480; *Tryon v. Oxley*, 3 Greene (Iowa) 289; *Hall v. Hunter*, 4

to prove a fact or state of facts when such is not the case, and to direct their attention to issues not involved.

Greene (Iowa) 539; Iowa College *v.* Hill, 12 Iowa 462; Van Vechten *v.* Smith, 59 Iowa 173; Packer *v.* Cockayne, 3 Greene (Iowa) 111; Gover *v.* Dill, 3 Greene (Iowa) 337; Hypfner *v.* Walsh, 3 Greene (Iowa) 509; Pomroy *v.* Parmelee, 9 Iowa 140.

Kansas. — Gregg *v.* George, 16 Kan. 546; Jaedicke *v.* Scrafford, 15 Kan. 120; Grant *v.* Pendery, 15 Kan. 236; Lewis *v.* State, 4 Kan. 297; Bigelow *v.* Henniger, 33 Kan. 362; State *v.* Hendricks, 32 Kan. 559; Abilene *v.* Hendricks, 36 Kan. 196.

Kentucky. — Smith *v.* Morrow, 5 Litt. (Ky.) 217; Smith *v.* Miller, 2 Bibb (Ky.) 617; Layson *v.* Galloway, 4 Bibb (Ky.) 100; Beasley *v.* Gillespie, 4 Bibb (Ky.) 316; Steamboat Blue Wing *v.* Buckner, 12 B. Mon. (Ky.) 249; Louisville, etc., R. Co. *v.* Bell, 13 Ky. L. Rep. 393; Sutton *v.* Floyd, 7 B. Mon. (Ky.) 3.

Louisiana. — State *v.* Garic, 35 La. Ann. 970; State *v.* Melton, 37 La. Ann. 77; State *v.* Simmons, 38 La. Ann. 41; State *v.* Tibbs, 48 La. Ann. 1278; State *v.* Riculfi, 35 La. Ann. 770; State *v.* Ford, 37 La. Ann. 443; State *v.* Labuzan, 37 La. Ann. 489; State *v.* Daly, 37 La. Ann. 576; McIntosh *v.* Smith, 2 La. Ann. 756; State *v.* Hamilton, 35 La. Ann. 1043.

Maine. — Tibbetts *v.* Penley, 83 Me. 118; Soule *v.* Winslow, 66 Me. 447; Penobscot R. Co. *v.* White, 41 Me. 512; State *v.* Gorham, 67 Me. 247; State *v.* Smith, 65 Me. 257; Brackett *v.* Brewer, 71 Me. 478; Hathorn *v.* Stinson, 10 Me. 224; Barney *v.* Norton, 11 Me. 350; Hammatt *v.* Russ, 16 Me. 171; Gilbert *v.* Woodbury, 22 Me. 246; Merrill *v.* Hampden, 26 Me. 234; George *v.* Stubbs, 26 Me. 243; Rumrill *v.* Adams, 57 Me. 565; Roberts *v.* Plaisted, 63 Me. 335; State *v.* Watson, 63 Me. 128; Norton *v.* Kidder, 54 Me. 189; State *v.* Pike, 65 Me. 111; State *v.* Reed, 62 Me. 129; Waite *v.* Vose, 62 Me. 184; State *v.* McDonald, 65 Me. 465; State *v.* Hall, 39 Me. 107; Treat *v.* Lord, 42 Me. 552; Tower *v.* Haslam, 84 Me. 86; Pillsbury *v.* Sweet, 80 Me. 392; Savage *v.* Savage, 80 Me. 472.

Maryland. — Caledonian Ins. Co. *v.* Traub, 80 Md. 214; Lurssen *v.* Lloyd, 76 Md. 360; Hurn *v.* Soper, 6 Har. & J. (Md.) 276; Coale *v.* Harrington, 7 Har. & J. (Md.) 147; State *v.* Reigart, 1

Gill (Md.) 1; Jackson *v.* Jackson, 82 Md. 17; Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330.

Massachusetts. — Com. *v.* Boutwell, 162 Mass. 230; H. A. Prentiss Co. *v.* Page, 164 Mass. 276; Kansas Invest. Co. *v.* Carter, 160 Mass. 421; Lake *v.* Clark, 97 Mass. 346; Northcoate *v.* Bachelder, 111 Mass. 322; Stearns *v.* Janes, 12 Allen (Mass.) 582; Coker *v.* Ropes, 125 Mass. 577; Salomon *v.* Hathaway, 126 Mass. 482; Drake *v.* Curtis, 1 Cush. (Mass.) 395; Daley *v.* Boston, etc., R. Co., 147 Mass. 101.

Michigan. — People *v.* Gosch, 82 Mich. 22; Seitz *v.* Miles, 16 Mich. 456; Van Deusen *v.* Cathcart, 43 Mich. 258; Bennett's Estate, 52 Mich. 415; Weaver *v.* Bechtel, 53 Mich. 516; Van Hoesen *v.* Cameron, 54 Mich. 610; Lane *v.* Pere Marquette Boom Co., 62 Mich. 63; Wilson *v.* Bowen, 64 Mich. 133; People *v.* Considine, 105 Mich. 149; Moon *v.* Ionia, 81 Mich. 635; Dehring *v.* Comstock, 78 Mich. 153; Wilcox *v.* Young, 66 Mich. 687; Koehler *v.* Buhl, 94 Mich. 496; Farrand *v.* Aldrich, 85 Mich. 593; Partlow *v.* Swigart, 90 Mich. 61; Weimer *v.* Bunbury, 30 Mich. 201; Fisher *v.* People, 20 Mich. 135; Maillet *v.* People, 42 Mich. 262; Rasch *v.* Bissell, 52 Mich. 456; Gould *v.* Sanders, 69 Mich. 5; Doyle *v.* Stevens, 4 Mich. 87; Phippen *v.* Bay Cities Consol. R. Co., (Mich. 1896) 68 N. W. Rep. 216; Locke *v.* Priestly Express Wagon, etc., Co., 71 Mich. 263; Bower *v.* Earl, 18 Mich. 367.

Minnesota. — Weber *v.* McClure, 44 Minn. 407; Johnston Harvester Co. *v.* Clark, 31 Minn. 165; Cowley *v.* Davidson, 13 Minn. 92; State *v.* Staley, 14 Minn. 105; Wilcox *v.* Chicago, etc., R. Co., 24 Minn. 269.

Mississippi. — McDaniel *v.* State, 8 Smed. & M. (Miss.) 401; Newman *v.* Foster, 3 How. (Miss.) 383; Loring *v.* Willis, 4 How. (Miss.) 383; Miles *v.* Myers, Walk. (Miss.) 379; Newman *v.* Vicksburg, etc., R. Co., 64 Miss. 115; Myers *v.* Oglesby, 6 How. (Miss.) 46; Powell *v.* Mills, 37 Miss. 691; Jarnigan *v.* Fleming, 43 Miss. 710; Evans *v.* State, 44 Miss. 762; Preston *v.* State, 25 Miss. 383; Browning *v.* State, 30 Miss. 656, 33 Miss. 48; Oliver *v.* State, 39 Miss. 526; Cothran *v.* State, 39 Miss. 541; Frank *v.* State, 39 Miss. 705; Durrah *v.* State, 44 Miss.

(3) *Instructions Not Based on Evidence — When Ground for Reversal.* — If it appears that the jury are misled by the instruc-

789; *O'Reilly v. Hendricks*, 2 Smed. & M. (Miss.) 388; *McDaniel v. State*, 8 Smed. & M. (Miss.) 401.

Missouri. — *Bowen v. Hannibal, etc.*, R. Co., 75 Mo. 426; *Bonine v. Richmond*, 75 Mo. 437; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567; *Kuhlmann v. Meier*, 7 Mo. App. 261; *Kramer v. Faulkner*, 9 Mo. App. 34; *Griswold v. St. Louis, etc.*, R. Co., 8 Mo. App. 582; *Morris v. Buckley*, 9 Mo. App. 577; *Anslyn v. Franke*, 11 Mo. App. 598; *White v. Graves*, 68 Mo. 218; *Hicks v. Hannibal, etc.*, R. Co., 68 Mo. 329; *Kenney v. Hannibal, etc.*, R. Co., 70 Mo. 252; *Flint v. Young*, 70 Mo. 221; *State v. Emmerson*, 74 Mo. 607; *St. Louis, etc.*, R. Co. *v. Cleary*, 77 Mo. 634; *Utley v. Tolfree*, 77 Mo. 307; *Price v. Hannibal, etc.*, R. Co., 77 Mo. 508; *Chubbuck v. Hannibal, etc.*, R. Co., 77 Mo. 591; *Elliott v. Welby*, 13 Mo. App. 19; *Muckel v. Rose*, 15 Mo. App. 393; *Semple v. Dennis*, 7 Mo. App. 596; *Williams v. Bugg*, 10 Mo. App. 586; *Van Hardenburg v. Schladerbach*, 10 Mo. App. 584; *Steinecke v. Marx*, 10 Mo. App. 581; *Siems v. Meier*, 11 Mo. App. 589; *Prietto v. Lewis*, 11 Mo. App. 601; *Skyles v. Bollman*, 12 Mo. App. 598; *Hildreth Printing Co. v. Stokes*, 14 Mo. App. 591; *Ehrlich v. Aetna L. Ins. Co.*, 15 Mo. App. 579; *Heman v. Green*, 15 Mo. App. 593; *Mound City Paint, etc.*, Co. *v. Conlon*, 15 Mo. App. 601; *Bury v. Woods*, 17 Mo. App. 245; *Walsh v. Morse*, 80 Mo. 568; *State v. St. Louis Brokerage Co.*, 85 Mo. 411; *Cox v. Tipton*, 18 Mo. App. 450; *Christian v. Wight*, 19 Mo. App. 165; *Brown v. Covenant Mut. L. Ins. Co.*, 86 Mo. 51; *Hollender v. Koetter*, 20 Mo. App. 79; *Cummiskey v. Williams*, 20 Mo. App. 606; *Simpson v. Schulte*, 21 Mo. App. 639; *McConey v. Wallace*, 22 Mo. App. 377; *Edwards v. Meyers*, 22 Mo. App. 481; *Turner v. Chillicothe, etc.*, R. Co., 51 Mo. 501; *Lester v. Kansas City, etc.*, R. Co., 60 Mo. 265; *Capital Bank v. Armstrong*, 62 Mo. 59; *Holman v. Brooklyn L. Ins. Co.*, 9 Mo. App. 596; *State v. Degonia*, 69 Mo. 485; *State v. Gerber*, 80 Mo. 94; *State v. Thompson*, 83 Mo. 257; *Flori v. St. Louis*, 3 Mo. App. 231; *Schlingmann v. Fiedler*, 3 Mo. App. 577; *Schmidt v. Rose*, 6 Mo. App. 588; *Bell v. Hannibal, etc.*, R. Co., 72 Mo. 50; *State v.*

Hollenscheit, 61 Mo. 302; *State v. Wilson*, 88 Mo. 13; *State v. Hayes*, 16 Mo. App. 560; *State v. Wilson*, 16 Mo. App. 550; *State v. Wilforth*, 74 Mo. 528; *State v. Miller*, 67 Mo. 604; *State v. Little*, 67 Mo. 624; *State v. Chambers*, 87 Mo. 406; *Cady v. Winters*, 35 Mo. App. 637; *Barr v. Kansas City*, 105 Mo. 550; *Logan v. Enterprise Invest., etc.*, Co., 47 Mo. App. 510; *Naylor v. Cox*, 114 Mo. 232; *Bean v. St. Louis, etc.*, R. Co., 20 Mo. App. 641; *White v. Chaney*, 20 Mo. App. 389; *State v. Rose*, 32 Mo. 346; *Camp v. Heelan*, 43 Mo. 591.

Montana. — *Dupont v. McCadow*, 6 Mont. 234; *Brownell v. McCormick*, 7 Mont. 12; *Kelley v. Cable Co.*, 7 Mont. 70.

Nebraska. — *Consaul v. Sheldon*, 35 Neb. 247; *Uhl v. Robison*, 8 Neb. 272; *Neihardt v. Kilmer*, 12 Neb. 35; *Lincoln v. Gillilan*, 18 Neb. 114; *Bradshaw v. State*, 17 Neb. 147; *Marion v. State*, 20 Neb. 233; *Caw v. People*, 3 Neb. 357; *Wells v. State*, 11 Neb. 409; *Dodge v. People*, 4 Neb. 220; *Hurlbut v. Hall*, 39 Neb. 889; *Omaha Nat. Bank v. Thompson*, 39 Neb. 269; *Brumback v. German Nat. Bank*, 46 Neb. 540.

New Hampshire. — *Moore v. Ross*, 11 N. H. 547; *Rice v. Porter*, 17 N. H. 133; *Whitney v. Goin*, 20 N. H. 354; *Ripley v. Colby*, 23 N. H. 438; *Wendall v. Moulton*, 26 N. H. 41; *Clark v. Wood*, 34 N. H. 447; *Goodrich v. Eastern R. Co.*, 38 N. H. 390.

New Jersey. — *Humphreys v. Woodstown*, 48 N. J. L. 588; *Allen v. Wanamaker*, 31 N. J. L. 370; *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697.

New Mexico. — *C. J. L. Meyer, etc., Co. v. Black*, 4 N. Mex. 190.

New York. — *Medler v. Atlantic Ave. R. Co.*, (Brooklyn City Ct.) 12 N. Y. Supp. 930; *Carlson v. Winterson*, 1 Misc. Rep. (N. Y. City Ct.) 207; *Hope v. Lawrence*, 50 Barb. (N. Y.) 258; *Benson v. Berry*, 55 Barb. (N. Y.) 620; *Kiernan v. Rocheleau*, 6 Bosw. (N. Y.) 148; *Harding v. Barney*, 7 Bosw. (N. Y.) 353; *Rouse v. Lewis*, 4 Abb. App. Dec. (N. Y.) 121; *Rushmore v. Hall*, 12 Abb. Pr. (N. Y. Supreme Ct.) 420; *Reilly v. Third Ave. R. Co.*, 14 Misc. Rep. (N. Y. City Ct.) 445; *Hine v. Bowe*, 114 N. Y. 350; *Jones v. Brooklyn L. Ins. Co.*, 61 N. Y. 79; *Moody v.*

tion to the injury of the party complaining, the judgment will be

Osgood, 54 N. Y. 488; *Leven v. Smith*, 1 Den. N. Y. 571; *Clark v. Vorce*, 19 Wend. (N. Y.) 232; *New York v. Price*, 5 Sandf. (N. Y.) 542.

North Carolina.—*State v. Shields*, 110 N. Car. 497; *Kelly v. Fleming*, 113 N. Car. 133; *Freeman v. Edmunds*, 3 Hawks. (N. Car.) 5; *State v. Clara*, 8 Jones L. (N. Car.) 25; *State v. Cain*, 2 Jones L. (N. Car.) 201; *King v. Wells*, 94 N. Car. 344; *State v. Martin*, 2 Ired. L. (N. Car.) 101; *State v. Rash*, 12 Ired. L. (N. Car.) 382; *Staton v. Mullis*, 92 N. Car. 623; *Leak v. Covington*, 99 N. Car. 559; *Humphrey v. Front St. M. E. Church*, 109 N. Car. 132.

Ohio.—*Lewis v. State*, 4 Ohio 389; *Mead v. McGraw*, 19 Ohio St. 55; *Lear v. McMillen*, 17 Ohio St. 470; *Oliver v. Sterling*, 20 Ohio St. 391; *Whelan v. Kinsley*, 26 Ohio St. 137.

Oregon.—*Fleckenstein v. Inman*, 27 Oregon 328; *Salomon v. Cress*, 22 Oregon, 177; *Latshaw v. Territory*, 1 Oregon 140; *State v. Glass*, 5 Oregon 73; *Glaze v. Whitley*, 5 Oregon 164; *State v. Brown*, 7 Oregon 186.

Pennsylvania.—*Smalley v. Morris*, 157 Pa. St. 349; *Hieskell v. Farmers'*, etc., Nat. Bank, 89 Pa. St. 155; *Northern Cent. R. Co. v. Husson*, 101 Pa. St. 7; *Urket v. Coryell*, 5 W. & S. (Pa.) 60; *Kline v. Johnston*, 24 Pa. St. 72; *Williams v. Williams*, 34 Pa. St. 312; *Altoona v. Lotz*, 114 Pa. St. 238; *Kitchen v. McCloskey*, 150 Pa. St. 376; *McKnight v. Ratcliff*, 44 Pa. St. 156; *Harper v. Philadelphia Traction Co.*, 175 Pa. St. 129.

South Carolina.—*State v. Petsch*, 43 S. Car. 132; *Columbia Phosphate Co. v. Farmers' Alliance Store*, (S. Car. 1896) 25 S. E. Rep. 116; *Fell v. Dial*, 14 S. Car. 250.

Tennessee.—*State v. Parker*, 13 Lea (Tenn.) 221; *Baird v. Trimble*, Cooke (Tenn.) 289; *Conner v. State*, 4 Yerg. (Tenn.) 137; *Ford v. Ford*, 11 Humph. (Tenn.) 89.

Texas.—*Hodo v. Mexican Nat. R. Co.*, (Tex. Civ. App. 1895) 31 S. W. Rep. 708; *Crutcher v. Schick*, 10 Tex. Civ. App. 676; *Pace v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 173; *Hedrick v. Smith*, 77 Tex. 608; *Galveston*, etc., R. Co. v. *Smith*, 81 Tex. 479; *Western Union Tel. Co. v. Bruner*, (Tex. 1892) 19 S. W. Rep. 149; *Gulf*, etc., R. Co. v. *Higby*, (Tex. Civ. App. 1894) 26 S. W. Rep. 737; *Maes v.*

Texas, etc., R. Co., (Tex. Civ. App. 1893) 23 S. W. Rep. 725; *Winkler v. Winkler*, (Tex. Civ. App. 1894) 26 S. W. Rep. 893; *Arbuthnot v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 269; *Ratigan v. State*, 33 Tex. Crim. Rep. 301; *Warren v. State*, 29 Tex. 369; *Hardin v. State*, 4 Tex. App. 355; *Seal v. State*, 28 Tex. 491; *Peck v. State*, 5 Tex. App. 611; *Priesmuth v. State*, 1 Tex. App. 481; *Hagerty v. Scott*, 10 Tex. 525; *Scranton v. Tilley*, 16 Tex. 183; *Blessing v. Edmonson*, 49 Tex. 333; *Norvell v. Phillips*, 46 Tex. 162; *Jacobs v. Crum*, 62 Tex. 401; *Bejarano v. State*, 6 Tex. App. 265; *Fordtran v. Ellis*, 58 Tex. 245; *Patton v. Gregory*, 21 Tex. 513; *Hicks v. Bailey*, 16 Tex. 229; *International*, etc., R. Co. v. *Young*, (Tex. Civ. App. 1894) 28 S. W. Rep. 819; *Floyd v. Efron*, 66 Tex. 221.

Vermont.—*Lucia v. Meech*, 68 Vt. 175; *Noyes v. Parker*, 64 Vt. 379; *French v. Ware*, 65 Vt. 338; *Clark v. Bardman*, 42 Vt. 667; *Wetherby v. Foster*, 5 Vt. 136; *Mack v. Snider*, 1 Aik. (Vt.) 104; *Barron v. Fay*, 38 Vt. 705; *Weeks v. Lyndon*, 54 Vt. 638; *Winchell v. National Express Co.*, 64 Vt. 15.

Virginia.—*Norfolk*, etc., R. Co. v. *Burge*, 84 Va. 63; *Philadelphia F. Assoc. v. Hogwood*, 82 Va. 342; *Hill v. Com.*, 88 Va. 633; *Caton v. Lenox*, 5 Rand. (Va.) 31; *Pasley v. English*, 10 Gratt. (Va.) 236; *Anderson v. Com.*, 83 Va. 327; *Bowen v. Flanagan*, 84 Va. 313; *Richmond*, etc., R. Co. v. *Yeamans*, 86 Va. 860; *Buster v. Wallace*, 4 Hen. & M. (Va.) 82.

Washington.—*Doctor Jack v. Territory*, 2 Wash. Ter. 101; *Brown v. Forest*, 1 Wash. Ter. 201; *Frost v. Ainslie Lumber Co.*, 3 Wash. Ter. 241.

West Virginia.—*Moore v. Douglass*, 14 W. Va. 708; *State v. Greer*, 22 W. Va. 801.

Wisconsin.—*Thomas v. Paul*, 87 Wis. 607; *Thayer v. Davis*, 75 Wis. 205; *Couillard v. Johnson*, 24 Wis. 533; *Plummer v. Johnsen*, 70 Wis. 131; *Doty v. Strong*, 1 Pin. (Wis.) 313; *Bowren v. Campbell*, 5 Wis. 187; *Sterling v. Ripley*, 3 Chand. (Wis.) 166.

United States.—*Northern Pac. R. Co. v. Paine*, 119 U. S. 561; *Texas*, etc., R. Co. v. *Minnick*, 61 Fed. Rep. 635; *Stryker v. Goodnow*, 123 U. S. 527; *Coffin v. U. S.*, 162 U. S. 664; *Dwyer v. Dunbar*, 5 Wall. (U. S.) 318;

reversed.¹ On the other hand, where it is apparent that the instruction could not have been prejudicial, the giving of such an instruction, though error, will not operate to re-

Hot Springs R. Co. v. Williamson, 136 U. S. 121; Haines v. McLaughlin, 135 U. S. 584; Hamilton v. Russell, 1 Cranch. (U. S.) 309; Chirac v. Rein-
necker, 2 Pet. (U. S.) 613; Tucker v. Moreland, 10 Pet. (U. S.) 158; Clarke v. Kownslar, 10 Pet. (U. S.) 657; M'Neil v. Holbrook, 12 Pet. (U. S.) 84; Roach v. Hulings, 16 Pet. (U. S.) 319; Rhett v. Poe, 2 How. (U. S.) 457; U. S. v. Breitling, 20 How. (U. S.) 252; Boardman v. Reed, 6 Pet. (U. S.) 328; Allen v. Blunt, 2 Woodb. & M. (U. S.) 121; Etting v. U. S. Bank, 11 Wheat. (U. S.) 59; Laber v. Cooper, 7 Wall. (U. S.) 565.

1. *Alabama*. — Goldsmith v. McCafferty, 101 Ala. 663.

Arkansas. — State Bank v. Hubbard, 8 Ark. 183.

California. — People v. Devine, 95 Cal. 227.

Colorado. — Rara Avis Gold, etc., Min. Co. v. Bouscher, 9 Colo. 385; Denver, etc., R. Co. v. Robinson, 6 Colo. App. 432.

Georgia. — Livingston v. Hudson, 85 Ga. 835; Ashworth v. East Tennessee, etc., R. Co., 94 Ga. 715; Andrews v. Andrews, 85 Ga. 276.

Illinois. — Webber v. Brown, 38 Ill. 87; Reeder v. Purdy, 41 Ill. 279; School Trustees v. McCormick, 41 Ill. 323; Nichols v. Mercer, 44 Ill. 250; Ten Eyck v. Harris, 47 Ill. 268; Illinois Cent. R. Co. v. Hileman, 53 Ill. App. 57; King v. Barnes, 30 Ill. App. 339; Irwin v. Atkins, 8 Ill. App. 221; Chicago City R. Co. v. Hastings, 136 Ill. 251.

Indiana. — Durham v. Smith, 120 Ind. 468; Nicklaus v. Burns, 75 Ind. 97; Crowder v. Reed, 80 Ind. 1.

Iowa. — Case v. Illinois Cent. R. Co., 38 Iowa 581; Seekel v. Norman, 71 Iowa 264.

Kansas. — State Sav. Assoc. v. Hunt, 17 Kan. 532; Raper v. Blair, 24 Kan. 374; Kansas City, etc., R. Co. v. Hay, 31 Kan. 177; Missouri Pac. R. Co. v. Pierce, 33 Kan. 61; Zimmerman v. Knox, 34 Kan. 245.

Kentucky. — Robards v. Wolfe, 1 Dana (Ky.) 156.

Maine. — Hopkins v. Fowler, 39 Me. 568; Weston v. Higgins, 40 Me. 102.

Maryland. — Long v. Eakle, 4 Md. 454; Marshall v. Haney, 4 Md. 498.

Michigan. — Briggs v. Fireman's Fund Ins. Co., 65 Mich. 52; Moon v. Ionia, 81 Mich. 635; Dehring v. Comstock, 78 Mich. 153.

Missouri. — Cottrell v. Spiess, 23 Mo. App. 35; Bowles v. Lewis, 58 Mo. App. 649; Claffin v. Sommers, 39 Mo. App. 419; State v. Bailey, 57 Mo. 131; Musick v. Atlantic, etc., R. Co., 57 Mo. 134; Waddingham v. Hulett, 92 Mo. 528; Stokes v. Ravenswood Distillery Co., 2 Mo. App. Rep. 1093.

Montana. — Sheehy v. Flaherty, 8 Mont. 365.

Nebraska. — Clark v. State, 32 Neb. 246; Esterly Harvesting Mach. Co. v. Frolkey, 34 Neb. 110; Williams v. State, 6 Neb. 334; Curry v. State, 4 Neb. 545; High v. Merchants' Bank, 6 Neb. 155; Harrison v. Baker, 15 Neb. 43; Atkins v. Gladwish, 27 Neb. 841.

New York. — Black v. Brooklyn City R. Co., 108 N. Y. 640, 13 N. Y. St. Rep. 645; Crossman v. Harrison, 4 Robt. (N. Y.) 38.

North Carolina. — King v. Wells, 94 N. Car. 344.

Ohio. — Aetna Ins. Co. v. Reed, 33 Ohio St. 283.

Pennsylvania. — Lee v. Newell, 107 Pa. St. 283; Philadelphia, etc., R. Co. v. Alvord, 128 Pa. St. 42.

Texas. — International, etc., R. Co. v. Kuehn, 70 Tex. 582; Atchison, etc., R. Co. v. Click, 5 Tex. Civ. App. 224; Harrell v. Houston, 66 Tex. 278; Atkinson v. State, 20 Tex. 522; Cravens v. Wilson, 48 Tex. 324; Andrews v. Smithwick, 20 Tex. 111; Corzine v. Morrison, 37 Tex. 511; Thrasher v. State, 3 Tex. App. 281; Wilson v. State, (Tex. Crim. App. 1896) 34 S. W. Rep. 284; Lee v. Hamilton, 12 Tex. 413; Hampton v. Dean, 4 Tex. 455; Foster v. Martin, 20 Tex. 118; Hancock v. Horan, 15 Tex. 507; Yarborough v. Tate, 14 Tex. 483; Blanton v. Mayes, 58 Tex. 422; Cook v. Dennis, 61 Tex. 246.

Virginia. — Richmond City R. Co. v. Scott, 86 Va. 902; Richmond, etc., R. Co. v. Yeamans, 86 Va. 860.

Washington. — Martin v. Union Mut. L. Ins. Co., 13 Wash. 275.

Wisconsin. — Ward v. Henry, 19 Wis. 76.

verse.¹ This is especially true where the instruction is favorable to the party complaining.²

(4) *What Evidence Sufficient to Warrant Instructions.* — To justify the trial court in giving an instruction predicated upon a supposed state of facts, it is not necessary that the court should be entirely satisfied of the existence of the facts on which the instruction was founded.³ It is not for the court, in ruling upon evidence, or in framing instructions, to determine the probative force of evidence. If the evidence is material, relevant, and competent, it is for the jury, and instructions bearing upon the evidence, without respect to its weight or credibility, cannot be deemed irrelevant.⁴ Accordingly an instruction cannot be deemed erroneous if there be any evidence on which to base it, no matter how slight and inconclusive that evidence may be.⁵

1. *California.* — *People v. Cochran*, 61 Cal. 548.

Georgia. — *Daniels v. Western, etc.*, R. Co., 96 Ga. 786.

Iowa. — *Spears v. Mt. Ayr*, 66 Iowa 721; *Hall v. Stewart*, 58 Iowa 681.

Louisiana. — *State v. Durbin*, 22 La. Ann. 154.

Missouri. — *Berry v. Missouri Pac. R. Co.*, 124 Mo. 223.

Nebraska. — *Waters v. Shafer*, 25 Neb. 225; *Labaree v. Klosterman*, 33 Neb. 150.

South Carolina. — *Petrie v. Columbia, etc.*, R. Co., 29 S. Car. 303.

Texas. — *Thomas v. Ingram*, 20 Tex. 727; *Gulf, etc.*, R. Co. v. *Greenlee*, 70 Tex. 553; *Ft. Worth, etc.*, R. Co. v. *Peters*, 7 Tex. Civ. App. 78.

2. *Johnson v. McKee*, 27 Mich. 471; *People v. Riley*, 65 Cal. 107.

Instance. — Thus, where there is no evidence tending to prove justification of an assault, no charge should be given on the subject, but if given, it is not an error that the defendant can complain of. *Johnson v. McKee*, 27 Mich. 471.

3. *Flournoy v. Andrews*, 5 Mo. 513; *Bradford v. Pearson*, 12 Mo. 71.

4. *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 73; *Boots v. Canine*, 94 Ind. 408; *Nave v. Flack*, 90 Ind. 205; *Hall v. Henline*, 9 Ind. 256; *Harbor v. Morgan*, 4 Ind. 158; *Peoria, etc.*, R. Co. v. *Puckett*, 42 Ill. App. 642.

It is not necessary to determine whether the evidence would outweigh other evidence offered by the opposite party. It is only necessary to say that it furnished a basis for the instruction asked. *Maupin v. Virginia Lead Min. Co.*, 78 Mo. 27.

5. *Alabama.* — *Hair v. Little*, 28 Ala. 236; *Jones v. Fort*, 36 Ala. 449; *Clealand v. Walker*, 11 Ala. 1058; *Partridge v. Forsyth*, 29 Ala. 200; *Knowles v. Ogletree*, 96 Ala. 555; *Schaungut v. Udell*, 93 Ala. 302.

Arkansas. — *Goodell v. Bluff City Lumber Co.*, 57 Ark. 203; *McNeill v. Arnold*, 22 Ark. 477.

Georgia. — *Camp v. Phillips*, 42 Ga. 289; *Willis v. Willis*, 18 Ga. 13.

Illinois. — *Milliken v. Marlin*, 66 Ill. 13; *Chicago v. Scholten*, 75 Ill. 468; *Thompson v. Duff*, 119 Ill. 226; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Chicago, etc.*, R. Co. v. *Bingenheimer*, 116 Ill. 226.

Indiana. — *McFadden v. Ferris*, 6 Ind. App. 454.

Iowa. — *Carbon v. Ottumwa*, 95 Iowa 524; *Bannum v. O'Connor*, 77 Iowa 632; *Walker v. Camp*, 69 Iowa 741.

Missouri. — *Sawyers v. Drake*, 34 Mo. App. 472.

Nebraska. — *Atkins v. Gladwish*, 27 Neb. 841.

Ohio. — *Breese v. State*, 12 Ohio St. 146.

South Carolina. — *State v. Ezzard*, 40 S. Car. 312.

Texas. — *Frank v. Frank*, (Tex. Civ. App. 1894) 25 S. W. Rep. 819.

Virginia. — *Honesty v. Com.*, 81 Va. 283; *Philadelphia F. Assoc. v. Hogwood*, 82 Va. 342.

The court should, if asked, submit to the jury every proposition of fact, if the evidence adduced in its support is of such force that fair-minded men might doubt or debate as to whether it had been proved, and an instruction as to the rule of law appropriate to such a state of case ought to be given.

A Refusal to give an instruction where there is any evidence at all, no matter how slight or inconclusive, is equally erroneous.¹ The court is not justified in refusing an instruction merely because it believes that the weight of the evidence does not support it.²

Trifling Statements. — Instructions should not be given, however, upon trifling and indefinite statements irrelevant to the question at issue.³

Evidence Raising Conjecture. — Nor should instructions be given upon evidence which at the most merely raises a conjecture,⁴ nor where the evidence is so slight as to amount merely to an assumption.⁵

Instructions as to Qualifications and Exceptions to Rules. — In giving a general rule as applicable to the evidence, if there is evidence tending fairly to bring the case within an exception to that rule, it is proper for the court, in connection with the rule itself, or in some other part of the charge, to refer to the exception and the

Peoria, etc., R. Co. v. Puckett, 42 Ill. App. 642.

It is not necessary the court should be satisfied the hypothetical case stated in an instruction is fully sustained by the testimony before it would be required to submit it to the jury. That would practically include the services of a jury, and would debar a party of the constitutional right to have his cause tried by a jury. The court might take one view of the evidence, and yet, if submitted, a jury might reach a different conclusion, and it is for that reason a party has the right to have submitted any hypothetical case the testimony tends to sustain, otherwise the court might try the cause without the intervention of a jury in the first instance. But that, of course, could not be done over objection taken. Even positive testimony is not always required. It has been held by this court, in cases where there was no direct evidence of a material fact, that circumstances proven from which the fact might reasonably be inferred would be sufficient on which to base an instruction. It was so ruled in Chicago, etc., R. Co. v. Gregory, 58 Ill. 272, and also in Missouri Furnace Co. v. Abend, 107 Ill. 44." Chicago, etc., R. Co. v. Lewis, 109 Ill. 134.

Where there is evidence to which an instruction is applicable, it is immaterial by whom or for what purpose it was introduced. Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 63.

1. Kane v. Torbit, 23 Ill. App. 311;

Chicago, etc., R. Co. v. Calkins, 17 Ill. App. 55; Ridens v. Ridens, 29 Mo. 470; De Camp v. Mississippi, etc., R. Co., 12 Iowa 348; Bradford v. Marbury, 12 Ala. 520.

2. Peoria, etc., R. Co. v. Puckett, 42 Ill. App. 642; De Camp v. Mississippi, etc., R. Co., 12 Iowa 348.

3. Dickinson v. Johnson, 24 Ark. 251.

4. Cawfield v. Asheville St. R. Co., 111 N. Car. 597; Sutton v. Madree, 2 Jones L. (N. Car.) 320; O'Connor, etc., Range, etc., Co. v. Alexe, 28 Mo. App. 184. See also Allston v. Pickett, 19 S. Car. 606. See also Bishop v. State, 43 Tex. 402. In this case the court said: "If its force is deemed to be very weak, trivial, light, and its application remote, the court is not required to give a charge upon it. If, on the other hand, it is so pertinent and forcible as that it might be reasonably supposed that the jury could be influenced by it in arriving at their verdict, the court should charge so as to furnish them with the appropriate rule of law upon the subject."

Although it is not easy in practice to draw the boundary between a defect of evidence and evidence confessedly slight, where no part of the testimony offered can fairly warrant the inference of the fact in issue or furnish more than materials for a mere guess or conjecture thereon, it is error for the court to leave it to the jury to infer the fact from such testimony. Cobb v. Fogelman, 1 Ired. L. (N. Car.) 440.

5. Bloyd v. Pollock, 27 W. Va. 75.

testimony tending to sustain it.¹ But the court need not specify exceptions to a general rule where there is no evidence tending to bring the case within such exceptions,² and it is even erroneous to lay down a correct qualification to a rule of law, when there is no evidence touching the subject-matter of the qualification.³

(5) *Basing Instructions on Rejected Testimony.* — It is erroneous to give an instruction based on rejected testimony,⁴ and, of course, it is proper to refuse a request to give such instruction.⁵ Such instructions are out of place and have nothing to rest on.⁶

(6) *Presumptions on Appeal.* — On appeal or error, if the record fails to show the applicability of an instruction asked and refused to the evidence, such refusal cannot be held erroneous. The presumption is that the instruction was properly refused.⁷ But the giving of an instruction not applicable to any evidence admissible under the issues is error and ground of reversal, though the evidence be not in the record.⁸

11. Basing Instructions on Belief from Evidence. — It is very generally declared to be erroneous so to instruct the jury that they can find a verdict upon their belief not based upon the evidence. Hence an instruction prefaced with the words, "if you believe," instead of, "if you believe from the evidence," should not be given.⁹

1. *White v. Thomas*, 12 Ohio St. 312.

2. *Fulwider v. Ingels*, 87 Ind. 414.

3. *Webb v. Robinson*, 14 Ga. 216.

4. *Caldwell v. Stephens*, 57 Mo. 589; *New York, etc., Min. Syndicate v. Fraser*, 130 U. S. 611.

Where Improper Testimony Is Withdrawn. — Where evidence is put in under an objection, and the judge permits the party putting in the evidence to withdraw it, a refusal to give instructions which are only appropriate on the theory that the evidence is in the case is not a ground of exception. *Hayes v. Kelley*, 116 Mass. 300.

5. *Pleasants v. Scott*, 21 Ark. 371; *Atkinson v. Gatcher*, 23 Ark. 101; *McKinzie v. Hill*, 51 Mo. 303; *Com. v. Cosseboom*, 155 Mass. 298.

6. *Pleasants v. Scott*, 21 Ark. 371.

7. *Little v. Martin*, 28 Iowa 558; *Amos v. Sinnott*, 5 Ill. 440; *Cresinger v. Welch*, 15 Ohio 156; *Davis v. State*, 25 Ohio St. 369; *Williams v. Barksdale*, 58 Ala. 288; *Richards v. Fanning*, 5 Oregon 356; *Pogue v. Joyner*, 7 Ark. 463; *State v. Robinson*, 35 S. Car. 340.

Unless the record shows affirmatively that there was evidence tending to prove every fact which an instruction asked for supposes, a refusal to give

the same is no ground for reversal. *Williams v. Barksdale*, 58 Ala. 288.

8. *Cates v. Bales*, 78 Ind. 288.

9. *Ewing v. Runkle*, 20 Ill. 448; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485; *Parker v. Fisher*, 39 Ill. 164; *Miller v. Balthasser*, 78 Ill. 302; *Mathews v. Hamilton*, 23 Ill. 470; *Horne v. Walton*, 117 Ill. 130; *Graff v. People*, 134 Ill. 380; *Toledo, etc., R. Co. v. Ingraham*, 77 Ill. 309; *Ingols v. Plimpton*, 10 Colo. 355; *Salomon v. Webster*, 4 Colo. 353; *McPherson v. St. Louis, etc., R. Co.*, 97 Mo. 253; *State v. Umfried*, 76 Mo. 404; *Munden v. State*, 37 Tex. 353. *Contra*, *Blumhardt v. Rohr*, 70 Md. 328, in which the court said: "The objection made to the plaintiff's prayers that they do not say that 'the jury must find from the evidence,' is hypercritical. All instructions are based on the evidence; and the jury are told that if they find, which means, without possible chance of misleading, that if the evidence convinces them of the state of facts set out in the prayer, then they must find for the plaintiff."

Instructions Held Unobjectionable. — An instruction that "if from all the evidence and under the instructions

Ground for Reversal. — There are very few decisions, however, in which it appears that an instruction vicious in this respect was of itself sufficient ground for reversal. According to two of the decisions cited, such a defect would not be ground for reversal.¹ According to others, the judgment should not be reversed unless it appears that the jury were misled.² The remaining decisions on this question all show other errors which would be ground for reversal, so that it is not easy to determine whether the court would have reversed on this ground alone.

It Is Not Necessary to Repeat in Each Clause of an instruction that the jury must believe from the evidence.³

you find for the plaintiff, then, in fixing the amount of damages you will award, it will be proper to allow the plaintiff * * * such damages as he sustained, if any, on account of the delay occasioned by being required to leave the train," is not objectionable as allowing the jury to assess the plaintiff's damages without reference to the evidence. *Pennsylvania Co. v. Connell*, (Ill. 1889) 20 N. E. Rep. 89.

So an instruction that in case the jury find for the plaintiff they "must take into consideration all the circumstances surrounding the case," is not objectionable as directing the jury that they are at liberty to go outside of the case as made for circumstances upon which to direct their verdict. *Dufour v. Central Pac. R. Co.*, 67 Cal. 324.

So the following instruction was held not objectionable as not requiring the jury to assess the damages from the evidence in the case: "If you find under the evidence that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages which, in your judgment, she should recover. In estimating this amount you may take into consideration expenses actually incurred, loss of time occasioned by the immediate effect of her injuries, and physical and mental suffering caused by and arising out of her injuries. In addition you may consider the professional occupation, if any, of the plaintiff, and her ability to earn money, and she will be entitled to recover for any permanent reduction of her power to earn money by reason of her injuries; and the amount assessed should be such a sum as, in your judgment, will fully compensate her for the injuries, or any of them, thus sustained." *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 429. See also *Indianapolis v. Scott*, 72 Ind. 196.

"If the Evidence Shows You," — It is not error for the court, in its charge to the jury, to use the words, "if the evidence shows you," instead of the language, "if you believe from the evidence." *Silberberg v. Pearson*, 75 Tex. 287.

Conjectures from Evidence. — It is not error for the court to caution the jury that they must find their verdict upon what is actually adduced in evidence, and not upon conjectures arising from a seeming withholding of the testimony of better-informed witnesses. *Statesville Bank v. Pinkers*, 83 N. Car. 377.

1. *McPherson v. St. Louis, etc., R. Co.*, 97 Mo. 253; *State v. Umfried*, 76 Mo. 404.

2. *Holliday v. Burgess*, 34 Ill. 193.

Where the first part of an instruction omitted the words, "from the evidence," as the basis of the jury's belief, but at the conclusion of the clause stated, "and if you further believe from the evidence," it was held that the jury could not have been misled and have felt authorized to act on a belief not arising from the evidence. *Belden v. Woodmansee*, 81 Ill. 25.

3. *Miller v. Balthasser*, 78 Ill. 302; *Wear v. Duke*, 23 Ill. App. 322; *Gizler v. Witzel*, 82 Ill. 322; *Toledo, etc., R. Co. v. Lockhart*, 71 Ill. 627; *State v. Davis*, 27 S. Car. 609. See also *Wills v. Cape Girardeau Southwestern R. Co.*, 44 Mo. App. 51.

It is sufficient if, in the first clause of the instruction, the jury are told that their belief must be founded upon the evidence, and there is nothing in the subsequent part from which sensible men could infer that they had a right to find a verdict upon any belief outside of the evidence. *Miller v. Balthasser*, 78 Ill. 302.

Admitted Facts. — An instruction based upon an admitted fact or upon facts not disputed is not erroneous merely because it fails to contain the words, "if you believe from the evidence."¹

Belief from Instructions. — An instruction beginning, "if you believe from the evidence and the instructions," is erroneous.²

"Inclined to Believe." — An instruction to find for one of the parties if the jury are "inclined to believe" certain facts, is erroneous.³

12. Singling Out and Giving Undue Prominence to Issues and Evidence — *a.* **SINGLING OUT ISSUES.** — If there are several important issues, the court should not single out one and submit it to the jury as the controlling issue.⁴

b. **SINGLING OUT EVIDENCE** — (1) *Statement of Rule.* — So, in framing instructions, it is very generally regarded as improper for the trial court to single out and give undue prominence to isolated portions of the evidence.⁵ Nor is it allowable in an

1. *Schmidt v. Pfau*, 114 Ill. 494, in which the court said: "It is only where the facts, hypothetically stated, are controverted by the party against whom the instruction is given, that the formula, 'If you believe from the evidence,' etc., becomes important."

2. *Kranz v. Thieben*, 15 Ill. App. 482.

3. *Cox v. People*, 109 Ill. 459, where the court said: "Evidence very slight indeed, especially on some subjects, might give a jurymen an inclination to decide in a particular way, when it would be wholly insufficient to sustain a verdict. Jurors are required to decide cases according to their convictions of the truth of the matter found by their verdict, and not their mere inclinations."

4. *Bowden v. Achor*, 95 Ga. 243; *Dallas, etc., El. R. Co. v. Harvey*, (Tex. Civ. App. 1894) 27 S. W. Rep. 423.

5. *Alabama.* — *McAdory v. State*, 62 Ala. 154; *Burton v. State*, 107 Ala. 108; *Duncan v. Freeman*, 109 Ala. 185.

Arkansas. — *Newton v. State*, 37 Ark. 333; *Winter v. Bandel*, 30 Ark. 383; *Bush v. State*, 37 Ark. 219.

Connecticut. — *Beers v. Housatonic R. Co.*, 19 Conn. 570.

Georgia. — *Flowers v. Flowers*, 92 Ga. 688; *Holt v. State*, 62 Ga. 314; *Black v. Thornton*, 30 Ga. 361; *Bowden v. Achor*, 95 Ga. 243; *Steed v. Cruise*, 70 Ga. 169.

Illinois. — *Moore v. Wright*, 90 Ill. 470; *Protection L. Ins. Co. v. Dill*, 91 Ill. 174; *Graves v. Colwell*, 90 Ill. 612;

Keyes v. Fuller, 9 Ill. App. 528; *Shugart v. Halliday*, 2 Ill. App. 45; *Lake Shore, etc., R. Co. v. Berlink*, 2 Ill. App. 427; *Hutchinson v. Crain*, 3 Ill. App. 20; *Pennsylvania Co. v. Stoelke*, 104 Ill. 201; *Brown v. Monson*, 51 Ill. App. 490; *Drainage Com'rs, etc., v. Illinois Cent. R. Co.*, 158 Ill. 353; *Aurora v. Hillman*, 90 Ill. 61; *Phillips v. Roberts*, 90 Ill. 492; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *McCartney v. McMullen*, 38 Ill. 237; *Chittenden v. Evans*, 41 Ill. 251; *Brant v. Gallup*, 5 Ill. App. 262; *Pope v. Lowitz*, 14 Ill. App. 96; *Chicago, etc., R. Co. v. Warner*, 108 Ill. 538; *Shugart v. Halliday*, 2 Ill. App. 52; *Chicago, etc., R. Co. v. Snyder*, 117 Ill. 376; *Haines v. Inter-Ocean Pub. Co.*, 20 Ill. App. 207; *Scott v. People*, 141 Ill. 195; *McIntyre v. Thompson*, 14 Ill. App. 554; *Sanders v. People*, 124 Ill. 218; *Ogden v. Kirby*, 79 Ill. 555; *Frame v. Badger*, 79 Ill. 441; *Homes v. Hale*, 71 Ill. 552; *Evans v. George*, 80 Ill. 51; *Martin v. Johnson*, 89 Ill. 537; *Hatch v. Marsh*, 71 Ill. 370; *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334; *Hewett v. Johnson*, 72 Ill. 513; *Hutchinson v. Crain*, 3 Ill. App. 20; *Pittsburgh, etc., R. Co. v. Dahlin*, 67 Ill. App. 99; *Waverly v. Henry*, 67 Ill. App. 407.

Indiana. — *Thompson v. Boden*, 81 Ind. 176; *Barker v. State*, 48 Ind. 163; *Westfield Bank v. Inman*, 8 Ind. App. 239; *McCorkle v. Simpson*, 42 Ind. 453; *Driskill v. State*, 7 Ind. 338; *Pittsburgh, etc., R. Co. v. Sponier*, 85 Ind. 165.

instruction to call the special attention of the jury to, and lay particular stress upon, the testimony of a designated witness or witnesses concerning facts about which the evidence is contradictory.¹ Such an instruction is calculated to induce the jury to

Iowa. — *Campbell v. Wheeler*, 69 Iowa 588.

Kansas. — *Gross v. Shaffer*, 29 Kan. 442; *Atchison, etc., R. Co. v. Retford*, 18 Kan. 245.

Kentucky. — *Com. v. Gray*, (Ky. 1895) 30 S. W. Rep. 1015; *Polly v. Com.*, (Ky. 1894) 27 S. W. Rep. 862; *Com. v. Delaney*, (Ky. 1895) 29 S. W. Rep. 616; *Louisville, etc., R. Co. v. Banks*, (Ky. 1896) 33 S. W. Rep. 627; *Flood v. Praggoff*, 79 Ky. 607; *Stokes v. Shippen*, 13 Bush (Ky.) 180; *Com. v. Hourigan*, 89 Ky. 305; *Bonner v. Com.*, (Ky. 1896) 38 S. W. Rep. 488; *Moran v. Higgins*, (Ky. 1897) 40 S. W. Rep. 928.

Michigan. — *Springett v. Colerick*, 67 Mich. 362; *Banner v. Schlessinger*, (Mich. 1896) 67 N. W. Rep. 116; *Webster v. Sibley*, 72 Mich. 630; *Weyburn v. Kipp*, 63 Mich. 79; *Wisner v. Bardwell*, 38 Mich. 278; *People v. Howard*, 50 Mich. 239; *People v. Murray*, 72 Mich. 10; *People v. Gastro*, 75 Mich. 127.

Mississippi. — *Prine v. State*, 73 Miss. 838; *Godwin v. State*, 73 Miss. 873; *Thompson v. State*, 73 Miss. 584; *Prine v. State*, 73 Miss. 838.

Missouri. — *Chaney v. Phoenix Ins. Co.*, 62 Mo. App. 45; *McClure v. Ritchey*, 30 Mo. App. 445; *Ackley v. St. Louis, etc., R. Co.*, 30 Mo. App. 657; *Copp v. Hardy*, 32 Mo. App. 588; *Pourcelly v. Lewis*, 8 Mo. App. 593; *Koenig v. Life Assoc. of America*, 3 Mo. App. 596; *Siegrist v. Arnot*, 10 Mo. App. 197; *Kendig v. Chicago, etc., R. Co.*, 79 Mo. 207; *Jamison v. Carroll*, 5 Mo. App. 598; *Ehrlich v. Aetna L. Ins. Co.*, 15 Mo. App. 579; *Clay v. Chicago, etc., R. Co.*, 17 Mo. App. 629; *Shaffner v. Leahy*, 21 Mo. App. 120; *Weil v. Schwartz*, 21 Mo. App. 372; *Judd v. Wabash, etc., R. Co.*, 23 Mo. App. 56; *Haney v. Kansas City*, 94 Mo. 334; *Curran v. Downs*, 7 Mo. App. 329; *Himes v. McKinney*, 3 Mo. 382; *Mead v. Brotherton*, 30 Mo. 201; *Meyer v. Pacific R. Co.*, 40 Mo. 151, 45 Mo. 137.

Nebraska. — *Markel v. Moudy*, 11 Neb. 213; *Burley v. Marsh*, 11 Neb. 291; *Kersenbrock v. Martin*, 12 Neb. 376; *Marion v. State*, 20 Neb. 233.

Nevada. — *Mendes v. Kyle*, 16 Nev. 369.

New York. — *Hughes v. Ferguson*, 23 N. Y. Wkly. Dig. 185.

North Carolina. — *Wilson v. White*, 80 N. Car. 280.

Oregon. — *Church v. Melville*, 17 Oregon 413.

Pennsylvania. — *Minick v. Gring*, 1 Pa. Super. Ct. Rep. 484; *Bohlen v. Stockdale*, 27 Pa. L. J. 198; *Reichenbach v. Ruddach*, 127 Pa. St. 564; *Stephens v. Cotterell*, 99 Pa. St. 188; *Webb v. Lees*, 149 Pa. St. 15; *Gehman v. Erdman*, 105 Pa. St. 371; *Reber v. Herring*, 115 Pa. St. 599.

South Carolina. — *Montgomery v. Scott*, 10 S. Car. 449.

Texas. — *Wilson v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 587; *Hurlbut v. Boaz*, 4 Tex. Civ. App. 371; *New York, etc., Land Co. v. Gardner*, (Tex. Civ. App. 1894) 25 S. W. Rep. 737; *Dallas, etc., El. R. Co. v. Harvey*, (Tex. Civ. App. 1894) 27 S. W. Rep. 423; *Long v. State*, 1 Tex. App. 710; *Newman v. Dodson*, 61 Tex. 91; *Blankenship v. Douglas*, 26 Tex. 225; *Machon v. Randle*, 66 Tex. 282; *Wood v. Chambers*, 20 Tex. 247; *Whitsett v. Miller*, 1 Tex. Unrep. Cas. 203; *Mitchell v. Mitchell*, 80 Tex. 101; *St. Louis, etc., R. Co. v. Taylor*, 5 Tex. Civ. App. 668; *Gulf, etc., R. Co. v. Gordon*, 70 Tex. 80; *Galveston, etc., R. Co. v. Kutac*, 76 Tex. 473; *Goodbar v. City Nat. Bank*, 78 Tex. 461; *Medlin v. Wilkin*, 60 Tex. 409; *Burcham v. Gann*, 1 Tex. Unrep. Cas. 333.

Vermont. — *Reed v. Reed*, 56 Vt. 492.

Virginia. — *New York, etc., R. Co. v. Thomas*, 92 Va. 606.

Washington. — *Sexton v. School Dist. No. 34*, 9 Wash. 5.

United States. — *Coffin v. U. S.*, 162 U. S. 664; *Hickory v. U. S.*, 160 U. S. 408; *Alberty v. U. S.*, 162 U. S. 499; *Scott v. Lloyd*, 9 Pet. (U. S.) 418.

1. *Devlin v. People*, 104 Ill. 504; *Wright v. Bell*, 5 Ill. App. 352; *Chase v. Buhl Iron Works*, 55 Mich. 139; *People v. Clarke*, 105 Mich. 169; *Fraser v. Haggerty*, 86 Mich. 521; *Gibson v. J. Snow Hardware Co.*, 94 Ala. 346; *Steed v. Knowles*, 97 Ala. 573; *Thompson v. State*, 106 Ala. 67; *Shaver v. McCarthy*, 110 Pa. St. 339; *Bell v.*

give undue weight to the evidence thus brought to their notice, and an instruction vicious in this respect may properly be refused.¹

Hutchings, (Tex. Civ. App. 1897) 41 S. W. Rep. 200.

1. *Alabama*. — Louisville, etc., R. Co. v. Hurt, 101 Ala. 34; Louisville, etc., R. Co. v. Rice, 101 Ala. 676; Chandler v. Jost, 96 Ala. 596; Louisville, etc., R. Co. v. Webb, 97 Ala. 308; Reese v. Beck, 24 Ala. 662; Mobile Bank v. Brown, 42 Ala. 108; Miller v. State, 107 Ala. 40; Mobile Sav. Bank v. McDonnell, 89 Ala. 445; Eastis v. Montgomery, 93 Ala. 293; Jackson v. Robinson, 93 Ala. 157; McPherson v. Foust, 81 Ala. 295; Allen v. State, 111 Ala. 80; Crawford v. State, 112 Ala. 1.

California. — People v. Hawes, 98 Cal. 648.

Georgia. — Model Mill Co. v. McEver, 95 Ga. 701.

Illinois. — Scott v. People, 141 Ill. 195; Aurora v. Hillman, 90 Ill. 61; Bowen v. Schuler, 41 Ill. 193; Callaghan v. Myers, 89 Ill. 566; Grube v. Nichols, 36 Ill. 95; Horne v. Walton, 117 Ill. 131; Crain v. Jacksonville First Nat. Bank, 114 Ill. 516; Swigar v. People, 109 Ill. 272; Drohn v. Brewer, 77 Ill. 280.

Indiana. — Kurtz v. Frank, 76 Ind. 595; Goodwin v. State, 96 Ind. 568; Toledo, etc., R. Co. v. Mylott, 6 Ind. App. 438.

Iowa. — Merrill v. Hole, 85 Iowa 66; Kline v. Kansas City, etc., R. Co., 50 Iowa 656; State v. Miller, 65 Iowa 60.

Kansas. — Atchison v. King, 9 Kan. 550.

Massachusetts. — Com. v. Cosseboom, 155 Mass. 298; Gunnison v. Langley, 3 Allen (Mass.) 337; Green v. Boston, etc., R. Co., 128 Mass. 221; Delaney v. Hall, 130 Mass. 524; Bugbee v. Kendrick, 132 Mass. 349; Murphy v. Boston, etc., R. Co., 133 Mass. 121; Manley v. Boston, etc., R. Co., 159 Mass. 493; Moseley v. Washburn, 167 Mass. 345.

Michigan. — Westchester F. Ins. Co. v. Earle, 33 Mich. 143; Busch v. Wilcox, 82 Mich. 315; Grand Rapids, etc., R. Co. v. Judson, 34 Mich. 507; Beurmann v. Van Buren, 44 Mich. 496; People v. Pope, (Mich. 1896) 66 N. W. Rep. 213.

Mississippi. — Meyer v. Blakemore, 54 Miss. 570.

Missouri. — State v. Homes, 17 Mo. 379; Kaiser v. South St. Louis Mut. F.

Ins. Co., 7 Mo. App. 579; Dobbs v. Cates, 60 Mo. App. 658; Chaney v. Phoenix Ins. Co., 62 Mo. App. 45; State v. Cantlin, 118 Mo. 100; Dodds v. Cates, 1 Mo. App. Rep. 195; Hackman v. Maguire, 20 Mo. App. 286.

New York. — Fitzgerald v. Long Island R. Co., (Supreme Ct.) 3 N. Y. Supp. 230; People v. O'Neil, 109 N. Y. 251; Ward v. Forrest, 20 How. Pr. (N. Y. Supreme Ct.) 465.

North Carolina. — State v. Clara, 8 Jones L. (N. Car.) 25.

Texas. — Thornley v. State, (Tex. Crim. App. 1896) 34 S. W. Rep. 264; Texas, etc., R. Co. v. Nelson, 9 Tex. Civ. App. 156; Gulf, etc., R. Co. v. Shearer, 1 Tex. Civ. App. 343; Jacobs v. Crum, 62 Tex. 401; Dawson v. Sparks, 1 Tex. Unrep. Cas. 735; Panhandle Nat. Bank v. Emery, 78 Tex. 498; Mitchell v. Mitchell, 80 Tex. 101; Schunior v. Russell, 83 Tex. 83; Goodbar v. City Nat. Bank, 78 Tex. 461; McKeen v. James, (Tex. Civ. App. 1893) 23 S. W. Rep. 460; Texas, etc., R. Co. v. Miller, 79 Tex. 78; Jones v. Reus, 5 Tex. Civ. App. 628.

United States. — Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408; Rio Grande Western R. Co. v. Leak, 163 U. S. 280.

Instructions Held Not to Violate Rule Against Singling Out Evidence. — An instruction which in substance informs the jury that if they find from the evidence the facts alleged in the declaration, relied upon as proved (reciting them), their verdict should be for the plaintiff, is not objectionable as selecting and giving undue prominence to isolated portions of the evidence. Chicago, etc., R. Co. v. Snyder, 117 Ill. 376. Where there were but two witnesses for the defendant, and the testimony of one M. presented fully the plaintiff's claim, it was not error as giving undue prominence to the testimony of one witness to charge that if the jury believed M. they should find for the plaintiff. Gregg v. Mallett, 111 N. Car. 74. An instruction which sets out the facts stated in the petition, and bases a right to recover on proof of such facts, is not objectionable for presenting the cause of action with undue emphasis. Gulf, etc., R. Co. v. Dunlap, (Tex. Civ. App. 1894) 26 S. W. Rep. 655.

Argumentativeness. — Such an instruction is, in a sense, argumentative, and the office of an instruction is not that of an argument to the jury on the facts, but to inform them what the law of the case is,¹ without giving undue prominence to any special feature of the evidence.²

A Positive Misdirection. — An instruction which singles out particular portions of the evidence,³ or the testimony of a particular witness or witnesses,⁴ and directs the jury to find one way or the other if they believe such evidence, amounts to a positive misdirection if there is other evidence which might authorize a different result, and of course the refusal of such an instruction is proper.⁵

Applications of Rule. — Where the court instructs the jury upon what state of facts they must find a verdict for a party, the instruction should include all the facts in controversy material to the rights of the plaintiff or the defense of the defendant.⁶ It is improper to direct the jury that they may look to certain evi-

1. *Martin v. Johnson*, 89 Ill. 537; *Hurlbut v. Boaz*, 4 Tex. Civ. App. 371; *Equitable Mortg. Co. v. Norton*, 71 Tex. 683; *Mobile Sav. Bank v. McDonnell*, 89 Ala. 445; *Jackson v. Robinson*, 93 Ala. 157; *Stone v. State*, 105 Ala. 60.

It is an abuse of the purpose of a request to charge, to endeavor to get the court to give special prominence to particular testimony by calling the jury's attention especially to it, and so get the court to argue the case for the party making such request. *Reed v. Reed*, 56 Vt. 492.

2. *Com. v. Gray*, (Ky. 1895) 30 S. W. Rep. 1015.

3. *Lafayette County Bank v. Metcalf*, 29 Mo. App. 384; *Chappell v. Allen*, 38 Mo. 213; *Rose v. Spies*, 44 Mo. 20; *Warsaw First Nat. Bank v. Currie*, 44 Mo. 91; *Meyer v. Pacific R. Co.*, 45 Mo. 137; *Spohn v. Missouri Pac. R. Co.*, 87 Mo. 74; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Towns v. Kellett*, 11 Ga. 286; *McIntyre v. Thompson*, 14 Ill. App. 554; *Growcock v. Hall*, 82 Ind. 202; *Thompson v. Boden*, 81 Ind. 176; *Larue v. Russell*, 26 Ind. 386; *McNamara v. Dratt*, 40 Iowa 413; *McFarlin v. State*, 41 Tex. 23.

Where, in a suit on an altered note, a knowledge on the part of the defendant of the alteration was put in issue, and there was also a denial by the defendant of the plaintiff's ownership of the note, the presentation of the note for payment, its dishonor, notice to the

plaintiff, etc., an instruction which tells the jury that if they should find that the alteration was made with the consent of the defendant, this would warrant a finding for the plaintiff, is erroneous, in that it singles out certain facts and directs a verdict on them, regardless of other facts at issue. *Iron Mountain Bank v. Murdock*, 62 Mo. 70.

4. *Anderson v. Cape Fear Steamboat Co.*, 64 N. Car. 399; *Long v. Hall*, 97 N. Car. 286; *Weisenfield v. McLean*, 96 N. Car. 248; *Jackson v. Greene County*, 76 N. Car. 282; *State v. Rogers*, 93 N. Car. 523; *Brem v. Allison*, 68 N. Car. 412; *Willey v. Gatling*, 70 N. Car. 410; *McGrath v. Metropolitan L. Ins. Co.*, (Supreme Ct.) 6 N. Y. St. Rep. 376; *Dolan v. Delaware, etc., Canal Co.*, 71 N. Y. 285; *Devlin v. People*, 104 Ill. 504; *Chase v. Buhl Iron Works*, 55 Mich. 139; *People v. Simpson*, 48 Mich. 474; *Fraser v. Haggerty*, 86 Mich. 521.

5. *Steed v. Knowles*, 97 Ala. 573; *Thompson v. State*, 106 Ala. 67; *Gibson v. J. Snow Hardware Co.*, 94 Ala. 346.

6. *Gallagher v. Williamson*, 23 Cal. 334; *Deasey v. Thurman*, 1 Idaho 779.

It is error to single out a number of inconclusive circumstances in proof favorable to the one side, omitting all references to other circumstances favorable to the other side and bearing on the same point, and inform the jury that such circumstances are proper for their consideration in making up their verdict. *McIntyre v. Thompson*, 14 Ill. App. 554.

dence as tending towards certain conclusions,¹ or that they may look to and consider certain facts in determining a disputed question,² or to state that a particular fact is of great importance.³

Giving Undue Prominence by Repetition. — So undue prominence may be given to evidence by a repeated reference thereto, and this should be avoided.⁴

Lessening the Importance of Evidence. — A commentary by the court upon a particular fact in evidence is also vicious when its tendency is to lessen the evidentiary value of such fact.⁵

(2) *Limitations and Exceptions to Rule.* — The rule against singling out facts in charging is not applicable where the effect of the facts thus selected cannot be varied by any of the other facts proven.⁶ So where all the evidence consists in a single undisputed fact, constituting the plaintiff's case, the rule does not apply.⁷ Nor is it objectionable to tell the jury that the force of a fact established by the evidence is not what is claimed for it.⁸ It is also held proper to direct a jury's attention to important evidence in such terms as to explain the case and aid them to give their attention to essential points, if it is done without misleading them or withdrawing their attention from other important evidence.⁹

1. Alabama G. S. R. Co. v. Sellers, 93 Ala. 9.

2. Jackson v. Robinson, 93 Ala. 157; Hussey v. State, 86 Ala. 34.

3. State v. Smith, 49 Conn. 389.

4. Gulf, etc., R. Co. v. Harriett, 80 Tex. 73; Gulf, etc., R. Co. v. Gordon, 70 Tex. 80; Mendes v. Kyle, 16 Nev. 369; Meachem v. Hahn, 46 Ill. App. 149.

"Counsel may select the strong and salient points appearing, and seek in the argument to direct the thought of the jury to them as being the important and controlling features of the case, but the instructions of the court should not be made the medium for conveying such views to the jury." Meachem v. Hahn, 46 Ill. App. 149.

Whether Error Will Operate to Reverse.

— Ordinarily the repetition in a charge of the court of the elements of damage which the jury may consider will not require a reversal of a judgment rendered against the defendant; but when the verdict seems excessive, a reasonable presumption arises that the jury may have been influenced thereby. Gulf, etc., R. Co. v. Gordon, 70 Tex. 80.

If the charge is otherwise correct, and it is not apparent that injury has been done by the repetition, the judgment will not be reversed. Maes v. Texas, etc., R. Co., (Tex. Civ. App.

1893) 23 S. W. Rep. 725; Houston, etc., R. Co. v. Larkin, 64 Tex. 454.

5. Leeser v. Bockhoff, 33 Mo. App. 223.

Casting Discredit upon Particular Witness. — The trial court should not call the attention of the jury to particular testimony in such a way as to throw discredit upon it, or to lead the jury to believe that the judge discredits the witnesses or their testimony. Wilson v. Hotchkiss, 81 Mich. 172.

6. Beers v. Housatonic R. Co., 19 Conn. 570.

7. Keyes v. Fuller, 9 Ill. App. 528.

8. Chouteau v. Jupiter Iron Works, 83 Mo. 73.

9. Beurmann v. Van Buren, 44 Mich. 496.

Theory of Each Party Fairly Presented.

— And where the theory of each party, as well as the testimony in support of it, is fairly presented, one party cannot complain that the testimony of the other assumes more prominence in the charge when it appears that this is due to the nature and quality of the testimony itself. Irvin v. Kuttruff, 152 Pa. St. 609.

Testimony of One Witness Decisive. —

So where the testimony of one witness is of such a character that if believed by the jury it is decisive of the merits of the case, the court may

13. Giving Undue Prominence to Propositions of Law. — According to some decisions the trial court should not, by frequent repetition, place too prominently before a jury any principle of law involved in the cause on trial,¹ and an instruction defective in this respect may properly be refused.² If, however, it becomes necessary, in instructing as to the different phases of the case, to embody a proposition in several instructions, the prominence thus given to the proposition does not constitute error,³ and according to another decision it does not constitute error to repeat a correct proposition of law any number of times.⁴

14. Ignoring Issues, Theories, and Evidence — *a. IGNORING ISSUES AND THEORIES.* — The charge should be so framed as not to ignore or exclude any of the material issues in the case. A requested instruction, defective in this respect, should always be refused, and if given will, in general, operate to reverse the decision.⁵ Where there are several distinct issues, it is error to

charge the jury hypothetically in reference to it without noticing the other evidence. *Hart v. Bray*, 50 Ala. 446; *Garrett v. Garrett*, 27 Ala. 687.

1. *Irvine v. State*, 20 Tex. App. 12; *Taylor v. Townsend*, 61 Tex. 147.

2. *Powell v. Messer*, 18 Tex. 401.

3. *Gran v. Houston*, 45 Neb. 813.

4. *Murray v. New York, etc., R. Co.*, 103 Pa. St. 37, in which the court said: "This instruction was not too strong, and as it was good law its repetition to the jury could have done no harm. Speaking for myself, I do not think seventy times seven would have been too often."

5. *Georgia*. — *Planters' Bank v. Richardson*, 15 Ga. 277; *Southwestern R. Co. v. Singleton*, 67 Ga. 307.

Illinois. — *Chicago, etc., R. Co. v. Clark*, 70 Ill. 276; *Illinois Cent. R. Co. v. Creighton*, 53 Ill. App. 45; *Collins v. Waters*, 54 Ill. 485; *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161; *Simpson Brick Press Co. v. Wormley*, 166 Ill. 383.

Indiana. — *Burke v. State*, 72 Ind. 392.

Maryland. — *Eureka Fertilizer Co. v. Baltimore Copper, etc., Co.*, 78 Md. 179; *Booster v. Rogers*, 9 Gill (Md.) 53; *Turner v. Ellicott*, 9 Md. 52.

Missouri. — *Turner v. Loler*, 34 Mo. 461; *Kraft v. McBoyd*, 32 Mo. App. 399; *Hayner v. Churchill*, 29 Mo. App. 676; *Carder v. Primm*, 1 Mo. App. Rep. 167; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567; *Russell v. Hannibal, etc., R. Co.*, 26 Mo. App. 368; *McDonald v. Kansas*

City Cable R. Co., 32 Mo. App. 70; *Bailey v. Beasley*, 32 Mo. App. 406; *State v. Foley*, 12 Mo. App. 431; *State v. Johnson*, 76 Mo. 121; *Martin v. Johnson*, 23 Mo. App. 96; *Brown v. McCormick*, 23 Mo. App. 181; *Kennedy v. Klein*, 19 Mo. App. 15; *Henry v. Bassett*, 75 Mo. 89.

Nebraska. — *Carruth v. Harris*, 41 Neb. 789; *Eaton v. Carruth*, 11 Neb. 231.

Oregon. — *Holmes v. Whitaker*, 23 Oregon 319; *Kearney v. Snodgrass*, 10 Oregon 181.

Pennsylvania. — *Hall v. Vanderpool*, 156 Pa. St. 152; *Relf v. Rapp*, 3 W. & S. (Pa.) 21; *Hasson v. Klee*, 168 Pa. St. 510.

Tennessee. — *Nashville, etc., R. Co. v. Conk*, 11 Heisk. (Tenn.) 575.

Texas. — *Parks v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 708; *Smithwick v. Andrews*, 24 Tex. 488; *Wootters v. Hale*, 83 Tex. 563; *McGehee v. Lane*, 34 Tex. 390; *McGown v. International, etc., R. Co.*, 85 Tex. 289; *Gulf, etc., R. Co. v. Kizziah*, 4 Tex. Civ. App. 356; *Guthrie v. Mann*, (Tex. Civ. App. 1896) 35 S. W. Rep. 710; *Island City Boating, etc., Assoc. v. New York, etc., Steamship Co.*, 80 Tex. 375; *Parker v. Chancellor*, 78 Tex. 524; *Cannon v. Cannon*, 66 Tex. 682.

Ignoring Issues and Theories — *Instances.* — Where the defendant's liability depended on the existence of a partnership, and there was evidence on that subject proper for a jury, a prayer denying the plaintiff's right to

instruct the jury to find a verdict in favor of one party if they determine a particular one of the issues in his favor,¹ and where a case rests upon several grounds necessary to be passed upon by the jury, the court cannot properly give an instruction which will make the case turn on a single point.² In charging the jury it will be sufficient if the charge taken as a whole covers all the issues,³ and an instruction may properly ignore issues where there is a total lack of evidence in support of them.⁴

b. IGNORING EVIDENCE — (1) Instructions Ignoring Material Evidence Erroneous. — Instructions which ignore material evidence in the case are erroneous.⁵ It is the right and duty of the

recover, based on the theory of principal and agent, of which there was also evidence, and ignoring the partnership, is erroneous. *Fulton v. Maccracken*, 18 Md. 528. An instruction upon a case of conflict brought on by the accused, giving only the law applicable if the conflict had been brought on with intent to kill, is erroneous. The failure to instruct upon the law had the conflict been brought on for any other purpose might convey to the jury the impression that the conflict had been brought on with intent to kill. *Perry v. State*, 44 Tex. 473. Where an affirmative defense is pleaded in the defendant's answer, it is error to instruct that "if you believe from the evidence that all the material allegations of the plaintiff's complaint have been proven by a preponderance of the evidence, then you will find for the plaintiff." *Dignan v. Spurr*, 3 Wash. 309. Where two contracts are in evidence, an instruction applicable to one of them, ignoring the existence of the other, is properly refused. *Krewson v. Purdom*, 13 Oregon 563. Where suit is brought for money loaned to a church, and the defense is that the plaintiff accepted the personal obligation of the church treasurer in satisfaction of his claim, an instruction ignoring this defense by directing a verdict for the plaintiff if the church has not paid the sum borrowed, is erroneous. *Swedish Lutheran Immanuel Church v. Nelson*, 43 Ill. App. 493. In a suit for breach of warranty an instruction that if the jury believe the goods to have been deposited with the plaintiff to be sold for the defendant, they must find for the defendant, is erroneous for failure to make any reference to the terms on which the deposit may have been made. *Beall v. Pearre*, 12 Md. 550. An instruction should not present promi-

nently the theory of one party and overlook that of his adversary. *Jones v. Rex*, (Tex. Civ. App. 1895) 31 S. W. Rep. 1077; *Fiore v. Ladd*, 25 Oregon 423; *Minick v. Gring*, 1 Pa. Super. Ct. Rep. 484; *Dikeman v. Arnold*, 71 Mich. 656; *Wilkey v. Crane*, 69 Mich. 17; *Miller v. Miller*, 97 Mich. 151; *Scarborough v. Blackman*, 108 Ala. 656. Thus an instruction that if a given state of facts is found by the jury the plaintiff is entitled to a verdict is erroneous, if it ignores the defendant's theory, which is supported by testimony, and which is a complete defense if accepted by the jury. *Dikeman v. Arnold*, 71 Mich. 656.

1. *Kearney v. Snodgrass*, 10 Oregon 181.

2. *Adams v. Roberts*, 2 How. (U. S.) 486.

3. *State v. Hope*, 102 Mo. 410; *Lowry v. Mt. Adams, etc., Incline Plane R. Co.*, 68 Fed. Rep. 827.

4. *Jones v. Missouri Pac. R. Co.*, 31 Mo. App. 614; *Gulf, etc., R. Co. v. Dorsey*, 66 Tex. 148. See also *Connecticut Mut. L. Ins. Co. v. McWhirter*, 73 Fed. Rep. 444.

5. *Alabama*. — *Hall v. State*, 40 Ala. 698; *Gooden v. State*, 55 Ala. 178; *Rowland v. State*, 55 Ala. 210; *Anniston Lime, etc., Co. v. Lewis*, 107 Ala. 535; *Holmes v. State*, 23 Ala. 17; *Woodbury v. State*, 69 Ala. 242; *McAdory v. State*, 59 Ala. 92; *Dodson v. State*, 86 Ala. 60; *Corbett v. State*, 31 Ala. 329; *Edgar v. McArn*, 22 Ala. 796; *Pritchett v. Munroe*, 22 Ala. 501; *Reese v. Beck*, 24 Ala. 651; *Upson v. Raiford*, 29 Ala. 188; *Dill v. State*, 25 Ala. 15.

Colorado. — *Venine v. Archibald*, 3 Colo. 163.

Connecticut. — *Hall v. Brown*, 30 Conn. 558; *Charter v. Lane*, 62 Conn. 121.

Georgia. — *Klink v. Boland*, 72 Ga.

jury to consider all the evidence on a point material to the issue,

485; *Black v. Thornton*, 30 Ga. 361; *Burney v. Ball*, 24 Ga. 506; *Beale v. Hall*, 22 Ga. 431; *Glass v. Cook*, 30 Ga. 133; *Leary v. Leary*, 18 Ga. 697; *White v. Dinkins*, 19 Ga. 285; *McGuffie v. State*, 17 Ga. 497; *Towns v. Kellett*, 11 Ga. 286; *Wylly v. Gazan*, 69 Ga. 507.

Idaho. — *Deasey v. Thurman*, 1 Idaho 775.

Illinois. — *Chesney v. Meadows*, 90 Ill. 430; *Chicago, etc., R. Co. v. Kuster*, 22 Ill. App. 188; *Calef v. Thomas*, 81 Ill. 478; *Sinclair v. Berndt*, 87 Ill. 174; *Gedney v. Gedney*, 61 Ill. App. 511; *Lake Shore, etc., R. Co. v. Beam*, 11 Ill. App. 215; *Elgin, etc., R. Co. v. Raymond*, 148 Ill. 241; *Eugene Glass Co. v. Martin*, 54 Ill. App. 288; *Sanford v. Miller*, 19 Ill. App. 536; *Dvorak v. Maloch*, 41 Ill. App. 131; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Gilmore v. Courtney*, 158 Ill. 432; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Logg v. People*, 92 Ill. 598; *Devine v. McMillan*, 61 Ill. App. 571; *Champion Iron Fence Co. v. Bradley*, 10 Ill. App. 328; *Chicago v. Dignan*, 14 Ill. App. 128; *Coon v. People*, 99 Ill. 368; *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296; *Craig v. Miller*, 133 Ill. 300; *Davies v. Cobb*, 11 Ill. App. 587; *Anderson v. Norvill*, 10 Ill. App. 240; *Doan v. Duncan*, 17 Ill. 272; *Cushman v. Cogswell*, 86 Ill. 62; *Volk v. Roche*, 70 Ill. 297.

Indiana. — *Hunter v. State*, 101 Ind. 241; *Larue v. Russell*, 26 Ind. 386; *Pruitt v. Cox*, 21 Ind. 15; *Prothero v. Citizens' St. R. Co.*, 134 Ind. 431; *Terry v. Shively*, 64 Ind. 106; *Growcock v. Hall*, 82 Ind. 202; *Longnecker v. State*, 22 Ind. 247.

Iowa. — *McNamara v. Dratt*, 40 Iowa 413; *State v. Meshek*, 51 Iowa 308; *Caruthers v. Torw*, 86 Iowa 318; *McKern v. Albia*, 69 Iowa 447; *Saunders v. Howard*, 51 Iowa 517.

Kentucky. — *Myers v. Sanders*, 7 Dana (Ky.) 509; *Howard v. Coke*, 7 B. Mon. (Ky.) 657.

Maryland. — *Higgins v. Grace*, 59 Md. 365; *Chew v. Beall*, 13 Md. 348; *Maryland, etc., R. Co. v. Porter*, 19 Md. 458; *Chipman v. Stansbury*, 16 Md. 154; *State v. Baker*, 8 Md. 44; *Cook v. Carr*, 20 Md. 403; *Boslev v. Chesapeake Ins. Co.*, 3 Gill & J. (Md.) 450; *Lewis v. Kramer*, 3 Md. 265; *Scott v. Bay*, 3 Md. 431; *Coates v. Sangston*, 5 Md. 121; *Planters' Bank v. Alexan-*

dria Bank, 10 Gill & J. (Md.) 346; *Baltimore, etc., R. Co. v. Green*, 25 Md. 72; *Adams v. Capron*, 21 Md. 187; *Conner v. Mount Vernon Co.*, 25 Md. 55; *Schillinger v. Kratt*, 25 Md. 49.

Michigan. — *Seiber v. Price*, 26 Mich. 518; *McKay v. Evans*, 48 Mich. 597; *People v. Marks*, 90 Mich. 555; *People v. Cummins*, 47 Mich. 334; *Sterling v. Callahan*, 94 Mich. 536; *American Cushman Telephone Co. v. Noble*, 98 Mich. 67.

Minnesota. — *De Foe v. St. Paul City R. Co.*, 65 Minn. 319.

Mississippi. — *Thrasher v. Gillespie*, 52 Miss. 840; *Solomon v. City Compress Co.*, 69 Miss. 319.

Missouri. — *Walter A. Wood Mowing, etc., Mach. Co. v. Bobbst*, 56 Mo. App. 427; *Evers v. Shumaker*, 57 Mo. App. 454; *Stocker v. Green*, 94 Mo. 280; *Clark v. Hammerle*, 27 Mo. 55; *Mead v. Brotherton*, 30 Mo. 201; *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240; *Fink v. Phelps*, 30 Mo. App. 431; *Birt-whistle v. Woodward*, 95 Mo. 113; *Craycroft v. Walker*, 26 Mo. App. 469; *Standfield v. Phoenix Loan Assoc.*, 53 Mo. App. 595; *Buswell v. Emerson*, 2 Mo. App. Rep. 1131; *Paxson v. Pierce*, 25 Mo. App. 59; *Sigerson v. Pomeroy*, 13 Mo. 620; *State v. Williamson*, 16 Mo. 394; *Wyatt v. Citizens' R. Co.*, 62 Mo. 408; *Compton v. Baker*, 34 Mo. App. 133; *Jones v. Jones*, 57 Mo. 138.

Nebraska. — *Brown v. State*, 9 Neb. 157; *Uhl v. Robinson*, 8 Neb. 272; *Rising v. Nash*, 48 Neb. 597.

New Hampshire. — *Ordway v. Sanders*, 58 N. H. 132.

North Carolina. — *State v. Floyd*, 6 Jones L. (N. Car.) 392; *Meredith v. Cranberry Coal, etc., Co.*, 99 N. Car. 576.

Ohio. — *Callahan v. State*, 21 Ohio St. 306.

Pennsylvania. — *Deal v. McCormick*, 3 S. & R. (Pa.) 343; *Keeler v. Vantuytle*, 6 Pa. St. 250; *Bovard v. Christy*, 14 Pa. St. 267; *Pennsylvania Canal Co. v. Harris*, 101 Pa. St. 93; *Ott v. Oyer*, 106 Pa. St. 7; *Peirson v. Duncan*, 162 Pa. St. 187; *Cross v. Tyrone Min., etc., Co.*, 121 Pa. St. 387; *Garey v. Woodward*, 127 Pa. St. 251; *Seeley v. Garey*, 109 Pa. St. 301; *Howell v. Mellon*, 169 Pa. St. 138; *Young v. Merkel*, 163 Pa. St. 513.

Texas. — *Gulf, etc., R. Co. v. Lankford*, 9 Tex. Civ. App. 593; *Weis v.*

and to determine what the evidence as a whole establishes, and

Dittman, 4 Tex. Civ. App. 35; Missouri, etc., R. Co. v. Simmons, 12 Tex. Civ. App. 501; Ellis v. Mathews, 19 Tex. 390; Hinchman v. Davis, (Tex. Civ. App. 1896) 33 S. W. Rep. 893; McFarlin v. State, 41 Tex. 23.

Vermont. — Gordon v. Tabor, 5 Vt. 103.

Virginia. — Hash v. Com., 88 Va. 172.

West Virginia. — Woodell v. West Virginia Imp. Co., 38 W. Va. 23; McMechen v. McMechen, 17 W. Va. 683; Storrs v. Feick, 24 W. Va. 606.

United States. — Clement v. Packer, 125 U. S. 309; Greenleaf v. Birth, 9 Pet. (U. S.) 292; Ranney v. Barlow, 112 U. S. 207; Allison v. U. S., 160 U. S. 203; Hall v. Weare, 92 U. S. 728.

Ignoring Evidence—Instances. — Instructions on a contract which altogether ignore the limitations of the contract are erroneous and should not be given. Craycroft v. Walker, 26 Mo. App. 469. On the contest of a will on the ground of an insane delusion on the part of the testator, the proponents of the will asked an instruction to the effect that if the maker's brain was not diseased to such an extent as to render him incapable of transacting his ordinary business, he was capable of making the will. It was held that this instruction was properly refused as ignoring the question of insane delusion. American Bible Soc. v. Price, 115 Ill. 623. A charge requested which, specifying one or two of the facts proved, instructs the jury that "this, in the absence of other suspicious circumstances, does not necessarily establish the crime" charged, is properly refused. Buchanan v. State, 55 Ala. 154. A charge that if the jury believe "from the evidence that the defendant killed deceased by shooting him with a pistol, the law presumes it was done with malice," when the evidence tended to show that the pistol was resorted to in self-defense, is erroneous, since it ignores the evidence of self-defense. Martin v. State, 47 Ala. 564. In an action against a street-car company to recover for injuries caused by a collision with a locomotive at a crossing, the defense was that the track was wet, and that the shortness of the distance from the crossing rendered it practically impossible to stop the car. It was held proper to refuse

an instruction requiring the defendant to show that the injury was the result of an inevitable accident. Jacquin v. Grand Ave. Cable Co., 57 Mo. App. 320.

Instructions Held Not Objectionable as Ignoring Evidence. — An instruction which directs the jury's attention to the principal question in the case is not erroneous, even if there are some minor and subordinate questions not noticed therein, but to which attention has been sufficiently called in other instructions. International Bank v. Ferris, 118 Ill. 465. In a proceeding to condemn land for right of way, in which a cross-petition was filed, claiming damages to other lands, it was admitted that the cross-petitioner had title to a portion of the land, and also that his grantors had good title to another portion of the land in question. It was held that an instruction that "statements of counsel or parties not made under oath, or made as admissions, are not evidence, and are not to be regarded as such by the jury in making up their verdict," was not objectionable as excluding such admissions from the jury. Bowman v. Venice, etc., R. Co., 102 Ill. 459. An instruction is not necessarily objectionable as ignoring a question of fact because it lays especial stress upon another question of fact. Thus an instruction telling the jury that it is a question of fact to be by them determined, whether any part, and if so how much, of the proceeds of the sale of cattle belonging to another, the claimant, came into the hands of the executor of the estate of the person making the sale, after the death of the latter, in a suit against the executor to recover such proceeds, is not to be understood as holding that to be the only question of fact submitted to the jury for consideration. Kirby v. Wilson, 98 Ill. 240. An instruction that if the jury found certain facts "from the testimony of the plaintiff," she was not necessarily negligent, is not objectionable for ignoring conflicting testimony given by the defendant, but simply states the effect of the facts testified to by the plaintiff. Shaw v. Sun Prairie, 74 Wis. 105.

Rebuttal Testimony of Minor Importance. — Where the trial judge has fully stated all the direct evidence bearing upon the case, the judgment will not be reversed because he failed to refer to

they should be left free to do so.¹ An instruction should not be based on the evidence of one party while that of his adversary is ignored,² and in criminal cases should not ignore a material fact as a constituent of the prisoner's guilt.³ The mere fact that evidence is strongly contradicted,⁴ or even weak and inconclusive, does not justify a charge ignoring it.

(2) *Refusal of Instructions Ignoring Material Evidence Proper.* — It is always proper to refuse an instruction which ignores material evidence in the case.⁵

15. Summing Up Evidence — *a. IN WHAT JURISDICTIONS PERMISSIBLE.* — In this country, while the practice of giving an opinion on the weight of evidence is, in most jurisdictions, pro-

rebuttal testimony of a minor character. *Winther v. Second, etc., Streets Pass. R. Co.*, 159 Pa. St. 628.

1. *Grube v. Nichols*, 36 Ill. 95; *Moore v. Wright*, 90 Ill. 470; *Ogden v. Kirby*, 79 Ill. 555; *Phillips v. Roberts*, 90 Ill. 492; *Hurlbut v. Boaz*, 4 Tex. Civ. App. 371.

2. *Cushman v. Cogswell*, 86 Ill. 62.

3. *Gooden v. State*, 55 Ala. 178; *Corbett v. State*, 31 Ala. 329; *Rowland v. State*, 55 Ala. 210.

4. *Champion Iron Fence Co. v. Bradley*, 10 Ill. App. 328.

5. *Alabama*. — *Louisville, etc., R. Co. v. Hurt*, 101 Ala. 34; *Williamson v. Tyson*, 105 Ala. 644; *White v. Craft*, 91 Ala. 139; *City Nat. Bank v. Burns*, 68 Ala. 267; *Savery v. Moore*, 71 Ala. 236; *Callan v. McDaniel*, 72 Ala. 96; *Darnell v. Griffin*, 46 Ala. 520; *Buchanan v. State*, 55 Ala. 154; *Hammett v. Brown*, 60 Ala. 498; *Jordan v. State*, 52 Ala. 188; *Ward v. Winston*, 20 Ala. 167; *Aaron v. State*, 39 Ala. 75; *Highland Ave., etc., R. Co. v. Sampson*, 112 Ala. 425; *Cox v. State*, 99 Ala. 162; *Jefferson v. State*, 110 Ala. 89.

California. — *Fox v. Stockton Combined Harvester, etc., Works*, 83 Cal. 333.

Connecticut. — *Plumb v. Curtis*, 66 Conn. 154.

Florida. — *Florida R., etc., Co. v. Webster*, 25 Fla. 394.

Illinois. — *Ryan v. Brown*, 59 Ill. App. 394; *American Bible Soc. v. Price*, 115 Ill. 623; *Wooley v. Lyon*, 117 Ill. 244; *Thorne v. McVeagh*, 75 Ill. 81; *American Ins. Co. v. Crawford*, 89 Ill. 62; *Phoenix Ins. Co. v. La Pointe*, 118 Ill. 384.

Maryland. — *Cover v. Myers*, 75 Md. 406; *Cover v. Bowersox*, (Md. 1892) 23 Atl. Rep. 1037; *Folk v. Wilson*, 21 Md.

538; *Thomas v. Sternheimer*, 29 Md. 268; *Fulton v. Maccracken*, 18 Md. 528; *Maryland Fertilizing, etc., Co. v. Lorentz*, 44 Md. 218; *Schillinger v. Kratt*, 25 Md. 49; *Beall v. Beall*, 7 Gill (Md.) 237; *Winner v. Penniman*, 35 Md. 163.

Massachusetts. — *Graves v. Dill*, 159 Mass. 74.

Michigan. — *Kieldsen v. Wilson*, 77 Mich. 45; *Wilcox v. Young*, 66 Mich. 687.

Missouri. — *Jackson v. Bowles*, 67 Mo. 609; *Crews v. Lackland*, 67 Mo. 619; *Seymour v. Seymour*, 67 Mo. 303; *Greer v. Parker*, 85 Mo. 107; *Barada v. Blumenthal*, 20 Mo. 162; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Piper v. Boonville*, 32 Mo. App. 138.

Nebraska. — *Atchison, etc., R. Co. v. Jones*, 9 Neb. 67; *Consaul v. Sheldon*, 35 Neb. 247.

New York. — *Ryan v. Miller*, 12 Daly (N. Y.) 77; *Hazewell v. Coursen*, 81 N. Y. 630.

South Carolina. — *Curnow v. Phoenix Ins. Co.*, 46 S. Car. 79.

Texas. — *Caraway v. Citizens' Nat. Bank*, (Tex. Civ. App. 1895) 29 S. W. Rep. 506; *Leach v. Wilson County*, 68 Tex. 353; *Pitt v. Elser*, 7 Tex. Civ. App. 47; *International, etc., R. Co. v. Kuehn*, 2 Tex. Civ. App. 210.

Vermont. — *Ashley v. Hendee*, 56 Vt. 209.

Wisconsin. — *Phoenix Ins. Co. v. Sholes*, 20 Wis. 35; *Sherman v. Kreul*, 42 Wis. 33.

United States. — *Lucas v. Brooks*, 18 Wall. (U. S.) 436; *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 611; *Orleans v. Platt*, 99 U. S. 676; *Ayers v. Watson*, 113 U. S. 594; *Edwards v. Darby*, 12 Wheat. (U. S.) 206; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408.

hibited by constitutional¹ or statutory provisions,¹ the common-law practice of summing up the evidence² is still permissible where there is nothing in the organic law or statutes prohibiting it.³

Statutory Authority. — In some of these jurisdictions, indeed, there is express constitutional or statutory authority for this practice. Thus in some states the provisions against charging on the weight of the evidence permit the court to state the testimony and declare the law applicable thereto.⁴

1. See *supra*, IV. 1. *Charging on the Weight of the Evidence.*

2. Summing up evidence is thus outlined by Blackstone: "When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence." 3 Black. Com. 375.

3. *California.* — *People v. Dick*, 34 Cal. 663; *People v. King*, 27 Cal. 513; *Morris v. Lachman*, 68 Cal. 109.

Colorado. — *Rose v. Otis*, 5 Colo. App. 472.

Georgia. — *City, etc., R. Co. v. Findley*, 76 Ga. 311; *Whitlow v. State*, 74 Ga. 819; *Shiels v. Stark*, 14 Ga. 429; *Bray v. State*, 69 Ga. 765.

Indiana. — The practice in Indiana seems to be in doubt. Three of the earlier decisions (*Driskill v. State*, 7 Ind. 338; *Ball v. Cox*, 7 Ind. 453; *Barker v. State*, 48 Ind. 163) hold that it is competent for the trial court to sum up the evidence. Then follow two decisions (*Killian v. Eigenmann*, 57 Ind. 480; *Cunningham v. State*, 35 Ga. 373) which hold directly to the contrary. But a still later decision (*Pittsburgh, etc., R. Co. v. Sponier*, 85 Ind. 165) contains a dictum to the effect that the trial judge may sum up the evidence. These are all the decisions on the question which the writer has been able to find, and he would not like to hazard an opinion as to what this court will decide when the question is again presented.

Kansas. — *Bellew v. Ahrburg*, 23 Kan. 287.

Massachusetts. — *Com. v. Barry*, 9 Allen (Mass.) 278.

Minnesota. — *State v. Rose*, 47 Minn. 47.

Nevada. — *State v. Duffy*, 6 Nev. 138. *New York.* — *People v. Fanning*, 131 N. Y. 663, 43 N. Y. St. Rep. 771.

North Carolina. — *State v. Lipsey*, 3 Dev. L. (N. Car.) 485; *State v. Moses*, 2 Dev. L. (N. Car.) 452; *Bailey v. Poole*, 13 Ired. L. (N. Car.) 404.

Ohio. — *Morgan v. State*, 48 Ohio St. 371.

Pennsylvania. — *Com. v. McManus*, 143 Pa. St. 64.

South Carolina. — *State v. Moorman*, 27 S. Car. 22; *Moore v. Columbia, etc., R. Co.*, 38 S. Car. 1; *Massey v. Wallace*, 32 S. Car. 149; *State v. Addy*, 28 S. Car. 13; *Davis v. Elmore*, 40 S. Car. 533; *Walker v. Laney*, 27 S. Car. 150; *State v. Green*, 5 S. Car. 65. Summing up is now prohibited by the organic law of this state. See *infra*, V. 15. *e. In What Jurisdictions Not Permissible.*

Tennessee. — *Case v. Williams*, 2 Coldw. (Tenn.) 239; *Lannum v. Brooks*, 4 Hayw. (Tenn.) 121; *Ivey v. Hodges*, 4 Humph. (Tenn.) 154; *Ayres v. Moulton*, 5 Coldw. (Tenn.) 154; *Hughes v. State*, 8 Humph. (Tenn.) 79; *Atchison v. State*, 13 Lea (Tenn.) 279; *Claxton v. State*, 2 Humph. (Tenn.) 181; *Harington v. Neely*, 7 Baxt. (Tenn.) 442.

Wisconsin. — *Hannon v. State*, 70 Wis. 448.

United States. — *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170; *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 197; *Starr v. U. S.*, 153 U. S. 614; *Tracy v. Swartwout*, 10 Pet. (U. S.) 80.

4. *Case v. Williams*, 2 Coldw. (Tenn.) 239; *Atchison v. State*, 13 Lea (Tenn.) 279; *Claxton v. State*, 2 Humph. (Tenn.) 181; *State v. Duffy*, 6 Nev. 138; *Miller v. Stewart*, 24 Cal. 502; *Com. v. Barry*, 9 Allen (Mass.) 278; *Pub. Stat. Mass. 1882*, c. 153, § 5.

So a statute of one state provides that the court may state to the jury the law of the case, and may also state

Construction. — The provisions which prohibit charging on the weight of the evidence, but which authorize the trial judge to state the evidence and declare the law, are thus construed. They take away from the judge all power to intimate or express any opinion on the facts, but leave unimpaired his right to recapitulate or sum up the evidence as at common law,¹ the latter clause being merely declaratory that the judge's discretion in that regard is not affected by the prohibitory clause.² So a statute which merely declares that the trial court shall not express an opinion as to what has or has not been proved does not take away the right to sum up the evidence.³

b. MANNER OF STATING EVIDENCE — (1) *In General.* — In summing up evidence the court need not repeat the testimony of a witness verbatim; it will be sufficient if the substance of the testimony is correctly given.⁴

the evidence when the same is disputed. Alabama Code, § 2754. See also *Hawes v. State*, 88 Ala. 37. And in another there is a statutory provision that the trial court "shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." North Carolina Code 1883, § 413.

1. *State v. Lipsey*, 3 Dev. L. (N. Car.) 485; *Com. v. Barry*, 9 Allen (Mass.) 278.

2. *State v. Lipsey*, 3 Dev. L. (N. Car.) 485.

"Although there is a seeming repugnancy in the two branches of the section, we think that they are susceptible of a reasonable interpretation, which will give full force and effect to both of them, and at the same time carry out what seems to have been the manifest purpose of the legislature. It is clear beyond controversy that the first clause contains a distinct and absolute prohibition, that the courts shall not charge juries with respect to matters of fact." To reconcile this with the clause that follows, which provides that the courts 'may state the testimony and the law,' the prohibition must be regarded as a restraint only on the expression of an opinion by the court on the question whether a particular fact or series of facts involved in the issue of a case is or is not established by the evidence. In other words, it is to be construed so as to prevent courts from interfering with the province of juries by any statement of their own judgment or conclusion upon matters of fact. This construction effectually accomplishes the great object of guarding against any bias or undue influence

which might be created in the minds of jurors, if the weight of the opinion of the court should be permitted to be thrown into the scale in deciding upon issues of fact. But further than this the legislature did not intend to go. The statute was not designed to deprive the court of all power to deal with the facts proved. On the contrary, the last clause of the section very clearly contemplates that the duty of the court may not be fully discharged by a mere statement of the law. By providing that the court may also state the testimony, the manifest purpose of the legislature was to recognize and affirm the power and authority of the court, to be exercised according to its discretion; to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law." *Com. v. Barry*, 9 Allen (Mass.) 278.

3. *Shiels v. Stark*, 14 Ga. 429.

4. *Krepps v. Carlisle*, 157 Pa. St. 358; *Strawn v. Shank*, 110 Pa. St. 259. Compare *People v. Doyell*, 48 Cal. 85, where it was held that if the judge in his charge to the jury in a criminal case undertakes to state a portion of the testimony, the safer way is to recite the language of the witness as taken down by the reporter or in the judge's notes; but when the language of the district judge is in substance and effect a repetition of the testimony, the defendant cannot complain. See also *People v. Perry*, 65 Cal. 569; *People v. Vasquez*, 49 Cal. 560.

Using Memorandum Made by Another Person. — It is not improper for a

Order of Recapitulation. — So the court is not bound to recapitulate or state the testimony of each witness in the exact order it was given, but he may arrange it in the order in which it applies to the several questions of fact arising in the case, and lay it before the jury as thus arranged.¹

Words Spoken by Witness — Circumstances. — Nor is the judge confined to the words spoken by the witnesses. He may state all the circumstances attendant upon the examination to show how they are contradictory and how reconcilable, and then submit a reasonable inference which may be drawn.²

Existence or Nonexistence of Evidence. — The right to state the evidence has been held to include the right to state that there is no evidence,³ or that there is evidence,⁴ as to a particular fact.

Testimony of Particular Witness. — So the court may tell the jury what the testimony of a particular witness was, if requested so to do.⁵

judge, in stating the testimony to the jury, to read a memorandum of testimony taken by another person, instead of using his own minutes or making the statement from his own recollection. *People v. Boggs*, 20 Cal. 432.

1. *State v. James*, 31 S. Car. 235; *Redding v. South Carolina R. Co.*, 5 S. Car. 69; *State v. Green*, 5 S. Car. 66; *State v. White*, 15 S. Car. 392; *Richards v. Munro*, 30 S. Car. 284; *State v. Summers*, 19 S. Car. 94; *Norris v. Clinkscales*, 47 S. Car. 488; *State v. Addy*, 28 N. Car. 13; *State v. Jones*, 97 N. Car. 469.

Summing up evidence includes the idea of placing it in its logical relation to the propositions which it is adduced to support or contradict, as well as to the propositions and rules of law by which its bearing and force ought to be controlled. *Redding v. South Carolina R. Co.*, 5 S. Car. 69.

2. *State v. Moses*, 2 Dev. L. (N. Car.) 452. See also *Rose v. Otis*, 5 Colo. App. 472.

Thus where a witness testified that at a distance of ten paces on a dark night he saw the prisoner pull the trigger of a gun, and the judge informed the jury that if they believed the witness to mean that by the flash of the gun he saw the prisoner's hand upon the trigger, that would explain the apparent contradiction, it was held that the judge by such an instruction did not transgress the limits of his duty. *State v. Moses*, 2 Dev. L. (N. Car.) 452.

The judge is not a mere machine to detail to the jury the evidence just as

it occurred and in the order it occurred. It is the duty of the judge, when he does charge upon evidence, to collate it and bring it together in one view, on each side, with such remarks and illustrations as may properly direct the attention of the jury to the merits of the case. It is also his duty to bring to the notice of the jury principles of law or facts which have an important bearing upon the case, though omitted in the arguments of counsel. *Bailey v. Poole*, 13 Ired. L. (N. Car.) 404.

The *North Carolina* statute (Code, § 413), prescribes that the court "shall state, in a plain and correct manner, the evidence given in the case, and declare and explain the law arising thereon." This does not imply a mere recital of the evidence. This would be of little or no service. It means a clear, fair, and intelligent statement of it in its bearings, its relations, one part with another, and its legal bearings upon the issues submitted to the jury. The object is to help the jury clearly to apprehend and apply it, and to give it just and proper weight, this being the sole province of the jury. *State v. Jones*, 97 N. Car. 469.

3. *People v. Dick*, 34 Cal. 663; *People v. King*, 27 Cal. 513.

4. *Harrington v. Neely*, 7 Baxt. (Tenn.) 442.

5. *State v. Smith*, 10 Nev. 106; *People v. Ybarra*, 17 Cal. 166; *Atchison v. State*, 13 Lea (Tenn.) 279.

The presiding judge, at a trial, may call the attention of the jury to the evidence which is in the case, and state his recollection of what has or has not

Claims and Theories. — The court may state the respective theories and claims of the parties.¹

(2) *Effect of Misstatement.* — It is not every misrecollection by the court of a witness's testimony, or every misstatement of his language, that works material error.² In the absence of anything to show that the jury were misled to the prejudice of the party complaining,³ or of exceptions saved,⁴ the judgment will not be reversed. A misstatement of evidence which will work a reversal "must be in a substantial part of the testimony, and such a misstatement as probably misleads the jury."⁵ Such a misstatement is, of course, reversible error.⁶

been testified to, submitting the whole matter to their consideration and judgment. *Eddy v. Gray*, 4 Allen (Mass.) 435.

1. *Clark v. Wilmington, etc., R. Co.*, 109 N. Car. 430; *Rose v. Otis*, 5 Colo. App. 472; *Hawes v. State*, 88 Ala. 37; *Mimms v. State*, 16 Ohio St. 221; *Dexter v. McCready*, 54 Conn. 174; *State v. Smith*, 49 Conn. 388, in which the court said: "The prisoner claims that the judge erred in saying, in the course of his charge, that it was claimed by the prisoner that three chambers only of his pistol were found discharged, that previous to the affray it had been shown by witnesses that he made three discharges of his pistol, and that the cylinder now showed that three discharges only had been made, and that consequently his pistol could not have done the mischief; that the state claimed to have shown that after the pistol was loaded at Thompson's corner, about four o'clock that afternoon, two discharges of it were made; that if these three discharges were made as the prisoner claims, then five discharges were made; that if this was so the prisoner must have reloaded somewhere. It is claimed that the judge stated a conclusion of fact to the jury, upon a point upon which there were conflicting claims and testimony. But it seems to us that the judge was simply stating the claims of the state and the prisoner, and that if such claims were correct, such must have been the result. We see no objection to this, and cannot see how the prisoner could possibly have been prejudiced by it."

2. *Bellew v. Ahrburg*, 23 Kan. 287.

3. *Bellew v. Ahrburg*, 23 Kan. 287; *People v. Caldwell*, (Mich. 1895) 65 N. W. Rep. 213; *Knapp v. Griffin*, 140 Pa. St. 604; *Richards v. Willard*, 176 Pa.

St. 181; *Braunsdorf v. Fellner*, 76 Wis. 1; *Moore v. Columbia, etc., R. Co.*, 38 S. Car. 1; *People v. Boggs*, 20 Cal. 432; *Texas, etc., R. Co. v. Gentry*, 163 U. S. 353.

A mistake by the judge in stating the testimony to the jury on a trial for murder is not a sufficient ground for setting aside a verdict finding the defendant guilty of manslaughter, where the character of the mistake renders it improbable that the verdict was influenced thereby. *People v. Boggs*, 20 Cal. 432.

4. *Knapp v. Griffin*, 140 Pa. St. 604; *Muetze v. Tuteur*, 77 Wis. 236; *Braunsdorf v. Fellner*, 76 Wis. 1; *People v. Caldwell*, (Mich. 1895) 65 N. W. Rep. 213; *State v. Davis*, 27 S. Car. 609; *Rumph v. Hiott*, 35 S. Car. 444; *Arnstein v. Haulenbeek*, 16 Daly (N. Y.) 382.

Failure to Save Exception — Illustration of Rule. — In charging the court said: "The evidence shows that three letters, I think, were mailed from La Crosse by the defendants, of this character;" and the evidence showed that there were only two. It was held that objections to this misstatement were waived by failure of the party aggrieved to call the attention of the court to it at the time. *Muetze v. Tuteur*, 77 Wis. 236.

Remedy for Misstatement of Testimony. — It has been held that if testimony is incorrectly stated to the jury, or reference to some material testimony is omitted in the charge, the proper remedy is to call the attention of the judge to such error or omission at the time, or at least move for a new trial before the Circuit Court upon that ground. *State v. Davis*, 27 S. Car. 609.

5. *Bellew v. Ahrburg*, 23 Kan. 287.

6. *Steinbrunner v. Pittsburgh, etc.,*

c. WHAT FULNESS OF STATEMENT REQUIRED. — In recapitulating the evidence, it is largely within the discretion of the court as to how much detail shall be entered into, and how minute the reference to the testimony shall be.¹

All Evidence and Theories. — The court is not bound to recapitulate all the evidence in its charge to the jury,² nor is the court bound

R. Co., 146 Pa. St. 504; *Collins v. Leafey*, 23 W. N. C. (Pa.) 264; *American Oak Extract Co. v. Ryan*, 104 Ala. 267.

Illustrations. — In an action for the killing of a person by a railroad company at a crossing, the evidence was conflicting as to whether the deceased, on approaching the crossing, stopped before going upon the track. The court charged that it was uncontradicted that the deceased did stop, "but did he stop there for the purpose of looking out for trains?" The judgment was reversed on this ground, and that too though the evidence had been correctly stated in the preceding part of the charge. *Steinbrunner v. Pittsburgh, etc., R. Co.*, 146 Pa. St. 509.

Under a statute providing that the court may give its recollection of the testimony on a point in dispute, a misstatement of a material fact to the prejudice of a party complaining, when requested by the jury to state its recollection of a part of the testimony, is erroneous. *Stephens v. Patterson*, 29 Neb. 697.

1. *Fowler v. Smith*, 153 Pa. St. 639; *Borham v. Davis*, 146 Pa. St. 72; *McPherson v. McPherson*, 21 S. Car. 273.

"The real point of controversy often and generally depends on a very small portion of the testimony introduced. In the course of a trial, points made upon prolix and complicated documents; or after the most wearisome examination of witnesses, are abandoned, sometimes expressly, but oftener tacitly, because not sufficiently raised by the proof adduced, or answered by fuller proof on the other side. * * *

A burden which the counsel thus takes away from the court and jury the judge cannot be bound to reassume. To advert to everything that has thus occurred during the trial, though not pressed by the party, though yielded by him, immaterial, or absurd, would be a harmful consumption of time, obscure the truth, and confound the minds of the jurors. And it is not possible to lay down any rule but one of two: either

that it must be left to the sound discretion of the judge himself to determine where and on what circumstances he will advert; or that he must notice and comment upon all; for who else can determine which was material or immaterial? * * * In the whole circle of duties to the performance of which a judge is called, there is not perhaps one, to the due performance of which greater abilities, and a happy temperament and elocution, are more necessary than this of summing up to a jury. It often calls for the highest efforts of the most vigorous natural faculties, improved by education, informed in professional and general learning, practiced in forensic debate and judicial investigation. It cannot be meant that the least man should fully and correctly perform that to which only the greatest is equal. * * *

The charge to the jury, therefore, must be left, as it always has been, to the discretion of the judge, the occasion to his conscience, the manner to his ability. The only exception is such a plain departure from impartiality in collating the evidence as of itself to convey to the jury an impression of the judge's opinion as clearly as an explicit declaration would. If it were possible to make such a case appear in its true light in the record brought here, this court would be bound to set aside the verdict." *Per Ruffin, J. (dissenting)*, in *State v. Lipsey*, 3 Dev. L. (N. Car.) 485.

2. *State v. Lipsey*, 3 Dev. L. (N. Car.) 485; *State v. Haney*, 2 Dev. & B. L. (N. Car.) 390; *State v. Morris*, 3 Hawks (N. Car.) 388; *Boon v. Murphy*, 108 N. Car. 190; *Boykin v. Perry*, 4 Jones L. (N. Car.) 325; *State v. Pritchett*, 106 N. Car. 667; *State v. Ussery*, 118 N. Car. 1177; *Kaminitzky v. Northeastern R. Co.*, 25 S. Car. 53; *People v. McGonegal*, 62 Hun (N. Y.) 622, 42 N. Y. St. Rep. 307; *Borham v. Davis*, 29 W. N. C. (Pa.) 467; *Allis v. U. S.*, 155 U. S. 117.

Stating Facts on One Side More Fully. — In charging a jury the judge may

to notice every position discussed by counsel.¹ It will be sufficient to direct the attention of the jury to the principal questions before them, and to explain the law applicable thereto.²

Repetition of Testimony. — If a repetition of the entire testimony or any specific part thereof is desired, a request for such repetition should be made in apt time,³ and if any material portion of the testimony is omitted, this should be brought to the attention of the court, and a request for correction made.⁴

Statement Prejudicial to One Side. — But a presentation of the proof prominently on one side, and an entire omission to state the countervailing evidence on the other, will probably operate to reverse whether any request for a statement of such evidence be made or not.⁵ The court should not omit or slur over the strong points on either side.⁶

d. DISCRETION OF COURT AS TO SUMMING UP. — In instructing the jury the trial judge, even in those jurisdictions where summing up is held proper, is under no obligation to do so, unless he sees fit. This is a matter which rests entirely in his discretion,⁷ and it makes no difference that he was requested so to do.⁸

arrange and classify the testimony, and in doing so, much must be left to his discretion. It cannot be declared error of law that the judge, in the opinion of counsel, stated the facts on one side with more fulness, clearness, and emphasis than he did on the other. *McPherson v. McPherson*, 21 S. Car. 273.

1. *Simpson v. Blount*, 3 Dev. L. (N. Car.) 34.

2. *State v. Ussery*, 118 N. Car. 1177; *State v. Haney*, 2 Dev. & B. L. (N. Car.) 390.

3. *State v. Ussery*, 118 N. Car. 1177; *Boon v. Murphy*, 108 N. Car. 190.

4. *State v. Davis*, 27 S. Car. 609.

The Code of *North Carolina*, § 413, which requires the court, in charging the jury, to "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon," does not require the court, without request from counsel, to "eliminate the material facts on both sides and apply the principles of law to them." *State v. Brady*, 107 N. Car. 822.

5. See *Wright v. Central R., etc.*, Co., 16 Ga. 46.

If a judge in his charge to the jury presents only the inference that can be drawn on one side, arrayed *in solido* so as to constitute an imposing argument to the jury, without summing up on the other side, it is an invasion of the

statute. *State v. Moses*, 2 Dev. L. (N. Car.) 452.

6. *Borham v. Davis*, 146 Pa. St. 72.

7. *Ivey v. Hodges*, 4 Humph. (Tenn.) 154; *Lannum v. Brooks*, 4 Hayw. (Tenn.) 121; *Lowe v. Minneapolis St. R. Co.*, 37 Minn. 283; *Morgan v. State*, 48 Ohio St. 371; *Wright v. Central R., etc.*, Co., 16 Ga. 46; *State v. Morris*, 3 Hawks (N. Car.) 390. See also *Parthen v. Peck*, 2 Mont. 572.

8. *State v. Morris*, 3 Hawks (N. Car.) 388.

"It cannot be traced or ascertained, on the first point, that any rule of the common law exists that makes it imperative on a judge to repeat the evidence to the jury. He is placed on the bench to the end that he may preside over the order and solemnity of trials, maintain the authority of the laws, and administer them upon all applications which are solely confined to his jurisdiction. If, on the trial of a cause, the witnesses are numerous, the evidence complicated, and the main question or principal issue obscured by various and conflicting testimony, he may, in his discretion, sum up the whole to the jury, that they may apply it properly, and have their attention directed to the essential points in controversy. No judge would ever refuse to impart such assistance when it is requested by a jury, nor would he withhold it in any

e. IN WHAT JURISDICTIONS NOT PERMISSIBLE. — In some jurisdictions the courts are expressly forbidden by statute to sum up the evidence,¹ and a recent constitutional provision in another state has been held to prohibit this practice, although not forbidding it in terms.² Under this provision the proper practice, it

case wherein the nature of the evidence or the conduct of the cause led him to believe that his aid would enable them to discharge their constitutional functions with more correctness or facility. But it must of necessity depend on the circumstances of each case whether the judge believes that his aid would be of any efficacy; whether the case be not so plain and intelligible as to render his interference unnecessary, or the evidence so equally balanced as to make it unsafe. All these considerations the law has wisely confided to the sound discretion of the judge; and it affords a singular testimony in favor of our free institutions, that the reluctance of judicial interposition should be made a subject of complaint, when in other countries, where the same system of law prevails, the invasion of the rights of juries has been an abundant source of public evil. The common law is not altered in this respect by the Act of 1796, c. 52, which professes only to prescribe the manner in which a judge shall charge the jury when he thinks fit to deliver a charge; not to make it his duty to deliver one if he deem it unnecessary. 'It shall not be lawful for any judge, in delivering a charge to the petit jury, to give an opinion whether any fact is fully or sufficiently proved, such matter being the true office and proper province of the jury; but it is hereby declared to be the duty of the judge in such cases to state, in a full and correct manner, the facts given in evidence, and to declare and explain the law arising therefrom.' No implication can arise from this law that he must charge the jury; but if he does charge them, he must do it according to the rule there laid down." *State v. Morris*, 3 Hawks (N. Car.) 390.

Waiving Statement of Evidence. — Counsel having incorrectly stated material evidence, the court refused to stop him, but remarked that this misstatement would be corrected by a recital of the testimony from the notes taken by the court. When about to commence the charge to the jury, the court asked if counsel desired the evi-

dence to be repeated, and counsel on both sides expressly agreed that it need not be recapitulated. It was held that a failure to do so could not be thereafter objected to. *Wiseman v. Penland*, 79 N. Car. 197.

1. Mississippi. — The judge shall not in any cause, civil or criminal, sum up or comment on the testimony, or charge the jury as to the weight of the evidence. Annot. Code of Mississippi 1892, § 732. See also *Southern R. Co. v. Kendrick*, 40 Miss. 374, in which the court instructed the jury that if they believed the testimony of K., the plaintiff (setting out what the testimony was), they might find vindictive damages. It was held that this was erroneous, being a matter to be determined entirely by the judgment of the jury what the testimony was.

Louisiana — Criminal Cases. — In charging the jury in criminal cases, the judge must limit himself to giving them a knowledge of the law applicable to the case. In doing so he shall abstain from stating or recapitulating the evidence so as to influence their decision on the facts. He shall not state or repeat to the jury the testimony of any witness. Rev. Stat. of Louisiana, § 991; *State v. Asberry*, 37 La. Ann. 125.

Texas — Criminal Cases. — In criminal trials the judge shall not express any opinion as to the weight of the evidence, nor shall he sum up the testimony. Rev. Stat. of Texas 1895, Code Civ. Pro., § 715; *Gibbs v. State*, 1 Tex. App. 13; *Hannah v. State*, 1 Tex. App. 579.

2. Norris v. Clinkscales, 47 S. Car. 488.

The Constitution of 1868, art. 4, § 26, provided that "judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." This was amended by the Constitution of 1895, art. 5, § 26, to read as follows: "Judges shall not charge juries in respect to matters of fact, but shall declare the law," thus taking away the permission to "state the testimony." *Norris v. Clinkscales*, 47 S. Car. 488.

would seem, is for the court to declare the law applicable to the case, base that law upon hypothetical findings of fact by the jury, and instruct the jury that if they believe so and so from the evidence they have heard, then such and such will be the result. In so doing if he be careful not to repeat any of the testimony, nor to intimate directly or indirectly what is in evidence, he will be chargeable neither with stating the testimony nor with charging in respect to matters of fact.¹ It has been held a violation of the provision even to recite the evidence in an interrogative form.²

16. Defining Words and Terms Used — *a.* WORDS AND TERMS OF ORDINARY SIGNIFICANCE. — The meaning of words or terms in ordinary use need not be defined in instructions.³ Accordingly

1. See *Norris v. Clinkscales*, 47 S. Car. 488. In reaching this conclusion the court, in a very able and exhaustive opinion, reasoned as follows: "The prohibition, 'Judges shall not charge juries in respect to matters of fact,' now stands alone in section 26, unqualified by the permission to 'state the testimony,' which permission has been stricken out by amendment. And any direct reference to the testimony in charging a jury, any expression as to what is in evidence, any remark that would amount to a stating of the testimony, in whole or in part, is absolutely prohibited. At the same time, we cannot presume that it was the intention of the framers of the new constitution (many of whom were members of the bar and learned in the law, and familiar with the decisions of this court), to require trial judges in their charges to declare the law, and yet forbid them to base that law upon any foundation by which alone they can make it apply to a given case. The constitutional mandate is, they 'shall declare the law.' To require that they shall do so, and to forbid them to establish the law they must declare upon any foundation, is to require the impossible. We have shown by the highest authority that such a foundation is absolutely necessary. Formerly it was furnished either by a statement of actual facts in evidence, or by a statement of hypothetical facts; now it must be found solely in the latter — a supposed state of facts. We therefore conclude and hold that as it would be impossible to declare the law applicable to a case on trial without connecting the legal principles involved with some state of facts, actual or hypothetical, it was the intention of the framers of the new constitution, in amending section

26, art. 4, that the trial judge, in charging the law of the case, should lay before the jury that law as applicable to a supposed state of facts, but that in so doing he should carefully avoid repeating the evidence on the facts at issue, making no statement of the testimony, either in whole or in part."

2. *Burnett v. Crawford*, (S. Car. 1897) 27 S. E. Rep. 645; *State v. Stello*, (S. Car. 1897) 27 S. E. Rep. 659.

A charge in the form: "Does" such a witness (naming him), "say" thus and so? (repeating the testimony) violates Const. 1895, art. 5, § 26, providing that "judges shall not charge jurors in respect to matters of fact, but shall declare the law," since the charge states the testimony, though it be in interrogative form. *State v. Stello*, (S. Car. 1897) 27 S. E. Rep. 659.

3. *Illinois*. — *Henderson v. People*, 124 Ill. 607.

Iowa. — *Rogers v. Millard*, 44 Iowa 466; *Commercial Bank v. Paddick*, 90 Iowa 63; *Iowa State Sav. Bank v. Black*, 91 Iowa 490.

Maine. — *Berry v. Billings*, 47 Me. 328; *Prince v. Ocean Ins. Co.*, 40 Me. 481.

Missouri. — *Larimore v. Legg*, 23 Mo. App. 645; *Holland v. McCarty*, 24 Mo. App. 113; *Cooper v. Johnson*, 81 Mo. 483; *Warder v. Henry*, 117 Mo. 530; *Reeds v. Lee*, 64 Mo. App. 686; *State v. Sattley*, 131 Mo. 464; *Deatherage Lumber Co. v. Snyder*, 2 Mo. App. Rep. 1227; *State v. Cantlin*, 118 Mo. 100; *State v. Scott*, 109 Mo. 226; *Cavender v. Waddingham*, 5 Mo. App. 457; *Young v. Crawford*, 23 Mo. App. 432; *St. Clair v. Missouri Pac. R. Co.*, 29 Mo. App. 76; *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332; *State v. Harkins*, 100 Mo. 666; *Cottrill v. Krum*, 100 Mo. 397; *Cooper v. John-*

it has been held that the following words and phrases in instructions and requests for instructions need not be accompanied by explanations: "guarantee,"¹ "substantial" and "substantially,"² "feloniously,"³ "carelessness,"⁴ "ratify" and "ratification,"⁵ "acquiescence," "repudiation," and "adoption,"⁶ "negligence,"⁷ "absolute drunkenness,"⁸ "compel,"⁹ "remotely," "prudence," and "care,"¹⁰ by diligent inquiry."¹¹

b. LEGAL AND TECHNICAL TERMS—(1) *Necessity for Defining.* In charging the jury it is, of course, proper for the court to explain the meaning of legal or technical terms not in common use and not generally known,¹² and it is generally improper not to do

son, 81 Mo. 483; *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 506.

Texas.—*Humphreys v. State*, 34 Tex. Crim. Rep. 434.

Vermont.—*Eastman v. Curtis*, 67 Vt. 432.

In the trial of a case it must be presumed by the court that the jury is possessed of common or ordinary intelligence, and that the jurors understand the meaning of ordinary language. *Rogers v. Millard*, 44 Iowa 466; *Cooper v. Johnson*, 81 Mo. 483; *Berry v. Billings*, 47 Me. 328.

1. *Reeds v. Lee*, 64 Mo. App. 686.

2. *Deatherage Lumber Co. v. Snyder*, 2 Mo. App. Rep. 1227.

3. *State v. Cantlin*, 118 Mo. 100; *State v. Scott*, 109 Mo. 226.

4. *Warder v. Henry*, 117 Mo. 531.

5. *Young v. Crawford*, 23 Mo. App. 432; *Iowa State Sav. Bank v. Black*, 91 Iowa 490.

6. *Iowa State Sav. Bank v. Black*, 91 Iowa 490. In this case the court said: "They are not words of rare use, nor are they technical terms applicable to any branch of learning or science, but words of common use and commonly understood." *Compare Lagow v. Glover*, 77 Tex. 448, where the court considered a charge defective for not explaining "acquiescence," but said that this was a matter which the parties might have had explained to the jury if a proper charge had been asked.

7. *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 506. The court said: "It is an English word of well-known meaning, and so used in the instruction, and the fact that under certain circumstances courts of law have to decide what constitutes negligence does not destroy the popular character of the word."

8. *Cavender v. Waddingham*, 5 Mo. App. 457.

9. *St. Clair v. Missouri Pac. R. Co.*, 29 Mo. App. 76.

10. *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332.

11. *Cottrill v. Krum*, 100 Mo. 397.

12. *Cobb v. Covenant Mut. Ben. Assoc.*, 153 Mass. 176; *Schmidt v. Sinnott*, 103 Ill. 160; *Gibson v. Cincinnati Enquirer*, 5 Cent. L. J. 380.

It is held often highly important and even indispensable for the court to explain to the jury the meaning of technical terms not in common use, or to define the meaning of words or phrases used in a contract, statute, or the like. And it is proper for the court, on its own motion, or on request, to define specifically what is meant in an instruction by the words "due and proper care," though there is no necessity for so doing except upon request. *Schmidt v. Sinnott*, 103 Ill. 160.

The court takes notice of the meaning and force of the ordinary words of our language, and also of technical words where their meaning is well settled by common usage, and it may, when necessary, define and explain them to the jury. It is, therefore, not error for the court to instruct the jury as to the ordinary meaning and definition of "anæsthetic," "chloroform," and "poison," as given by Webster's Dictionary and other works of standard authority, where it appears that the definitions are correct. *State v. Baldwin*, 36 Kan. 4.

Technical Phrases Not Necessary.—It is no objection to the charge of the court, that technical phrases are not employed. It is often necessary to employ phrases more familiar to unprofessional men, and if the jury be not misled there is no error in so doing. *Gano v. Samuel*, 14 Ohio 592.

so. The charge should embody the legal definition of the important technical words and phrases which are used and are necessary to be understood by the jury for the proper determination of the case,¹ and when the instructions given fail so to do, it is error for the court to refuse a request to define such words.² On the other hand, an instruction containing technical words which do not convey a definite impression to the ordinary mind without defining the words may be refused.³

(2) *Terms Held to Need Definition.* — Keeping in view these principles, it has been held that the following words and phrases used in an instruction need explanation: "warranty,"⁴ "material facts,"⁵ "exemplary damages,"⁶ "malice,"⁷ "unlawfully" (in a charge that the jury were to determine whether the killing was unlawfully done),⁸ "fixtures,"⁹ "presumptive notice,"¹⁰ "adverse possession,"¹¹ "for an illegitimate purpose,"¹² "to dispose of property with intent to defraud creditors,"¹³ "color of title,"¹⁴ "gross

1. *Arizona.* — *Rush v. French*, 1 Arizona 99.

California. — *People v. Byrnes*, 30 Cal. 207.

Mississippi. — *Wilson v. Williams*, 52 Miss. 488; *Mullins v. Cottrell*, 41 Miss. 293; *Jarnigan v. Fleming*, 43 Miss. 710.

Missouri. — *Flint-Walling Mfg. Co. v. Ball*, 43 Mo. App. 504; *Stewart v. Clinton*, 79 Mo. 603; *Digby v. American Cent. Ins. Co.*, 3 Mo. App. 603; *Hayes v. St. Louis R. Co.*, 15 Mo. App. 584; *Morgan v. Durfee*, 69 Mo. 469; *Grand Lodge, etc. v. Knox*, 27 Mo. 315; *Dyer v. Brannock*, 2 Mo. App. 432; *Speak v. Ely, etc., Dry Goods Co.*, 22 Mo. App. 122; *Ampleman v. Citizens' Ins. Co.*, 35 Mo. App. 308.

Tennessee. — *Rollings v. Cate*, 1 Heisk. (Tenn.) 97.

Texas. — *Sparks v. State*, 23 Tex. App. 447; *Wheeler v. State*, 23 Tex. App. 598.

Instructions Given at Request of Party.

— A party cannot complain that a charge of the court is insufficient in defining or explaining terms contained therein, when the same is given at his request. *Kelley v. Cable Co.*, 7 Mont. 70.

Presumptions on Appeal. — Where a court has given in its instructions the legal definition of a certain word or phrase, and such word or phrase is used in the question submitted and answered, it will be presumed that it was used by the court and jury with the meaning indicated by the definition. *Mooney v. Olsen*, 22 Kan. 69.

2. *Junction City v. Blades*, 1 Kan. App. 85; *Matthews v. Boydston*, (Tex. Civ. App. 1895) 31 S. W. Rep. 814.

3. *Fletcher v. Milburn Mfg. Co.*, 35 Mo. App. 321; *Owens, etc., Mach. Co. v. Pierce*, 5 Mo. App. 576; *Boogher v. Neece*, 75 Mo. 383; *Wiser v. Chesley*, 53 Mo. 547.

4. *Flint-Walling Mfg. Co. v. Ball*, 43 Mo. App. 504.

5. *Digby v. American Cent. Ins. Co.*, 3 Mo. App. 603.

6. *Hayes v. St. Louis R. Co.*, 15 Mo. App. 584.

7. *Morgan v. Durfee*, 69 Mo. 469, in which the court said that the jury should not be "left to construe it as they would. It is a legal term, and 'understood to mean that general malignity and recklessness of the lives and personal safety of others which proceed from a heart void of a just sense of social duty and fatally bent on mischief.'"

The following definition of malice in an action against a school teacher for assault in punishing a pupil was held erroneous: "Malice means bad temper, high temper, or quick temper." *State v. Long*, 117 N. Car. 791.

8. *People v. Byrnes*, 30 Cal. 207.

9. *Grand Lodge, etc., v. Knox*, 27 Mo. 315.

10. *Wilson v. Williams*, 52 Miss. 488.

11. *Dyer v. Brannock*, 2 Mo. App. 432.

12. *Speak v. Ely, etc., Dry Goods Co.*, 22 Mo. App. 122.

13. *Matthews v. Boydston*, (Tex. Civ. App. 1895) 31 S. W. Rep. 814.

14. *Boogher v. Neece*, 75 Mo. 383.

negligence,"¹ "presumption of law" (in a charge that a delivery of a note created a presumption of law that it was paid).²

"**Preponderance of Evidence.**"—About the use of the term "preponderance of evidence" without explaining its meaning, the authorities are not harmonious. According to some decisions no explanation of it is necessary,³ and a request for an instruction explaining it may be refused.⁴ According to other decisions it is not the best practice to use this term without explanation, but a judgment will not be reversed for this defect.⁵ The court taking this view considers it proper to refuse an instruction defective in this regard.⁶

"**Wilfully.**"—If an act must be committed wilfully to render it an offense, the legal meaning of the word "wilfully" should ordinarily be explained.⁷ But if attempt to defraud is an element of the offense, and the court explains that the act must have been committed with such intent, no explanation of the word "wilfully" as used in the statute is necessary.⁸

(3) *Defining Offense Charged.*—It is proper,⁹ and perhaps better,¹⁰ to define the offense charged in the language of the statute, but if words having the same meaning are used this will

1. *Wiser v. Chesley*, 53 Mo. 547.

2. *Owens, etc., Mach. Co. v. Pierce*, 5 Mo. App. 576.

3. *Gulf, etc., R. Co. v. Reagan*, (Tex. Civ. App. 1896) 34 S. W. Rep. 798; *Berry v. Wilson*, 64 Mo. 164.

In *Gulf, etc., R. Co. v. Reagan*, (Tex. Civ. App. 1896) 34 S. W. Rep. 798, the court refused a request for a charge defining the meaning of the term "preponderance of evidence." The reviewing court said: "There is, in our opinion, no need for the giving of any such definition, the terms themselves having a well-defined, popular meaning, which any juror of average intelligence can understand as well as he can understand any definition given by the court."

4. *Gulf, etc., R. Co. v. Reagan*, (Tex. Civ. App. 1896) 34 S. W. Rep. 798.

5. *Anchor Milling Co. v. Walsh*, 37 Mo. App. 567; *Berry v. Wilson*, 64 Mo. 164, [*qualifying Clarke v. Kitchen*, 52 Mo. 316]; *Steinwender v. Creath*, 44 Mo. App. 360.

6. *Mackin v. People's St. R., etc., Co.*, 45 Mo. App. 82; *Anchor Milling Co. v. Walsh*, 37 Mo. App. 567.

Use of Term with Proper Definition.—The use of the term "preponderance of evidence" in an instruction, in con-

nection with the proper definition of its meaning, is not erroneous. *Hill v. Scott*, 38 Mo. App. 370.

Burden of Proof.—The unexplained use in an instruction of a phrase having a technical legal meaning, as for instance, "burden of proof," is not ground for reversing a judgment. *Miller v. Woolman-Todd Boot, etc., Co.*, 26 Mo. App. 59. See also *Murphy v. Creath*, 26 Mo. App. 581.

7. *Wheeler v. State*, 23 Tex. App. 598; *Thomas v. State*, 14 Tex. App. 200; *Trice v. State*, 17 Tex. App. 43; *Sparks v. State*, 23 Tex. App. 447; *Rose v. State*, 19 Tex. App. 470.

8. *Wheeler v. State*, 23 Tex. App. 598, in which the court said: "The intent to defraud cannot exist in the commission of the act without the act being wilfully committed. Such intent *per se* makes the act wilful, and in explaining to the jury in the charge that the act must have been committed by the defendant with the intent to defraud the owner of the horse, they were sufficiently instructed in the meaning of the term 'wilfully' as used in this statute."

9. *Duncan v. People*, 134 Ill. 110. See also *People v. McGonegal*, 62 Hun (N. Y.) 622, 42 N. Y. St. Rep. 307.

10. *Long v. State*, 23 Neb. 33.

be sufficient.¹ In charging, no material element of the statutory definition must be omitted.²

17. Assuming Facts by Way of Illustration. — The trial judge may very properly use assumed facts, not connected with the case and not proved, to illustrate a principle or rule of law, if the instruction is so framed as not to assume that these facts have been proven.³ Even a faulty or erroneous illustration will not

1. *Long v. State*, 23 Neb. 33.

2. *Hix v. People*, 157 Ill. 382, in which it was held that under a statute defining larceny as "the felonious stealing, taking and carrying, leading, riding, or driving away the personal goods of another," an instruction defining the offense as "the felonious taking and carrying away the personal goods of another," or taking "with felonious intent," is erroneous.

3. *California*. — *People v. Campbell*, 30 Cal. 312; *People v. Williams*, 59 Cal. 674.

Connecticut. — *Masters v. Warren*, 27 Conn. 293.

Georgia. — *Stephen v. State*, 11 Ga. 225; *Wilson v. State*, 33 Ga. 207; *McConnell v. State*, 67 Ga. 635; *Pressley v. State*, 19 Ga. 192; *Central R., etc., Co. v. Smith*, 80 Ga. 526.

Indiana. — *Bundy v. McKnight*, 48 Ind. 502.

Louisiana. — *State v. Obregon*, 10 La. Ann. 799.

Massachusetts. — *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158.

Michigan. — *Gullikson v. Gjordud*, 82 Mich. 503; *Beecher v. Venn*, 35 Mich. 466.

Ohio. — *Gage v. Payne, Wright* (Ohio) 678.

Pennsylvania. — *Long v. Milford Tp.*, 137 Pa. St. 122.

Vermont. — *Whitcomb v. Fairlee*, 43 Vt. 675.

"This is a common practice in our courts. No intelligent juror can be deceived by such illustrations. And whether the judge, in commenting upon the facts of the case, has made use of too strong language, or has gone too far in using, by way of illustration, historical or personal incidents of a kindred character to those on trial, is not for us to say. He has a right to illustrate his views as he pleases, and a rule requiring that a rigid criticism should be applied to such expressions would impose upon the judge an unreasonable restraint, and lead to great

inconvenience." *Masters v. Warren*, 27 Conn. 300.

Instances of Illustrations Held Proper.

— In an action to recover for personal injuries, an instruction assuming the facts as to the plaintiff being "engaged in reading a newspaper, or otherwise having his attention" averted, merely as an illustration of contributory negligence, and not as facts proved in the case, is proper. *Long v. Milford Tp.*, 137 Pa. St. 122. So in stating the circumstance which might be considered evidence of guilt, an enumeration by way of illustration of certain circumstances which did not appear in the evidence in the case is not error. *People v. Williams*, 59 Cal. 674. Where a charge illustrates the case by analogy, but so cautions the jury against applying it fully that they could not have been misled by it, it is not error. It was so held where the analogy was between a wife's authority to buy necessities on her husband's credit, and the power to purchase supplies exercised by one who is hired to run a hotel. *Beecher v. Venn*, 35 Mich. 466. If the court instructs the jury as to the abstract principle of the right of taking life in self-defense, and then states a hypothetical case falling within the principle as an illustration of the rule laid down in the charge, the statement of the hypothetical case cannot be construed as telling the jury that the right of taking life in self-defense is confined to the hypothetical case stated. *People v. Campbell*, 30 Cal. 312.

Instances of Instructions Held Improper. — On the trial of an action against a city to recover for an injury received from a defect in a culvert, the court instructed the jury "that positive evidence is entitled to more weight than negative evidence; and that if twelve men were in a room where there was a clock, and one of them should swear he heard the clock strike, and the eleven should swear they did not

vitiates a correct charge on the law, or operate to reverse,¹ unless it has a tendency to mislead.² The court is not required to give to the jury a hypothetical illustration of the law in the language of a written request, but may illustrate the principle to suit his own views.³ It is sufficient if he gives the law as requested, leaving out all illustrations of the legal principle, if he sees fit so to do.⁴

18. Erroneous Reasons for Giving or Refusing Instructions.—Instructions which are correct in themselves will not be deemed invalid because erroneous reasons were given for them,⁵ unless it plainly appears that the jury were misled by them, or that injustice has been done in consequence of them, or at least that the verdict may have been in some way affected by them.⁶ With the reason for the instruction the jury has nothing to do.⁷ So if an instruction should have been refused, it makes no difference that the reason given for such refusal was erroneous.⁸

hear it strike, then the jury, in such a case, should give a judgment for one against the eleven; and if H. and G. swear they saw a hole in the culvert in question, and twice as many witnesses, equally as credible, say they did not see holes in the culvert, then positive evidence should be taken by the jury." It was held that the instruction was objectionable, and not apt as an illustration, since it omitted the element of the reasonableness of the fact testified to. *Greenville v. Henry*, 78 Ill. 150.

Illustration by Hypothesis Unfavorable to Accused.—The court may illustrate its instruction to the jury by a hypothesis unfavorable to the accused provided the evidence justifies it, and need not say anything of an opposite state of facts if there be no evidence of those facts before the jury. *Pressley v. State*, 19 Ga. 192.

1. *State v. Alvarez*, 7 La. Ann. 284; *Parker v. Glenn*, 72 Ga. 638.

2. *Parker v. Glenn*, 72 Ga. 638. To the same effect see *Wilson v. State*, 33 Ga. 207, in which the court said that where, in charging the jury, the court correctly states the law governing the case, but exception is taken to an illustration used by the court explanatory of a legal principle, the reviewing court will not narrowly scrutinize the illustration if satisfied that, whether right or wrong, it was not calculated to mislead and did not in fact mislead the jury.

3. *Whitley v. State*, 66 Ga. 659.

4. *Whitley v. State*, 66 Ga. 659. See also *Whitcomb v. Fairlee*, 43 Vt. 675, in which it was said: "Nor do we

hold it to be the duty of the court to illustrate a general proposition of law, correctly stated, in every conceivable way, or in any particular manner, unless specially requested so to do. It is enough if the illustrations given do not inculcate any false principle."

5. *Leitensdorfer v. Webb*, 1 N. Mex. 34; *Easley v. Craddock*, 4 Rand. (Va.) 423; *Marion v. State*, 20 Neb. 233; *Carpenter v. Pierce*, 13 N. H. 403; *Blodgett v. Berlin Mills Co.*, 52 N. H. 215; *Rupp v. Orr*, 31 Pa. St. 517; *Dale v. Arnold*, 2 Bibb (Ky.) 606.

Instances.—If a party move the court to instruct the jury that a deed is void for one cause, and the instruction is given accordingly, the instruction, although not warranted for the cause assigned, is not ground for reversal if it appears that the deed was void for another reason. *Dale v. Arnold*, 2 Bibb (Ky.) 606.

If the court rightly instructs the jury on the result of evidence, the reviewing court will not reverse because of a wrong reason being given for such conclusion. *Rupp v. Orr*, 31 Pa. St. 517.

6. *Carpenter v. Pierce*, 13 N. H. 403.

7. *Marion v. State*, 20 Neb. 233.

8. *Budd v. Brooke*, 3 Gill (Md.) 198; *Posey v. Patton*, 109 N. Car. 455.

Instance.—Where a request for an instruction is made too late, the fact that the court bases its refusal on the ground that it has already given such instruction—which it has not—does not render the refusal erroneous. *Posey v. Patton*, 109 N. Car. 455.

19. Instructions as to Punishment — *a. WHEN ASSESSED BY THE COURT.* — Where the jury have nothing to do with fixing the punishment no instruction on the subject is necessary, and the court may properly refuse to instruct thereon.¹ Whether the punishment following the verdict would be greater or smaller, cannot in any way come within the range of the jury's province, since it can in no manner affect the weight or indication of the evidence on which the jury are required to consider and act.²

Consequences of Verdict. — The court may nevertheless instruct the jury as to the consequences which will flow from their verdict, but this is a matter which is entirely within its discretion,³ and it has been said to be the better practice for the court to say nothing about it in the charge.⁴

b. WHEN ASSESSED BY THE JURY — (1) *In General.* — In some jurisdictions, where the court is required by statute to give in charge the law applicable to the case,⁵ a failure to instruct on the question of punishment when it is to be assessed by the jury, whether requested or not, is held reversible error.⁶ Thus where

1. *Wood v. People*, 1 Hun (N. Y.) 381; *People v. Ryan*, 55 Hun (N. Y.) 214; *Russell v. State*, 57 Ga. 424; *Ford v. State*, 46 Neb. 390; *State v. Peffers*, 80 Iowa 580; *State v. Ragsdale*, 59 Mo. App. 590. *Contra* *People v. Cassiano*, 30 Hun (N. Y.) 388, in which it is said that as a part of the question the punishment should be known to the jury.

The court may, of course, inform the jury that they have nothing to do with fixing the punishment. *State v. Howard*, 118 Mo. 144; *State v. Avery*, 113 Mo. 501.

2. *Russell v. State*, 57 Ga. 420; *People v. Ryan*, 55 Hun (N. Y.) 214.

3. *Keller v. Strasburger*, 90 N. Y. 379.

It is frequently important to give the jury such an instruction to incite them to greater care in weighing and scrutinizing the evidence. *Keller v. Strasburger*, 90 N. Y. 379.

4. *Russell v. State*, 57 Ga. 424. See also *State v. Peffers*, 80 Iowa 580, where the court said. "If there is any good reason for stating in the charge the punishment authorized for a given offense, when the punishment is not to be fixed by the jury, our attention has not been called to it."

5. **Texas.** — Rev. Stat. Tex. 1895, Code Crim. Pro., p. 100, art. 715, requires the court to give a charge which distinctly sets forth the law applicable to the case, and provides that this charge shall be given in all felony cases, whether asked or not.

Utah. — Rev. Stat. Utah (1898),

§ 3147, subd. 4, provides that "the court shall instruct the jury in writing upon the law applicable to the case."

6. *Cesure v. State*, 1 Tex. App. 20; *Ringo v. State*, 2 Tex. App. 291; *Jones v. State*, 7 Tex. App. 338; *Collins v. State*, 5 Tex. App. 38; *Buford v. State*, 44 Tex. 525; *Prinzel v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 350; *Hamilton v. State*, 2 Tex. App. 494; *Irwin v. State*, (Tex. App. 1888) 8 S. W. Rep. 681; *Brannigan v. People*, 3 Utah 488; *Calton v. Utah*, 130 U. S. 83.

Instructions as to Punishment Held Sufficient. — An instruction in the language of the statute, authorizing the jury, on conviction of the defendant for a misdemeanor, to say whether he shall be put at hard labor for nonpayment of a fine, sufficiently explains the nature and meaning of the statute, and under such instruction the jury may find in their verdict that if the fine is not paid the defendant shall be put to hard labor for its nonpayment. *Smith v. Com.*, (Ky. 1895) 31 S. W. Rep. 471.

So where an indictment for robbery contains several counts, and on each count the court instructs as to the punishment for the offense therein charged, this is a sufficient statement of the punishment, and the defendant cannot complain that the punishment was not stated in connection with the definition of the offense of robbery. *Stewart v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 407.

Inconsistent Instructions. — On a trial

the jury are authorized by statute to recommend life imprisonment instead of the death penalty, in case of mitigating circumstances, the judgment has been reversed for failure of the court so to instruct, even in the absence of a request therefor.¹ But in another jurisdiction it is held that in the absence of a request for an instruction on that subject, the judgment will not be reversed for the failure to give it;² the statute governing charges in criminal cases in that jurisdiction providing that the court shall charge in writing, and that if either party desires further instructions they shall write precisely what they desire the judge to say further.

How Charge Framed.—Where the punishment is to be fixed by the jury a charge on that subject should be so framed as not to interfere with the discretion of the jury in that regard.³

for aggravated assault the court gave a proper instruction as to the penalty, and said in addition thereto: "If you find the defendant guilty and assess his punishment at a fine only, the form of your verdict will be: 'We, the jury, find the defendant E. guilty, * * * and assess his punishment at a fine of \$500,' filling in the amount agreed upon." This instruction was held erroneous as stating two inconsistent penalties, one correctly presenting the law and the other stating a penalty unknown to the law. *Blackwell v. State*, 30 Tex. App. 416.

Failure to Submit Determination of Punishment to Jury—Collateral Attack.—Where the plea of guilty of murder in the first degree is entered by the defendant, the court commits error in sentencing him to imprisonment for life without submitting to the jury the question whether in their discretion the punishment shall be assessed at death or at imprisonment for life; but while this is true the judgment is not void, and cannot be attacked collaterally on habeas corpus proceedings. *Lowery v. Howard*, 193 Ind. 440.

Recommendation to Mercy—Charge Held Sufficient.—Where a charge is requested that "notwithstanding any recommendation to mercy that they might think proper to make, the punishment would still require confinement in the penitentiary," a charge in the language of the statute on that subject, that "in all cases where the term of punishment in the penitentiary is discretionary, the court shall determine that punishment, paying due respect to any recommendation which the jury might think proper to make in

that regard," is a sufficient compliance with the request. *Fogarty v. State*, 80 Ga. 465.

Charge Defective for Misspelling and Omissions.—An instruction regarding punishment that if the jury "found appellant guilty, his punishment should be confinement in the penitentiary for any term not less than fives within your discretion," "five" being spelled "fives" and "years" being omitted, is no ground for reversal on account of bad spelling and omissions, where no exception was saved at the time. *Champ v. State*, 32 Tex. Crim. Rep. 90.

Statement in Writing.—The court may properly instruct the jury in writing as to the penalty for the crime charged. *Farmer v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 197.

1. *Calton v. Utah*, 130 U. S. 83.

2. *State v. Becton*, 7 Baxt. (Tenn.) 138; *Honeycutt v. State*, 8 Baxt. (Tenn.) 371.

3. *People v. Bawden*, 90 Cal. 195. See also *People v. Murback*, 64 Cal. 369.

Charges Not Violating This Rule.—An instruction that if the jury find the defendant guilty of murder in the first degree, and also find some extenuating fact or circumstance, it is within their discretion to fix the punishment at imprisonment for life, but that if there are no extenuating circumstances, then they should impose the death penalty, is not erroneous as interfering with the discretion of the jury. *People v. Bawden*, 90 Cal. 195.

So an instruction that "you can find defendant guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of manslaughter,

(2) *Effect of Misstating Punishment.* — Nor should the court misstate the punishment prescribed for the offense charged. According to the decisions of one state this is a fundamental error,¹ which will operate to reverse even though the punishment may have been legally assessed,² or although the error operated to the benefit of the accused,³ and it makes no difference that no exceptions were saved.⁴ In other jurisdictions, however, it has been held that the judgment will not be reversed if it appears that the error was not injurious to the defendant.⁵

or you may render a verdict of not guilty; and it is for you to decide which one of these verdicts you may render; but if you do find the defendant guilty of murder in the first degree you have the discretion to determine the nature of his punishment; and if, in your sound judgment and discretion, there is any fact or circumstance in the case which ought to mitigate the extreme penalty of death, you will by your verdict indicate the same; but if you find no such mitigation in the facts of the case, and think the death penalty should be inflicted, you will simply find him guilty of murder in the first degree," does not improperly restrict the jury in the exercise of their discretion to determine the punishment to be inflicted. *People v. Murback*, 64 Cal. 369.

1. *Robinson v. State*, 2 Tex. App. 390; *Buford v. State*, 44 Tex. 525; *Jones v. State*, 7 Tex. App. 338; *Allen v. State*, 1 Tex. App. 514; *Searcy v. State*, 1 Tex. App. 440; *Williams v. State*, 25 Tex. App. 76; *Ingram v. State*, 29 Tex. App. 33; *Moody v. State*, 30 Tex. App. 422; *Soria v. State*, 2 Tex. App. 298; *Spears v. State*, 8 Tex. App. 467; *Veal v. State*, 8 Tex. App. 475; *Vincent v. State*, 10 Tex. App. 334; *Sanders v. State*, 17 Tex. App. 222; *Blackwell v. State*, 30 Tex. App. 416; *Hargrove v. State*, (Tex. Crim. App. 1895) 30 S. W. Rep. 801; *Wilson v. State*, 14 Tex. App. 527; *Bostic v. State*, 22 Tex. App. 136; *Gardenhire v. State*, 18 Tex. App. 565.

Overstating Minimum Penalty. — It is erroneous for the court to overstate the minimum punishment prescribed by law for the offense charged. *State v. McNally*, 87 Mo. 644; *Watson v. People*, 134 Ill. 374.

Overstating Maximum Penalty. — An instruction which overstates the maximum penalty is also erroneous. *State v. Sands*, 77 Mo. 118; *Hargrove v. State*, (Tex. Crim. App. 1895) 30 S. W.

Rep. 801; *Williams v. State*, 25 Tex. App. 76.

Alternative Penalties. — On trials of offenses to which alternative penalties are attached, it is the duty of the court, whether asked or not, to give such alternative penalties in charge to the jury, and an omission to do so is erroneous. *Cesure v. State*, 1 Tex. App. 20; *Prinzel v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 350; *Moody v. State*, 30 Tex. App. 422. Thus where the offense is punishable by imprisonment in the penitentiary or a fine as an alternative, the jury might substitute the county jail in lieu of the penitentiary, and whether asked or not, the jury should be so instructed. *Ringo v. State*, 2 Tex. App. 291.

2. *Allen v. State*, 1 Tex. App. 514; *Searcy v. State*, 1 Tex. App. 440. In this last case the judgment was reversed because the court charged that the jury could assess the punishment at not less than three nor more than ten years in the penitentiary, where the punishment prescribed by the law for the offense charged is not less than two years.

3. *Buford v. State*, 44 Tex. 525; *Gardenhire v. State*, 18 Tex. App. 565.

4. *Ingram v. State*, 29 Tex. App. 33; *Howard v. State*, 18 Tex. App. 348.

5. *Whitlock v. Com.*, 89 Va. 340; *Mitchell v. Com.*, 75 Va. 856; *Quinn v. People*, 123 Ill. 333; *State v. Wheeler*, 108 Mo. 658; *State v. Peffers*, 80 Iowa 581. In this last case, while the error was harmless, the court seems in a measure to base its decision on the ground that it was not necessary for the court to give any charge on that subject.

In *Whitlock v. Com.*, 89 Va. 340, the reviewing court said: "Technically, the court erred in telling the jury that this section applied to the case, inasmuch as a specific fine for practicing as a physician without a license is imposed by the Act of 1884, which im-

20. Instructions as to Lower Grades of Offense — a. WHEN NECESSARY. — On a criminal prosecution, it is not necessary for the court of its own motion, or on request, to instruct as to the lower grades of crime involved, where there is no evidence on which to base such an instruction.¹ The giving of such an instruction is

poses a fine of not less than thirty dollars nor more than one hundred dollars for each offense. Acts 1883-84, p. 597, § 92. But this error was not to the prejudice of the defendant, since the minimum fine imposed by the act is the same as that prescribed by section 574 of the code, viz., thirty dollars; and in this case the jury, by their verdict, upon which the judgment complained of was entered, have imposed the minimum fine."

1. *Arkansas*. — *Benton v. State*, 30 Ark. 328.

California. — *People v. Byrnes*, 30 Cal. 207; *People v. Stanton*, 106 Cal. 139; *People v. Lee Gam*, 69 Cal. 552; *People v. Turley*, 50 Cal. 469; *People v. Estrado*, 49 Cal. 171; *People v. Welch*, 49 Cal. 174.

Colorado. — *Smith v. People*, 1 Colo. 121.

Indiana. — *Richie v. State*, 58 Ind. 355.

Iowa. — *State v. Perigo*, 80 Iowa 37; *State v. Sterrett*, 80 Iowa 609; *State v. Cople*, 63 Iowa 695; *State v. Mahan*, 68 Iowa 304; *State v. Casford*, 76 Iowa 330; *State v. Munchrath*, 78 Iowa 268; *State v. Froelick*, 70 Iowa 213.

Kansas. — *State v. Hendricks*, 32 Kan. 566; *State v. Mowry*, 37 Kan. 369; *State v. Estep*, 44 Kan. 572; *State v. Mize*, 36 Kan. 187; *State v. Rhea*, 25 Kan. 576.

Missouri. — *State v. Johnson*, 129 Mo. 26; *State v. Fairlamb*, 121 Mo. 137.

New Mexico. — *Territory v. Romero*, 2 N. Mex. 474.

Tennessee. — *Good v. State*, 1 Lea (Tenn.) 293; *State v. Hargrove*, 13 Lea (Tenn.) 178; *State v. Parker*, 13 Lea (Tenn.) 221; *Williams v. State*, 3 Heisk. (Tenn.) 376; *Ray v. State*, 3 Heisk. (Tenn.) 379, note.

Texas. — *Stekner v. State*, 33 Tex. Crim. Rep. 291; *Collins v. State*, 6 Tex. App. 72; *Browning v. State*, 1 Tex. App. 96; *Holden v. State*, 1 Tex. App. 226; *O'Connell v. State*, 18 Tex. 343; *Washington v. State*, 1 Tex. App. 647; *Taylor v. State*, 3 Tex. App. 387; *Hubby v. State*, 8 Tex. App. 597; *Lum v. State*, 11 Tex. App. 483; *Ney-*

land v. State, 13 Tex. App. 536; *Davis v. State*, 14 Tex. App. 645; *Gomez v. State*, 15 Tex. App. 327; *Darnell v. State*, 15 Tex. App. 70; *Smith v. State*, 15 Tex. App. 139; *Rhodes v. State*, 17 Tex. App. 579; *Jackson v. State*, 18 Tex. App. 586; *Johnson v. State*, 18 Tex. App. 385; *Bryant v. State*, 18 Tex. App. 107; *May v. State*, 22 Tex. App. 595; *Henning v. State*, 24 Tex. App. 315; *Trumble v. State*, 25 Tex. App. 631; *Blocker v. State*, 27 Tex. App. 16; *Hodge v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 69; *Mayfield v. State*, 44 Tex. 59.

Washington. — *Smith v. U. S.*, 1 Wash. Ter. 262.

Applications of the Rule. — On a trial for murder in the first degree, if there is no evidence that the lower grades of homicide are involved, no charge as to those grades is necessary. *Benton v. State*, 30 Ark. 328. Thus where murder in the first degree is charged the court need not instruct as to murder in the second degree, where there is no evidence on which to base such an instruction. *O'Connell v. State*, 18 Tex. 343; *People v. Byrnes*, 30 Cal. 207; *Blocker v. State*, 27 Tex. App. 16; *Johnson v. State*, 18 Tex. App. 385; *State v. Fairlamb*, 121 Mo. 137. Nor is it necessary to instruct as to manslaughter where the evidence clearly shows that the offense was not manslaughter. *People v. Lee Gam*, 69 Cal. 552; *People v. Turley*, 50 Cal. 469; *Smith v. People*, 1 Colo. 121; *People v. Byrnes*, 30 Cal. 206; *People v. Estrado*, 49 Cal. 171. Nor as to possible crimes lower than manslaughter, where the defendant was on trial for murder and the killing of the deceased was clearly proved. *State v. Munchrath*, 78 Iowa 268. So where the crime charged is assault with intent to murder, and the evidence shows that the defendant inflicted serious wounds on the prosecutor with a deadly weapon, it is proper to refuse an instruction as to simple assault. *Hodge v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 69.

Confining Attention of Jury to Offense Actually Involved. — In a trial for homi-

not only unnecessary but improper.¹ On the other hand, if there is evidence tending to reduce the grade of the offense, it is the duty of the court to give in charge the law applicable to that grade of offense,² and it makes no difference that the evidence tending to reduce the offense is very slight,³ or that the only evidence tending to reduce the offense is the testimony of the defendant himself.⁴

b. HOW FRAMED. — In giving a series of instructions relating to several grades of an offense, the court should be careful to make the jury understand to what grade each instruction is intended to apply.⁵

cide, where there is no evidence to reduce the crime from murder in the first degree, the court may so instruct. *State v. Garrand*, 5 Oregon 216. This, however, should not be done if there is any conflict of testimony as to premeditation. *State v. Lee*, 7 Oregon 237; *State v. Whitney*, 7 Oregon 386. And if the evidence all tends to prove a case of murder in the first degree, or of justifiable homicide, it is proper for the court by its instruction to confine the jury's attention to those two points. *State v. Schoenwald*, 31 Mo. 147; *State v. Starr*, 38 Mo. 270.

1. *Lopez v. State*, 42 Tex. 299; *State v. Mowry*, 37 Kan. 369; *Washington v. State*, 36 Ga. 222; *Curtis v. State*, 36 Ark. 284; *People v. Byrnes*, 30 Cal. 206.

No rule is better settled than that an instruction should not be given upon a theory to which the evidence affords no support. *State v. Cole*, 63 Iowa 695.

No instruction should be given which would be inapplicable to the facts as disclosed in the evidence, as they might mislead and confuse the jury. *State v. Estep*, 44 Kan. 575.

2. *Crawford v. State*, 12 Ga. 142; *Terry v. State*, 17 Ga. 204; *State v. Young*, 99 Mo. 666; *State v. Banks*, 73 Mo. 592; *Dolan v. State*, 44 Neb. 643; *State v. Mize*, 36 Kan. 187; *State v. Woodward*, 84 Iowa 172; *State v. Pennell*, 56 Iowa 29; *State v. Peters*, 56 Iowa 263; *State v. Vinsant*, 49 Iowa 241; *State v. Clemons*, 51 Iowa 274; *State v. Glynden*, 51 Iowa 463; *Chappel v. State*, 7 Coldw. (Tenn.) 92; *Territory v. Romero*, 2 N. Mex. 474; *Gatlin v. State*, 5 Tex. App. 531. See also article HOMICIDE, vol. 10, p. 106.

Doubt as to Degree of Crime. — By statutory provision (Code, § 4429), the jury is required, in case of reasonable doubt as to the degree of the offense of which the defendant is guilty, to con-

vict him only of the lower degree; and it is error to fail to instruct the jury in accordance with this provision, even where proper instructions to the effect that they may convict of a lower degree or included crime are given. *State v. Jay*, 57 Iowa 164; *State v. Neis*, 68 Iowa 469; *State v. Walters*, 45 Iowa 389.

Waiving Right to Instruction. — While the defendant is entitled to an instruction on each grade of an offense on which there is evidence to base it, the defendant may waive his right to such instructions by requesting that the instructions be confined to the exact offense charged in the indictment. *State v. Keele*, 105 Mo. 38.

Even though the counsel for the prisoner has claimed and insisted upon the trial that the prisoner, if guilty at all, is guilty of the offense charged in the indictment, yet the prisoner has the right to the proper instruction as to lower grades of offense. *State v. Johnson*, 8 Iowa 525.

3. *State v. Patterson*, 52 Kan. 335; *State v. Evans*, 36 Kan. 497; *Blocker v. State*, 27 Tex. App. 16; *Davis v. State*, 28 Tex. App. 542; *State v. O'Hara*, 92 Mo. 59.

4. *State v. Palmer*, 88 Mo. 568; *State v. Partlow*, 90 Mo. 608; *State v. Jackson*, 96 Mo. 200; *State v. Tate*, 12 Mo. App. 327.

The defendant in a criminal case has a right to testify as to the intent with which he acted, and his testimony, for the purpose of instructing the jury, occupies the same footing as that of any other witness; and where he testifies that he did not intend to kill the deceased, he is entitled to an instruction for a lower grade of homicide than murder in either degree. *State v. Palmer*, 88 Mo. 568.

5. *Burris v. State*, 38 Ark. 221.

It is proper to instruct the jury that

VI. REQUESTS FOR INSTRUCTIONS — 1. Duty of Court to Instruct on Request — *a.* **STATEMENT OF RULE.** — It is the right of the parties to have the jury instructed on the law applicable to the case,¹ clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake.² And it is the duty of the judge, when requested, to give in charge any requested instruction which is correct as a proposition of law and applicable to the issues.³

evidence which only tends to reduce the grade of offense is not to be considered by them as tending to excuse or justify the killing. *Territory v. Gay*, 2 Dakota 125.

1. *Johnson v. McCampbell*, 11 Heisk. (Tenn.) 28; *Wilson v. Smith*, 5 Yerg. (Tenn.) 379; *Williams v. Norwood*, 2 Yerg. (Tenn.) 329; *Parker v. State*, 136 Ind. 284; *Chicago West Div. R. Co. v. Haviland*, 12 Ill. App. 561; *State v. Wilson*, 3 Ill. 225; *Parkhurst v. Northern Cent. R. Co.*, 19 Md. 472; *Whiteford v. Burckmyer*, 1 Gill (Md.) 127; *Aldrige v. State*, 59 Miss. 250; *Brooke v. Young*, 3 Rand. (Va.) 106; *Pennock v. Dialogue*, 2 Pet. (U. S.) 1.

It is the privilege of a party to raise any question of law arising out of the facts and to demand the opinion of the court distinctly upon it; and the opposite party has the equal privilege of asking an opinion upon additional facts, not embraced in the hypothesis of his adversary's prayer, but not of controlling or modifying that hypothesis. *Birney v. New York, etc., Tel. Co.*, 18 Md. 341.

2. *People v. Clayton*, 4 Utah 451; *Muldowney v. Illinois Cent. R. Co.*, 32 Iowa 176.

3. *California*. — *People v. Taylor*, 36 Cal. 255; *Hunt v. Elliott*, 77 Cal. 588; *Davis v. Russell*, 52 Cal. 611; *Emerson v. Santa Clara County*, 40 Cal. 543; *Sperry v. Spaulding*, 45 Cal. 544; *Renton v. Monnier*, 77 Cal. 449.

Colorado. — *Last Chance Min., etc., Co. v. Ames*, 23 Colo. 167.

Connecticut. — *Hartford v. Champion*, 58 Conn. 276; *Morris v. Platt*, 32 Conn. 75.

Florida. — *Baker v. State*, 17 Fla. 406; *Keitt v. Spencer*, 19 Fla. 748.

Georgia. — *Pryor v. Coggin*, 17 Ga. 444; *Thompson v. Thompson*, 77 Ga. 692; *Terry v. State*, 17 Ga. 204; *Chastain v. Robinson*, 30 Ga. 55; *Davis v. State*, 10 Ga. 101.

Illinois. — *Wooters v. King*, 54 Ill. 343; *Henderson v. Henderson*, 88 Ill. 248; *Bowman v. Wettig*, 39 Ill. 416;

State v. Wilson, 3 Ill. 225; *Fisher v. Stevens*, 16 Ill. 397; *Peoria M. & F. Ins. Co. v. Anapow*, 45 Ill. 86; *Chicago v. Scholten*, 75 Ill. 468; *Wooters v. King*, 54 Ill. 343; *Cook County v. Harms*, 108 Ill. 153; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Eames v. Rend*, 105 Ill. 506; *Trask v. People*, 104 Ill. 569; *Riedle v. Mulhausen*, 20 Ill. App. 68; *Chicago Heights Land Assoc. v. Butler*, 55 Ill. App. 461; *Leuder v. People*, 6 Ill. App. 98.

Indiana. — *Case v. Weber*, 2 Ind. 108; *Blacketer v. House*, 67 Ind. 414; *Parker v. State*, 136 Ind. 284; *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; *Jared v. Goodtitle*, 1 Blackf. (Ind.) 29; *Carpenter v. State*, 43 Ind. 371; *Conoway v. Shelton*, 3 Ind. 334.

Iowa. — *State v. Gibbons*, 10 Iowa 117; *Durant v. Fish*, 40 Iowa 559; *Muldowney v. Illinois Cent. R. Co.*, 32 Iowa 176.

Kentucky. — *Tribble v. Frame*, 5 Litt. (Ky.) 189; *Reading v. Metcalf*, Hard. (Ky.) 544; *Bell v. North*, 4 Litt. (Ky.) 133; *Owings v. Trotter*, 1 Bibb (Ky.) 157.

Louisiana. — *State v. Tucker*, 38 La. Ann. 536, 789.

Maine. — *Anderson v. Bath*, 42 Me. 346; *Lapish v. Wells*, 6 Me. 175.

Maryland. — *Wells v. Turner*, 16 Md. 133; *Union Bank v. Kerr*, 7 Md. 88.

Massachusetts. — *Coffin v. Coffin*, 4 Mass. 25.

Michigan. — *Sword v. Keith*, 31 Mich. 247; *People v. Jacks*, 76 Mich. 218; *Dikeman v. Arnold*, 71 Mich. 656; *O'Callaghan v. Boeing*, 72 Mich. 669; *Cooper v. Mulder*, 74 Mich. 374; *Wisner v. Davenport*, 5 Mich. 501; *Babbitt v. Bumpus*, 73 Mich. 331.

Mississippi. — *Nichols v. State*, 46 Miss. 284; *Levy v. Gray*, 56 Miss. 318.

Missouri. — *Koontz v. Kaufman*, 31 Mo. App. 397; *State v. Partlow*, 90 Mo. 608.

Nebraska. — *Skinner v. Majors*, 19 Neb. 453; *Hancock v. Stout*, 28 Neb. 301; *Madison First Nat. Bank v. Car-*

But in order that a party may insist on his right to have an instruction embodying a correct proposition of law given to the jury he must not only make the request seasonably, but the proposition must be one not covered by instructions already given.¹

Reversible Error.—A violation of duty by the court in this regard is reversible error,² unless no injury could have

son, 30 Neb. 104; *Gilbert v. Merriam*, etc., *Saddlery Co.*, 26 Neb. 194; *Billings v. McCoy*, 5 Neb. 188.

Nevada.—*State v. Levigne*, 17 Nev. 435.

New York.—*Evarts v. Burton*, 17 N. Y. Wkly. Dig. 401; *Zabriskie v. Smith*, 13 N. Y. 322; *Foster v. People*, 50 N. Y. 601.

North Carolina.—*Phifer v. Alexander*, 97 N. Car. 335; *State v. Christmas*, 6 Jones L. (N. Car.) 471.

Ohio.—*Lewis v. State*, 4 Ohio 389; *Lytle v. Boyer*, 33 Ohio St. 506.

Pennsylvania.—*Pennsylvania Co. v. Toomey*, 91 Pa. St. 256; *Bellas v. Hays*, 5 S. & R. (Pa.) 427; *Hughes v. Boyer*, 9 Watts (Pa.) 556; *Hays v. Paul*, 51 Pa. St. 134; *Sommer v. Gilmore*, 160 Pa. St. 129.

Tennessee.—*Kendrick v. Cisco*, 13 Lea (Tenn.) 251; *Crumless v. Sturgess*, 6 Heisk. (Tenn.) 190; *Lawrence v. Hudson*, 12 Heisk. (Tenn.) 671; *Johnson v. McCampbell*, 11 Heisk. (Tenn.) 28; *McGavock v. Ward*, *Cooke (Tenn.)* 405; *Baird v. Trimble*, *Cooke (Tenn.)* 289.

Texas.—*Fox v. Brady*, 1 Tex. Civ. App. 590; *Western Union Tel. Co. v. Andrews*, 78 Tex. 305; *Texas, etc., R. Co. v. Scott*, 64 Tex. 549; *Nels v. State*, 2 Tex. 280.

Utah.—*U. S. v. Cannon*, 4 Utah 151.

Vermont.—*Washburn v. Tracy*, 2 D. Chip. (Vt.) 128; *Brainard v. Burton*, 5 Vt. 97.

Virginia.—*Hopkins v. Richardson*, 9 Gratt. (Va.) 496; *Farish v. Reigle*, 11 Gratt. (Va.) 719; *Early v. Garland*, 13 Gratt. (Va.) 1; *Honesty v. Com.*, 81 Va. 283; *New York, etc., R. Co. v. Thomas*, 92 Va. 606; *Brooke v. Young*, 3 Rand. (Va.) 106.

Wisconsin.—*Sailer v. Barnousky*, 60 Wis. 169; *Campbell v. Campbell*, 54 Wis. 90; *Roberts v. McGrath*, 38 Wis. 52; *Wheeler v. Konst*, 46 Wis. 398; *Tupper v. Huson*, 46 Wis. 646; *Conners v. State*, 47 Wis. 523; *Rogers v. Brightman*, 10 Wis. 55.

United States.—*Thorwegan v. King*, 111 U. S. 549; *Texas, etc., R. Co. v.*

Rhodes, 71 Fed. Rep. 145; *Douglass v. M'Allister*, 3 Cranch (U. S.) 298; *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506.

Effect of Statute Making Jury Judges of the Law.—The fact that the jury are made judges of the law as well as of fact, in criminal cases, is no reason why the court should refuse to instruct the jury on the law of the case when requested. *Leuder v. People*, 6 Ill. App. 98.

The fact that the jury is the judge of both the law and the fact makes no difference. It is nevertheless the duty of the court to instruct it as to the law. *Parker v. State*, 136 Ind. 284.

Duty of Judge to Know the Evidence.—A statute confining the charge of the judge to matters of law does not release him from the duty of knowing the evidence given on the trial. It is important that he should know the evidence to enable him to charge the jury correctly on the law of the case as applicable to it, and to decide properly on a motion for new trial. *Dibble v. Truluck*, 11 Fla. 135.

1. See *infra*, VI. 5. *Time of Presenting Requests*; and XI. *Repetition of Instructions—Points Already Covered*.

2. *California*.—*People v. Taylor*, 36 Cal. 255.

Georgia.—*Adair v. Adair*, 30 Ga. 102; *Terry v. State*, 17 Ga. 204.

Illinois.—*Wooters v. King*, 54 Ill. 343.

Indiana.—*Parker v. State*, 136 Ind. 284; *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; *Blacketer v. House*, 67 Ind. 414.

Kansas.—*St. Louis, etc., R. Co. v. Boyce*, (Kan. App. 1897) 48 Pac. Rep. 949.

Michigan.—*O'Callaghan v. Boeing*, 72 Mich. 669; *Cooper v. Mulder*, 74 Mich. 374; *Babbitt v. Bumpus*, 73 Mich. 331.

Nebraska.—*Madison First Nat. Bank v. Carson*, 30 Neb. 104; *Hancock v. Stout*, 28 Neb. 301; *Skinner v. Majors*, 19 Neb. 453.

resulted therefrom.¹

b. CONFLICT IN OR WEAKNESS OF EVIDENCE NOT A GROUND FOR REFUSAL. — Though the evidence is conflicting, each party is entitled to have the law given to the jury which is applicable to his theory of the case and the testimony of his witnesses;² and an instruction correct in point of law and applicable to the evidence should always be given, no matter how slight the evidence is in support of the hypothesis on which the instruction is based.³ The instruction, if pertinent, should be given without regard to the weight or preponderance of the evidence.⁴

North Carolina. — *State v. Christmas*, 6 Jones L. (N. Car.) 471.

Ohio. — *Lytle v. Boyer*, 33 Ohio St. 506.

Pennsylvania. — *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256.

Tennessee. — *Johnson v. McCampbell*, 11 Heisk. (Tenn.) 28; *Kendrick v. Cisco*, 13 Lea (Tenn.) 251.

Texas. — *Jones v. Parker*, (Tex. Civ. App. 1897) 42 S. W. Rep. 123.

Wisconsin. — *Sailer v. Barnousky*, 60 Wis. 169.

United States. — *Thorwegan v. King*, 111 U. S. 549; *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506.

1. *Douglass v. M'Allister*, 3 Cranch (U. S.) 298.

Rule under the Georgia Statute. — Under the Trial Act of 1853-54, the defendant is not called upon to show affirmatively that injury has resulted from the refusal of the court to give a legal charge as requested; the statute assumes that damage is done, and will listen to no allegation to the contrary. *Terry v. State*, 17 Ga. 204.

2. *Renton v. Monnier*, 77 Cal. 449; *State v. Partlow*, 90 Mo. 608; *Sperry v. Spaulding*, 45 Cal. 549; *Wells v. Turner*, 16 Md. 133; *Trask v. People*, 104 Ill. 569; *Smith v. Wilson*, 1 Tex. Civ. App. 115.

In *Sperry v. Spaulding*, 45 Cal. 549, it was said: "It is insisted by the plaintiff, that as the defendant's evidence in respect to the time when the note was made and transferred was contradicted by that of the payee and indorsee, the jury were justified in rejecting as untrue all of the defendant's evidence; and that in view of the verdict, the court should presume that the jury had so rejected the evidence. But it is obvious that the defendant was entitled to have the jury instructed upon the law of the case, on the theory that

they would regard all his testimony as true."

Illustration. — In an action to recover the price of an article sold, in respect to which it is claimed there was a warranty and a breach thereof, if there be evidence on the subject of such defense, although contradictory, it is the right of the defendant to have the jury pass upon it, and it is error to refuse an instruction asked for that purpose. *Wooters v. King*, 54 Ill. 343.

3. *Illinois.* — *Riedle v. Mulhausen*, 20 Ill. App. 73; *Peoria M. & F. Ins. Co. v. Anapow*, 45 Ill. 86; *Chicago v. Scholten*, 75 Ill. 468; *Wooters v. King*, 54 Ill. 343; *Cook County v. Harms*, 108 Ill. 151; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Eames v. Rend*, 105 Ill. 506; *Chicago Heights Land Assoc. v. Butler*, 55 Ill. App. 461.

Mississippi. — *Levy v. Gray*, 56 Miss. 318.

New York. — *Evarts v. Burton*, 17 N. Y. Wkly Dig. 401.

Virginia. — *Hopkins v. Richardson*, 9 Gratt. (Va.) 485; *Farish v. Reigle*, 11 Gratt. (Va.) 697; *Early v. Garland*, 13 Gratt. (Va.) 1; *Honesty v. Com.*, 81 Va. 283; *New York, etc., R. Co. v. Thomas*, 92 Va. 606.

4. *Levy v. Gray*, 56 Miss. 318; *Cook County v. Harms*, 108 Ill. 153.

"Where there is any evidence, however slight, to sustain a legal claim or a legal defense, the party introducing such evidence has a right to have it submitted to the jury by appropriate instructions; and when an instruction is based upon evidence in the case, and stating correctly a principle of law applicable to such evidence and not covered by any instruction given, it is error to refuse the instruction, however meager the evidence to sustain the hypothesis contained in it." *Riedle v. Mulhausen*, 20 Ill. App. 73.

2. Right of Court to Instruct on Its Own Motion. — In the absence of a statute providing otherwise, it is apprehended, the court may always of its own motion instruct the jury on any question of law where the interests of justice require it.¹

3. Necessity of Requesting Instructions — *a.* **RULE AS TO MISDIRECTION.** — If the court misdirects the jury as to a matter of law involved in a case submitted to them, such error is ground for reversal,² unless it is apparent that no harm could have resulted

Unintentional Omission by Judge — Effect. — Where a legal charge is requested upon the main points in the case, but is unintentionally omitted by the judge and is not suggested by counsel when called on at the end of the general charge to suggest omitted points, a new trial ought to be granted. *Adair v. Adair*, 30 Ga. 102.

Where all the facts and circumstances relating to the subject are admitted, a party has the right to ask the court to instruct whether the evidence is sufficient to establish a waiver or not. *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1.

Special Verdict. — In *Illinois* it has been held that when the jury are to find a special verdict — “not the law, but the facts simply, entirely independent of their legal bearings, and regardless of any consideration of liability on the part of any one” — there is no error in refusing to give general instructions as to the law of the case. *Indianapolis, etc., R. Co. v. Bush*, 101 Ind. 582.

In *Wisconsin* it has been held that when the jury are called upon to render a special verdict the trial court may, in its discretion, limit its instructions to such matters as are necessarily involved in the questions of fact submitted to them. *Burns v. North Chicago Rolling Mill Co.*, 60 Wis. 544.

1. *Thistle v. Frostburg Coal Co.*, 10 Md. 129; *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539; *Gwatkins v. Com.*, 9 Leigh (Va.) 678; *Blunt v. Com.*, 4 Leigh (Va.) 689; *Brown v. People*, 9 Ill. 439; *Stumps v. Kelley*, 22 Ill. 140; *State v. Burns*, 8 Nev. 251; *State v. Pierce*, 8 Nev. 291; *Clarke v. Baker*, 7 J. J. Marsh. (Ky.) 197.

In *Mississippi*, by virtue of statutory provisions, the court cannot give any instruction of its own motion, either in civil or criminal cases. *Stewart v. State*, 50 Miss. 587; *Edwards v. State*, 47 Miss. 581; *Archer v. Sinclair*, 49 Miss. 343; *Bangs v. State*, 61 Miss. 363;

Davis v. Tiernan, 2 How. (Miss.) 786; *Montgomery v. Norris*, 1 How. (Miss.) 499; *Williams v. State*, 32 Miss. 389. And if it does so, the error will operate to reverse, although the matter so charged is sound law and applicable to the case. *Williams v. State*, 32 Miss. 389.

The statute does not, however, require the court to give the identical charge requested, but when asked to charge on a certain point, a given instruction differing from the one asked, but which is pertinent thereto, is proper. *Carpew v. Canavan*, 4 How. (Miss.) 370.

It is not a violation of the statute to modify the request, and this power of modification may be exercised as well by giving a wholly new instruction, supplemental and amendatory of those asked, pointing out the limitations and qualifications of the doctrine announced, as by annexing the qualifying words to those asked. *Watkins v. State*, 60 Miss. 323.

Capital Cases. — Even in capital cases the court is not authorized to instruct the jury except upon request. *Edwards v. State*, 47 Miss. 581.

Suggesting Requests to Counsel Improper. — The rule that the court cannot originate independent instructions, not called for nor rendered necessary by those requested by counsel, cannot be evaded by handing the charge to the district attorney, who returns it, requesting that it be given, which is done. *Watkins v. State*, 60 Miss. 323.

In *Iowa*, where the powers of a justice of the peace are prescribed by statute, it is held that a justice cannot instruct the jury, the power to do so not having been expressly given by statute. *St. Joseph Mfg. Co. v. Harrington*, 53 Iowa 380.

2. *Iowa.* — *State v. Pennell*, 56 Iowa 29. *New York.* — *Gowdey v. Robbins*, 3 N. Y. App. Div. 353; *Carnes v. Platt*, 6 Robt. (N. Y.) 270; *Low v. Hall*, 47 N. Y. 104.

therefrom.¹ Having undertaken to state the law the judge must do so correctly,² even though there has been no request for a correction, or any request at all to charge upon the point in relation to which the court has committed a misdirection.³

b. RULE AS TO PARTIAL NONDIRECTION—NECESSITY OF REQUESTING A FULLER AND MORE EXPLICIT INSTRUCTION.—(1) *Statement of Rule.*—The rule as to nondirection is altogether different from that just stated; for while it is the duty of the court to give instructions requested which are correctly drawn and applicable, and which are seasonably presented, it is a general rule in both civil and criminal cases, subject to a few exceptions which will be noticed hereafter,⁴ that mere nondirection, in the absence of request, does not constitute error. If an instruction is correct as far as it goes, but is too general, or is not sufficiently full and explicit, or omits material issues raised on the pleadings and proof, error cannot be assigned in the absence of a properly drawn request for more specific and comprehensive instructions.⁵ The reason of this is plain. The failure

North Carolina.—Hice *v.* Woodard, 12 Ired. (N. Car.) 293; Boon *v.* Murphy, 108 N. Car. 187; Bynum *v.* Bynum, 11 Ired. L. (N. Car.) 632; M'Rae *v.* Evans, 1 Dev. & B. L. (N. Car.) 243; Pierce *v.* Alspaugh, 83 N. Car. 258.

Ohio.—Globe Ins. Co. *v.* Sherlock, 25 Ohio St. 50.

Pennsylvania.—Seigle *v.* Louderbaugh, 5 Pa. St. 490.

Texas.—Stude *v.* Saunders, 2 Tex. Unrep. Cas. 122.

1. Hice *v.* Woodard, 12 Ired. L. (N. Car.) 293. See also Toulmin *v.* Lesesne, 2 Ala. 359.

A new trial will not be granted for a misdirection which the finding of the jury corrects. Glen *v.* Charlotte, etc., R. Co., 63 N. Car. 510; Winburne *v.* Bryan, 73 N. Car. 47.

2. Bynum *v.* Bynum, 11 Ired. L. (N. Car.) 632; Pierce *v.* Alspaugh, 83 N. Car. 258.

3. Gowdey *v.* Robbins, 3 N. Y. App. Div. 353; Carnes *v.* Platt, 6 Robt. (N. Y.) 270; Low *v.* Hall, 47 N. Y. 104; Stude *v.* Saunders, 2 Tex. Unrep. Cas. 122; Garrett *v.* Gonter, 42 Pa. St. 143.

Where the jury has been misdirected in reference to a controlling question the judgment should be reversed and a new trial awarded, although the weight of the evidence may seem to support the verdict. Globe Ins. Co. *v.* Sherlock, 25 Ohio St. 50.

Excluding Material Conclusions.—Where the charge of the court in effect excludes material conclusions to be de-

duced from the evidence, it is error, although counter-instructions had not been presented. Stude *v.* Saunders, 2 Tex. Unrep. Cas. 122.

Burden of Proof.—Where the charge of the court erroneously places the burden of proof on the wrong party, this is ground for reversal, although the error was not called to the attention of the court by request for another instruction on that point, and although no objection was made. Gowdey *v.* Robbins, 3 N. Y. App. Div. 353.

4. See *infra*, VI. 3. *b.* (4) *Exceptions to Rule.*

5. *Alabama.*—Robinson *v.* Levi, 81 Ala. 134; Skinner *v.* State, 30 Ala. 524; Towns *v.* Riddle, 2 Ala. 694; Hodges *v.* Branch Bank, 13 Ala. 455; Scully *v.* State, 39 Ala. 240; Hutchinson *v.* Dearing, 20 Ala. 798; Fitzpatrick *v.* Hays, 36 Ala. 684; Dave *v.* State, 22 Ala. 23; Casky *v.* Haviland, 13 Ala. 321; Ivey *v.* Owens, 28 Ala. 648; Hunt *v.* Toulmin, 1 Stew. & P. (Ala.) 185; Durrett *v.* State, 62 Ala. 434; Herbert *v.* Huie, 1 Ala. 18.

Arizona.—West *v.* Territory, (Arizona 1894) 36 Pac. Rep. 207.

Arkansas.—Robins *v.* Fowler, 2 Ark. 133; White *v.* McCracken, 60 Ark. 613; Carroll *v.* State, 45 Ark. 539; Fordyce *v.* Jackson, 56 Ark. 594; Holt *v.* State, 47 Ark. 196.

California.—People *v.* Haun, 44 Cal. 96; People *v.* Ah Wee, 48 Cal. 237; People *v.* Collins, 48 Cal. 277; People *v.* Flynn, 73 Cal. 511; People *v.* Olsen,

of a judge to charge upon any material point usually results from inadvertence, and the law casts upon the parties the duty of call-

80 Cal. 122; *People v. Byrnes*, 30 Cal. 206; *People v. Connelly*, (Cal. 1894) 38 Pac. Rep. 42; *Scott v. Wood*, 81 Cal. 398; *People v. McNutt*, 93 Cal. 658; *People v. Ahern*, 93 Cal. 518; *People v. Gray*, 66 Cal. 277; *People v. Christensen*, 85 Cal. 571; *Rice v. Whitmore*, 74 Cal. 619; *People v. Marks*, 72 Cal. 46; *People v. Fice*, 97 Cal. 459; *Hart v. Western Union Tel. Co.*, 66 Cal. 591; *People v. Ah Yute*, 53 Cal. 613; *Weinburg v. Soms*, (Cal. 1893) 33 Pac. Rep. 341; *Nichol v. Laumeister*, 102 Cal. 658; *People v. Barney*, 114 Cal. 554.

Colorado. — *Mackey v. Briggs*, 61 Colo. 143; *Goldhammer v. Dyer*, 7 Colo. App. 29.

Connecticut. — *State v. Smith*, 65 Conn. 283.

Florida. — *Carter v. Bennett*, 4 Fla. 283; *Haber v. Nassitts*, 12 Fla. 589; *Lungren v. Brownlie*, 22 Fla. 491; *Cato v. State*, 9 Fla. 163.

Georgia. — *Smith v. Page*, 72 Ga. 539; *Cole v. Byrd*, 83 Ga. 207; *Lewis v. State*, 91 Ga. 168; *East Tennessee, etc., R. Co. v. Fleetwood*, 90 Ga. 24; *Ronsheim v. Brimberry*, 89 Ga. 97; *Orr v. Garabold*, 85 Ga. 373; *Hawkins v. Kermod*, 85 Ga. 116; *Thomas v. State*, 95 Ga. 485; *McCook v. Harp*, 81 Ga. 229; *Hardin v. Almand*, 64 Ga. 582; *Sapp v. Faircloth*, 70 Ga. 691; *Rozar v. Burns*, 13 Ga. 34; *Morgan v. Swann*, 81 Ga. 207; *Poullain v. Poullain*, 76 Ga. 420; *Moore v. Brown*, 81 Ga. 11; *Stevens v. Central R., etc., Co.*, 80 Ga. 24; *Central R. Co. v. Harris*, 76 Ga. 502; *Street v. Lynch*, 38 Ga. 631; *Spurlock v. West*, 80 Ga. 302; *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539; *Fortson v. Mikell*, 97 Ga. 336; *Merchants', etc., Nat. Bank v. Masonic Hall*, 62 Ga. 272; *Matthews v. Poythress*, 4 Ga. 287; *Brown v. State*, 28 Ga. 199; *Alston v. Grantham*, 26 Ga. 374; *Thomas v. State*, 91 Ga. 204; *Durand v. Grimes*, 18 Ga. 693; *Wright v. State*, 18 Ga. 383; *Nicol v. Crittenden*, 55 Ga. 497; *Seiler v. State*, 76 Ga. 103; *Sulter v. State*, 76 Ga. 105; *Averett v. Brady*, 20 Ga. 523; *Howland v. Bartlett*, 86 Ga. 669; *McCaulla v. Murphy*, 86 Ga. 475; *Small v. Williams*, 87 Ga. 681; *Gunn v. Harris*, 88 Ga. 439; *Freeman v. Coleman*, 88 Ga. 421; *Chattanooga, etc., R. Co. v. Huggins*, 89 Ga. 494; *Wilson v. State*, 69 Ga. 227; *Wheelwright v. Aiken*, 92 Ga. 394; *Johnson v. State*, 14

Ga. 55; *Mitchell v. State*, 63 Ga. 222; *Bertody v. Ison*, 69 Ga. 317; *Atlanta v. Brown*, 73 Ga. 631; *Rush v. Ross*, 65 Ga. 144; *Richmond, etc., R. Co. v. Howard*, 79 Ga. 45; *Downing v. State*, 66 Ga. 114; *Bailey v. Ogden*, 75 Ga. 874; *Rutledge v. Hudson*, 80 Ga. 267.

Illinois. — *Provident Hospital, etc., School v. Barbour*, 58 Ill. App. 421; *Ames, etc., Co. v. Stachurski*, 46 Ill. App. 310; *Plaut v. Young*, 38 Ill. App. 102; *Sloan v. Lingafelter*, 56 Ill. App. 320; *Hyde Park v. Washington Ice Co.*, 117 Ill. 233; *Chicago v. Keefe*, 114 Ill. 222; *Louisville, etc., Consol. R. Co. v. Spencer*, 149 Ill. 97; *Hessing v. McCloskey*, 37 Ill. 341; *Vinegar Hill v. Busson*, 42 Ill. 45.

Indiana. — *Heiney v. Garretson*, 1 Ind. App. 551; *Marshall v. State*, 123 Ind. 128; *Hatton v. Jones*, 78 Ind. 466; *Conrad v. Kinzie*, 105 Ind. 285; *Leeper v. State*, 12 Ind. App. 637; *Hodge v. State*, 85 Ind. 564; *Rollins v. State*, 62 Ind. 46; *Foxwell v. State*, 63 Ind. 539; *Jones v. State*, 49 Ind. 549; *Pittsburgh, etc., R. Co. v. Noel*, 77 Ind. 118; *Puett v. Beard*, 86 Ind. 108; *Standard Oil Co. v. Bretz*, 98 Ind. 236; *Taber v. Ferguson*, 109 Ind. 235; *Vancleave v. Clark*, 118 Ind. 66; *Western Union Tel. Co. v. Buskirk*, 107 Ind. 552; *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378; *Kelley v. Kelley*, 8 Ind. App. 613; *Chamness v. Chamness*, 53 Ind. 301; *Boffandick v. Raleigh*, 11 Ind. 136; *Carpenter v. State*, 43 Ind. 371; *McClary v. State*, 75 Ind. 266; *Garber v. State*, 94 Ind. 219; *Beller v. State*, 90 Ind. 449; *Adams v. State*, 65 Ind. 565; *Du Souchet v. Dutcher*, 113 Ind. 253; *Stockwell v. Byrne*, 22 Ind. 6; *Burgett v. Burgett*, 43 Ind. 78; *Lipprant v. Lipprant*, 52 Ind. 273; *Felton v. State*, 139 Ind. 531; *Springfield State Nat. Bank v. Bennett*, 8 Ind. App. 679; *Barnett v. State*, 100 Ind. 171; *Insurance Co. of North America v. Brim*, 111 Ind. 281; *Grubb v. State*, 117 Ind. 277; *Keyes v. State*, 122 Ind. 527; *South Bend v. Hardy*, 98 Ind. 586; *Bissot v. State*, 53 Ind. 408; *Island Coal Co. v. Neal*, 15 Ind. App. 15; *German F. Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623; *Hindman v. Timme*, 8 Ind. App. 416; *Murray v. State*, 26 Ind. 141; *Blacketer v. House*, 67 Ind. 414; *Eichel v. Senhenn*, 2 Ind. App. 212; *Gastlin v. Weeks*, 2 Ind. App. 227; *Morningstar*

ing the judge's attention to the matter. If he then refuses to give a proper requested instruction, such refusal is ground of

v. Hardwick, 3 Ind. App. 436; *Dyer v. Dyer*, 87 Ind. 18; *Cleveland, etc., R. Co. v. Bates*, 91 Ind. 290; *Carver v. Carver*, 97 Ind. 514; *Judd v. Martin*, 97 Ind. 175; *Ireland v. Emmerson*, 93 Ind. 6; *Colee v. State*, 75 Ind. 516; *Hatton v. Jones*, 78 Ind. 471; *Batten v. State*, 80 Ind. 404; *Mobley v. State*, 83 Ind. 94; *Bishop v. Redmond*, 83 Ind. 161; *Wells v. Morrison*, 91 Ind. 60; *Louisville, etc., R. Co. v. Grantham*, 104 Ind. 358; *Rauck v. State*, 110 Ind. 389; *Warner v. State*, 114 Ind. 142; *Morgan v. State*, 117 Ind. 572; *Cincinnati, etc., R. Co. v. Smock*, 133 Ind. 417; *Moore v. Shields*, 121 Ind. 271; *Fitzgerald v. Goff*, 99 Ind. 40; *Trogdon v. State*, 133 Ind. 4; *Simpkins v. Smith*, 94 Ind. 470; *Batten v. State*, 80 Ind. 394; *Reissner v. Oxley*, 80 Ind. 585; *Eppert v. Hall*, 133 Ind. 417; *Citizens' St. R. Co. v. Abright*, 14 Ind. App. 433; *Adams v. Stringer*, 78 Ind. 175; *Harper v. State*, 101 Ind. 113.

Iowa. — *Churchill v. Gronewig*, 81 Iowa 449; *Deere v. Wolf*, 77 Iowa 115; *Gwinn v. Crawford*, 42 Iowa 63; *State v. Illsley*, 81 Iowa 49; *Buetzier v. Jones*, 85 Iowa 721; *State v. Tweedy*, 11 Iowa 350; *State v. O'Day*, 69 Iowa 368; *State v. Helvin*, 65 Iowa 289; *Wimer v. Allbaugh*, 78 Iowa 79; *State v. Viers*, 82 Iowa 397; *Wheelan v. Chicago, etc., R. Co.*, 85 Iowa 167; *Smith v. Chicago, etc., R. Co.*, 60 Iowa 512; *Duncombe v. Powers*, 75 Iowa 185; *Martin v. Davis*, 76 Iowa 762; *State v. Watson*, 81 Iowa 380; *State v. Pennell*, 56 Iowa 29; *State v. Walters*, 45 Iowa 390; *State v. Glynden*, 51 Iowa 463; *Hubbell v. Ream*, 31 Iowa 289; *Dixon v. Stewart*, 33 Iowa 125; *Harrison v. Iowa Midland R. Co.*, 36 Iowa 323; *Koehler v. Wilson*, 40 Iowa 183; *Gwynn v. Duffield*, 66 Iowa 708; *Carpenter v. Scott*, 86 Iowa 563; *Shroeder v. Webster*, 88 Iowa 627; *Hall v. Manson*, 90 Iowa 585; *State v. Phipps*, 95 Iowa 487; *State v. Jelinek*, 95 Iowa 420; *Dimmick v. Babcock*, 92 Iowa 692; *Mackie v. Central R. Co.*, 54 Iowa 540; *Hall v. Stewart*, 58 Iowa 681; *Ault v. Sloan*, 4 Iowa 508; *State v. Woodward*, 84 Iowa 172; *State v. Hazen*, 39 Iowa 648; *McCausland v. Cresap*, 3 Greene (Iowa) 161; *Miller v. Bryan*, 3 Iowa 58.

Kansas. — *Ryan v. Madden*, 46 Kan. 245; *State v. Peterson*, 38 Kan. 211; *State v. Cox*, 1 Kan. App. 447;

State v. Potter, 15 Kan. 302; *State v. Pfefferle*, 36 Kan. 97; *Douglass v. Geiler*, 32 Kan. 499; *State v. Estep*, 44 Kan. 572; *State v. Falk*, 46 Kan. 498; *State v. Shenkler*, 36 Kan. 43; *State v. Rook*, 42 Kan. 419; *Phinney v. Bronson*, 43 Kan. 451; *Hoyt v. Dengler*, 54 Kan. 309; *Roller v. James*, (Kan. App. 1897) 49 Pac. Rep. 630.

Kentucky. — *Reading v. Metcalf*, *Hard. (Ky.)* 544.

Louisiana. — *State v. Scott*, 12 La. Ann. 386; *Milne v. Pontchartrain R. Co.*, 9 La. 257; *State v. Salter*, 48 La. Ann. 197.

Maine. — *Gardner v. Gooch*, 48 Me. 487; *Harpwell v. Phippsburg*, 29 Me. 313; *State v. Conley*, 39 Me. 78; *Purington v. Pierce*, 38 Me. 447; *Stone v. Redman*, 38 Me. 578; *Emery v. Vinall*, 26 Me. 295; *Badger v. Cumberland Bank*, 26 Me. 428; *Hatch v. Spearin*, 11 Me. 354; *Sidensparker v. Sidensparker*, 52 Me. 481; *Hewey v. Nourse*, 54 Me. 256; *Howes v. Tolman*, 63 Me. 258; *Stowel v. Goodenow*, 31 Me. 538; *Osgood v. Lansil*, 33 Me. 360; *State v. Straw*, 33 Me. 554; *Rogers v. Kennebec, etc., R. Co.*, 38 Me. 227; *Hunter v. Heath*, 67 Me. 507; *State v. Reed*, 62 Me. 129; *Darby v. Hayford*, 56 Me. 246; *Barrett v. Delano*, (Me. 1888) 14 Atl. Rep. 288; *Stephenson v. Thayer*, 63 Me. 143; *Eaton v. New England Tel. Co.*, 68 Me. 63; *State v. Knight*, 43 Me. 11; *Stratton v. Staples*, 59 Me. 94; *Hearn v. Shaw*, 72 Me. 187; *Webber v. Dunn*, 71 Me. 331; *Willey v. Belfast*, 61 Me. 569; *Bradstreet v. Rich*, 74 Me. 303.

Massachusetts. — *Brigham v. Wentworth*, 11 Cush. (Mass.) 123; *Reed v. Call*, 5 Cush. (Mass.) 14; *Corrigan v. Connecticut F. Ins. Co.*, 122 Mass. 298; *Hall v. Weir*, 1 Allen (Mass.) 261; *Davis v. Elliott*, 15 Gray (Mass.) 90; *Buzzell v. Emerton*, 161 Mass. 176.

Michigan. — *Hitchcock v. Supreme Tent, etc.*, (Mich. 1895) 65 N. W. Rep. 285; *Hollywood v. Reed*, 55 Mich. 308; *Herbstreit v. Beckwith*, 35 Mich. 93; *Howry v. Eppinger*, 34 Mich. 35; *Ward v. Ward*, 37 Mich. 259; *Turner v. People*, 33 Mich. 382; *Advertiser, etc., Co. v. Detroit*, 43 Mich. 120; *Lynch v. Johnson*, (Mich. 1896) 67 N. W. Rep. 908; *Peterson v. Toner*, 80 Mich. 350; *Little v. Williams*, (Mich. 1895) 65 N. W. Rep. 568; *Vernon v. Cornwell*, 104 Mich. 62; *People v. Willett*, 105 Mich.

error; but a party cannot, in a court of error, avail himself of an omission which he made no effort to have supplied at the time.

110; Rankin *v.* West, 25 Mich. 195; Crowell *v.* Truax, 94 Mich. 585; People *v.* McKinney, 10 Mich. 54; Copas *v.* Anglo-American Provision Co., 73 Mich. 541; Pickard *v.* Bryant, 92 Mich. 430; Kinney *v.* Folkerts, 84 Mich. 616; Driscoll *v.* People, 47 Mich. 413.

Minnesota. — Egan *v.* Faendel, 19 Minn. 231; Le Clair *v.* First Division St. Paul, etc., R. Co., 20 Minn. 9; Minnesota Cent. R. Co. *v.* McNamara, 13 Minn. 508; McKnight *v.* Chicago, etc., R. Co., 44 Minn. 141; Bowe *v.* Hyland, 44 Minn. 88; Clapp *v.* Minneapolis, etc., R. Co., 36 Minn. 6; McCarvel *v.* Phenix Ins. Co., 64 Minn. 193; Nininger *v.* Knox, 8 Minn. 149.

Missouri. — Farmer *v.* Farmer, 129 Mo. 530; Coleman *v.* Drane, 116 Mo. 394; De Laoreal *v.* Kemper, 9 Mo. App. 77; Cahill *v.* Liggett, etc., Tobacco Co., 14 Mo. App. 596; Remmler *v.* Shenuit 15 Mo. App. 192; McHale *v.* Oertel, 15 Mo. App. 583; Young *v.* Keller, 16 Mo. App. 551; Otto *v.* St. Louis, etc., R. Co., 12 Mo. App. 168; Brown *v.* Missouri Pac. R. Co., 13 Mo. App. 463; Campbell *v.* St. Louis, etc., R. Co., 16 Mo. App. 553; Hyde *v.* St. Louis Book, etc., Co., 32 Mo. App. 298; Tyler *v.* Larimore, 19 Mo. App. 445; Chicago, etc., R. Co. *v.* Randolph Town-Site Co., 103 Mo. 468; Hurst *v.* Scammon, 2 Mo. App. Rep. 946; Quirk *v.* St. Louis United Elevator Co., 126 Mo. 279; Nolan *v.* Johns, 126 Mo. 159; Boggess *v.* Boggess, 127 Mo. 305; Johnson *v.* Missouri Pac. R. Co., 96 Mo. 340; St. Louis Bolt, etc., Co. *v.* Buell, 8 Mo. App. 594; State *v.* Haase, 6 Mo. App. 586; Howard *v.* Mutual Ben. L. Ins. Co., 6 Mo. App. 577; Simonds *v.* Oliver, 23 Mo. 32; Watson *v.* Race, 46 Mo. App. 546; Estes *v.* Fry, 22 Mo. App. 80; Hunter *v.* McElhaney, 48 Mo. App. 234; Drey *v.* Doyle, 99 Mo. 459.

Montana. — Kelley *v.* Cable Co., 7 Mont. 70.

Nebraska. — Republican Valley R. Co. *v.* Fink, 18 Neb. 89; Republican Valley R. Co. *v.* Fellers, 16 Neb. 169; Klosterman *v.* Olcott, 25 Neb. 382; Gettinger *v.* State, 13 Neb. 308; Hill *v.* State, 42 Neb. 503; York Park Bldg. Assoc. *v.* Barnes, 39 Neb. 834; Burlington, etc., R. Co. *v.* Schluntz, 14 Neb. 421; Carleton *v.* State, 43 Neb. 373; German Nat. Bank *v.* Leonard, 40 Neb. 676; McPherson *v.* Wiswell, 19 Neb.

117; Sioux City, etc., R. Co. *v.* Finlayson, 16 Neb. 578; Carter White Lead Co. *v.* Kinlin, 47 Neb. 409; Housh *v.* State, 43 Neb. 163; Barr *v.* Omaha, 42 Neb. 341.

Nevada. — State *v.* Charley Hing, 16 Nev. 307; State *v.* Davis, 14 Nev. 407; Allison *v.* Hagan, 12 Nev. 38; State *v.* Smith, 10 Nev. 106; State *v.* St. Clair, 16 Nev. 207; Gaudette *v.* Travis, 11 Nev. 149; State *v.* McLane, 15 Nev. 345.

New Hampshire. — Moore *v.* Ross, 11 N. H. 547; Dow *v.* Merrill, 65 N. H. 107.

New Jersey. — Cole *v.* Taylor, 22 N. J. L. 59; Folly *v.* Vantuyl, 9 N. J. L. 157; Hetfield *v.* Dow, 27 N. J. L. 440; Westcott *v.* Garrison, 6 N. J. L. 132; Mead *v.* State, 53 N. J. L. 601.

New Mexico. — U. S. *v.* De Amador, 6 N. Mex. 173; U. S. *v.* De Lujan, 6 N. Mex. 179; U. S. *v.* Chaves, 6 N. Mex. 180; Territory *v.* O'Donnell, 4 N. Mex. 66.

New York. — Van Akin *v.* Caler, 48 Barb. (N. Y.) 58; Stedman *v.* Western Transp. Co., 48 Barb. (N. Y.) 97; Parsons *v.* Brown, 15 Barb. (N. Y.) 590; Winchell *v.* Hicks, 18 N. Y. 559; Muller *v.* McKesson, 73 N. Y. 195; Fisher *v.* Monroe, 16 Daly (N. Y.) 467; Sudlow *v.* Warshing, 108 N. Y. 520; Harris *v.* Northern Indiana R. Co., 20 N. Y. 239; Hotchkiss *v.* Hodge, 38 Barb. (N. Y.) 117; Redmond *v.* Liverpool, etc., Steamboat Co., 46 N. Y. 578; Avery *v.* New York Cent., etc., R. Co., (Buffalo Super. Ct.) 2 N. Y. Supp. 101; People *v.* McLaughlin, 2 N. Y. App. Div. 419; Dows *v.* Rush, 28 Barb. (N. Y.) 157; People *v.* Moett, 58 How. Pr. (N. Y. Supreme Ct.) 467; Smith *v.* Matthews, 9 N. Y. Misc. Rep. (Buffalo Super. Ct.) 427; David *v.* Williamsburgh City F. Ins. Co., 7 Abb. N. Cas. (Brooklyn City Ct.) 47; Haupt *v.* Pohlmann, 1 Robt. (N. Y.) 126; Wyman *v.* Hart, 12 How. Pr. (N. Y. Supreme Ct.) 122; Law *v.* Merrills, 6 Wend. (N. Y.) 268; Dunlop *v.* Patterson, 5 Cow. (N. Y.) 243; Burtch *v.* Nickerson, 17 Johns. (N. Y.) 217; Ward *v.* Lee, 13 Wend. (N. Y.) 41; Gardner *v.* Pickett, 19 Wend. (N. Y.) 186; Ford *v.* Monroe, 20 Wend. (N. Y.) 210; Simpson *v.* Downing, 23 Wend. (N. Y.) 316; Stafford *v.* Bacon, 1 Hill (N. Y.) 532; Underhill *v.* Pomeroy, 2 Hill (N. Y.) 603; Colemar *v.* Lamb, 15

The court cannot be presumed to do more in ordinary cases than express its opinion upon the questions which the parties them-

Wend. (N. Y.) 329; *Hogan v. Cregan*, 6 Robt. (N. Y.) 138; *Carnes v. Platt*, 6 Robt. (N. Y.) 271; *Seymour v. Cowing*, 1 Keyes (N. Y.) 532; *Fasshender v. Western Transit Co.*, (City Ct.) 26 N. Y. St. Rep. 112; *Gallagher v. White*, 31 Barb. (N. Y.) 92; *Booth v. Boston*, etc., R. Co., 73 N. Y. 38.

North Carolina. — *Morgan v. Lewis*, 95 N. Car. 296; *King v. Blackwell*, 96 N. Car. 322; *Lawrence v. Hester*, 93 N. Car. 79; *Boon v. Murphy*, 108 N. Car. 187; *Arey v. Stephenson*, 12 Ired. L. (N. Car.) 34; *Torrence v. Graham*, 1 Dev. & B. L. (N. Car.) 284; *Branton v. O'Briant*, 93 N. Car. 99; *State v. O'Neal*, 7 Ired. L. (N. Car.) 251; *Harrison v. Chappell*, 84 N. Car. 258; *Taylor v. Old Dominion Steamship Co.*, 88 N. Car. 15; *Fry v. Currie*, 91 N. Car. 436; *Bynum v. Bynum*, 11 Ired. L. (N. Car.) 632; *Burton v. Wilmington*, etc., R. Co., 82 N. Car. 504; *Pierce v. Alspaugh*, 83 N. Car. 258; *Brown v. Calloway*, 90 N. Car. 118; *Brown v. Morris*, 4 Dev. & B. L. (N. Car.) 429; *Simpson v. Blount*, 3 Dev. L. (N. Car.) 34; *Hice v. Woodard*, 12 Ired. L. (N. Car.) 293; *Dupree v. Virginia Home Ins. Co.*, 92 N. Car. 417; *Hall v. Castleberry*, 101 N. Car. 153; *White v. Clark*, 82 N. Car. 6; *Ward v. Herrin*, 4 Jones L. (N. Car.) 23; *Thornburgh v. Mastin*, 93 N. Car. 258; *Thompson v. Western Union Tel. Co.*, 107 N. Car. 449; *Shelfer v. Gooding*, 2 Jones L. (N. Car.) 175; *King v. Blackwell*, 96 N. Car. 322; *State v. Varner*, 115 N. Car. 744; *State v. Thomas*, 98 N. Car. 599; *M'Rae v. Evans*, 1 Dev. & B. L. (N. Car.) 243; *Terry v. Danville*, etc., R. Co., 91 N. Car. 236; *Gillespie v. Shuliberrier*, 5 Jones L. (N. Car.) 157; *State v. Scott*, 4 Ired. L. (N. Car.) 409; *Higdon v. Chastaine*, 1 Winst. L. (N. Car.) 212; *State v. Jackson*, 112 N. Car. 850; *State v. Debnam*, 98 N. Car. 712; *Kendrick v. Dellinger*, 117 N. Car. 491; *Wiggins v. Guthrie*, 101 N. Car. 661; *State v. Bailey*, 100 N. Car. 528; *Morgan v. Smith*, 77 N. Car. 37; *Horah v. Knox*, 87 N. Car. 483; *Gwaltney v. Scottish Carolina Timber Co.*, 115 N. Car. 579.

Ohio. — *Schryver v. Hawkes*, 22 Ohio St. 308; *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 294; *Jones v. State*, 20 Ohio 34; *Smith v. Pittsburg*, etc., R. Co., 23 Ohio St. 10; *Doll v. State*, 45 Ohio St. 452; *Wright v. Cincinnati St. R. Co.*, 9

Ohio Cir. Ct. Rep. 503; *Taft v. Wildman*, 15 Ohio 123; *Myer v. State*, 3 Ohio Dec. 198; *Jones v. State*, 20 Ohio 46; *Pennsylvania Co. v. Rossman*, 13 Ohio Cir. Ct. Rep. 111.

Oregon. — *Kearney v. Snodgrass*, 12 Oregon 317; *Schoellhamer v. Rometsch*, 26 Oregon 394.

Pennsylvania. — *Lilly v. Paschal*, 2 S. & R. (Pa.) 394; *Poorman v. Smith*, 2 S. & R. (Pa.) 464; *Kean v. M'Laughlin*, 2 S. & R. (Pa.) 469; *Carothers v. Dunning*, 3 S. & R. (Pa.) 373; *Fisher v. Larick*, 7 S. & R. (Pa.) 99; *Morris v. Travis*, 7 S. & R. (Pa.) 220; *Rahn v. McElrath*, 6 Watts (Pa.) 151; *Brittain v. Doylestown Bank*, 5 W. & S. (Pa.) 87; *Dennis v. Alexander*, 3 Pa. St. 50; *Fisher v. Filbert*, 6 Pa. St. 61; *Crail v. Crail*, 6 Pa. St. 480; *Burns v. Sutherland*, 7 Pa. St. 103; *Klein v. Franklin Ins. Co.*, 13 Pa. St. 247; *Holliday v. Rheem*, 18 Pa. St. 465; *Wertz v. May*, 21 Pa. St. 274; *Huber v. Wilson*, 23 Pa. St. 178; *Raush v. Miller*, 24 Pa. St. 277; *Storch v. Carr*, 28 Pa. St. 135; *Weamer v. Juart*, 29 Pa. St. 257; *Newman v. Edwards*, 34 Pa. St. 32; *Dean v. Herrold*, 37 Pa. St. 150; *Bain v. Doran*, 54 Pa. St. 124; *Walker v. Humbert*, 55 Pa. St. 407; *Davis v. Bigler*, 62 Pa. St. 242; *Cooper v. Altimus*, 62 Pa. St. 486; *Arthurs v. Bascom*, 28 Leg. Int. (Pa.) 284; *Neely v. Merrick*, 7 Phila. (Pa.) 170; *Mershon v. Hood*, 2 Pittsb. (Pa.) 207; *Dawson v. Robinson*, 3 W. N. C. (Pa.) 449; *Grantz v. Price*, 130 Pa. St. 415; *Serfass v. Dreisbach*, 141 Pa. St. 142; *Reeves v. Delaware*, etc., R. Co., 30 Pa. St. 454; *Philadelphia*, etc., R. Co. v. *Getz*, 113 Pa. St. 214; *Mitchell v. Mitchell*, 18 W. N. C. (Pa.) 439; *Menges v. Muncy Creek Tp.*, 1 Penny. (Pa.) 179; *Fox v. Fox*, 96 Pa. St. 60; *Sayer v. Schroeder*, 2 Penny. (Pa.) 79; *Ott v. Oyer*, 106 Pa. St. 7; *Pennsylvania R. Co. v. Page*, 21 W. N. C. (Pa.) 52; *Thomas v. Loose*, 114 Pa. St. 35; *Gheen v. Hepburn*, 1 Walk. (Pa.) 148; *Weaver v. Sandham*, 3 Del. (Pa.) 163; *Kurtz v. Haines*, (Pa. 1888) 15 Atl. Rep. 716; *Gowen v. Glaser*, (Pa. 1886) 3 Cent. Rep. 109; *Readdy v. Shamokin*, 137 Pa. St. 98; *Com. v. Zappe*, 153 Pa. St. 498; *Warden v. Philadelphia*, 167 Pa. St. 523; *Brinser v. Longenecker*, 169 Pa. St. 51; *Paterson v. Blaisdell*, 169 Pa. St. 636; *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244; *Wray v. Spence*, 145 Pa.

selves have raised on the trial. It is not bound to submit to the jury any particular proposition of law unless its attention is called

St. 399; *Trainor v. Philadelphia, etc.*, R. Co., 137 Pa. St. 148, 26 W. N. C. (Pa.) 441; *Cannell v. Smith*, 142 Pa. St. 25; *Stuckslager v. Neel*, 123 Pa. St. 53; *Curtin v. Gephart*, 175 Pa. St. 417; *Carr v. H. C. Frick Coke Co.*, 170 Pa. St. 62; *McMeen v. Com.*, 114 Pa. St. 300; *Garratt v. Jackson*, 20 Pa. St. 331; *Lancaster County Bank v. Albright*, 21 Pa. St. 228; *Dingee v. Jackson*, 23 Pa. St. 176; *Wood v. Figard*, 28 Pa. St. 403; *Levers v. Van Buskirk*, 4 Pa. St. 309; *Payne v. Noon*, (Pa. 1887) 8 Atl. Rep. 428; *Munderbach v. Lutz*, 14 S. & R. (Pa.) 220; *Mulvany v. Rosenberger*, 18 Pa. St. 203; *Leary v. Electric Traction Co.*, 180 Pa. St. 136.

South Carolina.—*Abrahams v. Kelly*, 2 S. Car. 237; *Madsen v. Phoenix F. Ins. Co.*, 1 S. Car. 29; *Ancrum v. Wehmann*, 15 S. Car. 122; *Fox v. Savannah, etc.*, R. Co., 4 S. Car. 543; *State v. Dodson*, 16 S. Car. 463; *Carter v. Columbia, etc.*, R. Co., 19 S. Car. 26; *Jordan v. Lang*, 22 S. Car. 164; *State v. Anderson*, 24 S. Car. 113; *Asbill v. Asbill*, 24 S. Car. 360; *Hume v. Providence Washington Ins. Co.*, 23 S. Car. 199; *Jones v. Spartanburg Herald Co.*, 44 S. Car. 526; *Massey v. Wallace*, 32; S. Car. 153; *State v. Robinson*, 40 S. Car. 553; *State v. Meyers*, 40 S. Car. 555; *Caveny v. Neely*, 43 S. Car. 70; *Dial v. Agnew*, 28 S. Car. 454; *State v. Sullivan*, 43 S. Car. 205; *Brown v. Foster*, 41 S. Car. 118; *Lagrone v. Timmerman*, 46 S. Car. 372; *State v. Smith*, 10 Rich. L. (S. Car.) 341; *Frick v. Wilson*, 36 S. Car. 65; *Du Rant v. Du Rant*, 36 S. Car. 49; *Sullivan v. Jones*, 14 S. Car. 365; *Congdon v. Morgan*, 13 S. Car. 198; *Hammitt v. Brown*, 44 S. Car. 397; *State v. Davenport*, 38 S. Car. 348; *Long v. Southern R. Co.*, (S. Car. 1897) 27 S. E. Rep. 531.

South Dakota.—*Frye v. Ferguson*, 6 S. Dak. 392.

Tennessee.—*Maxwell v. Hill*, 89 Tenn. 584; *Nashville, etc.*, R. Co. v. Jones, 9 Heisk. (Tenn.) 30; *Southern Oil Works v. Bickford*, 14 Lea (Tenn.) 651; *Watterson v. Watterson*, 1 Head (Tenn.) 6; *Mann v. Grove*, 4 Heisk. (Tenn.) 405; *Bridges v. Vick*, 2 Humph. (Tenn.) 516; *Souey v. State*, 13 Lea (Tenn.) 472.

Texas.—*Sanger v. Craddock*, (Tex. 1886) 2 S. W. Rep. 196; *O'Neil v. Wills Point Bank*, 67 Tex. 36; *Davidson v.*

State, 27 Tex. App. 262; *Rousel v. Stanger*, 73 Tex. 670; *Odom v. Woodward*, 74 Tex. 41; *Adams v. Crenshaw*, 74 Tex. 111; *Brotherton v. Weathersby*, 73 Tex. 471; *McKinney v. Nunn*, 82 Tex. 44; *Freiberg v. Elliott*, (Tex. 1888) 8 S. W. Rep. 322; *Pitkins v. Johnson*, (Tex. 1886) 2 S. W. Rep. 459; *Kidwell v. Carson*, 3 Tex. Civ. App. 327; *Gulf, etc.*, R. Co. v. Shearer, 1 Tex. Civ. App. 343; *Stephens v. Motl*, 82 Tex. 81; *Galveston, etc.*, R. Co. v. Arispe, 81 Tex. 517; *Texas, etc.*, R. Co. v. Crowder, 70 Tex. 222; *Half v. Curtis*, 68 Tex. 640; *Tucker v. Smith*, 68 Tex. 473; *Gallagher v. Bowie*, 66 Tex. 265; *Stude v. Saunders*, 2 Tex. Unrep. Cas. 122; *Gartner v. Butcher*, 1 Tex. Unrep. Cas. 43; *Beazley v. Denson*, 40 Tex. 434; *Cockrill v. Cox*, 65 Tex. 669; *International, etc.*, R. Co. v. Underwood, 64 Tex. 463; *St. Louis Southwestern R. Co. v. Byas*, 12 Tex. Civ. App. 657; *Clary v. Myers*, (Tex. Civ. App. 1897) 40 S. W. Rep. 633; *Galveston Oil Co. v. Malin*, 60 Tex. 645; *Austin, etc.*, R. Co. v. Beatty, 6 Tex. Civ. App. 650; *Schneider v. McCoulsky*, 6 Tex. Civ. App. 501; *Texas, etc.*, R. Co. v. Casey, 52 Tex. 112; *Endick v. Endick*, 61 Tex. 559; *Van Alstine v. Houston, etc.*, R. Co., 56 Tex. 374; *San Antonio St. R. Co. v. Helm*, 64 Tex. 147; *International, etc.*, R. Co. v. Leak, 64 Tex. 654; *Liverpool, etc.*, Ins. Co. v. Ende, 65 Tex. 118; *Chalk v. Foster*, 2 Tex. Unrep. Cas. 704; *Smyth v. Caswell*, 67 Tex. 567; *Currie v. Gunter*, 77 Tex. 490; *Texas, etc.*, R. Co. v. Brown, 78 Tex. 397; *Gulf, etc.*, R. Co. v. Jones, 1 Tex. Civ. App. 372; *Galveston, etc.*, R. Co. v. Daniels, 1 Tex. Civ. App. 695; *International, etc.*, R. Co. v. Smith, (Tex. 1886) 1 S. W. Rep. 565; *Reed v. Hardeman*, (Tex. 1887) 5 S. W. Rep. 505; *Myer v. Fruin*, (Tex. 1891) 16 S. W. Rep. 868; *Bluefields Banana Co. v. Wollfe*, (Tex. Civ. App. 1893) 22 S. W. Rep. 269; *McLane v. Elder*, (Tex. Civ. App. 1893) 23 S. W. Rep. 757; *Richardson v. Jankofsky*, (Tex. Civ. App. 1893) 23 S. W. Rep. 815; *Blum v. Jones*, (Tex. Civ. App. 1893) 23 S. W. Rep. 844; *Missouri, etc.*, R. Co. v. Pfluger, (Tex. Civ. App. 1894) 25 S. W. Rep. 792; *Templeton v. Green*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1073; *Johnson v. White*, (Tex. Civ. App. 1894) 27 S. W. Rep. 174; *Witt v. Repey*, 2 Tex. Unrep. Cas. 654; *Milmo*

to it. If counsel desire to bring any view of the law of the case before the jury they must make such view the sub-

v. Adams, 79 Tex. 526; *Texas, etc., R. Co. v. Beard*, 68 Tex. 265; *Texas, etc., R. Co. v. Gay*, 86 Tex. 571; *International, etc., R. Co. v. Philips*, 63 Tex. 590; *San Antonio, etc., R. Co. v. Kniffen*, 4 Tex. Civ. App. 484; *Missouri, etc., R. Co. v. Kirschoffer*, (Tex. Civ. App. 1893) 24 S. W. Rep. 577; *Mexican Nat. R. Co. v. Mussette*, 7 Tex. Civ. App. 169; *Heilbron v. State*, 2 Tex. App. 538; *Greenwood v. State*, 35 Tex. 587; *Texas, etc., R. Co. v. O'Donnell*, 58 Tex. 27; *Galveston, etc., R. Co. v. Edmunds*, (Tex. Civ. App. 1894) 26 S. W. Rep. 633; *Mills v. Haas*, (Tex. Civ. App. 1894) 27 S. W. Rep. 263; *Wisson v. Baird*, 1 Tex. App. Civ. Cas., § 710; *Johns v. Brown*, 1 Tex. App. Civ. Cas., § 1017; *Mayer v. Duke*, 72 Tex. 445; *Missouri Pac. R. Co. v. Peay*, 7 Tex. Civ. App. 400; *Kirby v. Estill*, 75 Tex. 484; *Gulf, etc., R. Co. v. Hodges*, 76 Tex. 90; *Habel v. State*, 28 Tex. App. 588; *Berry v. Texas, etc., R. Co.*, 72 Tex. 620; *Jenkins v. State*, 36 Tex. 638; *Ford v. McBryde*, 45 Tex. 499; *Hocker v. Day*, 80 Tex. 529; *Wilkinson v. Johnson*, 83 Tex. 392; *Gulf, etc., R. Co. v. Moody*, (Tex. Civ. App. 1895) 30 S. W. Rep. 574; *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 496; *Farquhar v. Dallas*, 20 Tex. 200; *Dewees v. Hudgeons*, 1 Tex. 197; *Linn v. Wright*, 18 Tex. 317; *Waxachie v. Connor*, (Tex. Civ. App. 1896) 35 S. W. Rep. 692; *Farris v. Bennett*, 26 Tex. 568; *Gillmore v. State*, 36 Tex. 334; *Powell v. Haley*, 28 Tex. 52; *Albright v. Penn*, 14 Tex. 290; *Peeler v. Guilkey*, 27 Tex. 355; *Berry v. Donley*, 26 Tex. 737; *Jones v. Thurmond*, 5 Tex. 318; *Metzger v. Wendler*, 35 Tex. 367; *Browning v. State*, 1 Tex. App. 96; *Foster v. State*, 1 Tex. App. 363; *Porter v. State*, 1 Tex. App. 479; *Goode v. State*, 2 Tex. App. 520; *Schell v. State*, 2 Tex. App. 31; *Forrest v. State*, 3 Tex. App. 232; *Work v. State*, 3 Tex. App. 234; *Lary v. Young*, (Tex. Civ. App. 1894) 27 S. W. Rep. 908; *Gulf, etc., R. Co. v. Perry*, (Tex. Civ. App. 1895) 30 S. W. Rep. 709; *International, etc., R. Co. v. Beasley*, 9 Tex. Civ. App. 569; *Mutual L. Ins. Co. v. Baker*, 10 Tex. Civ. App. 515; *Sigal v. Miller*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1012; *Hargadine v. Davis*, (Tex. Civ. App. 1894) 26 S. W. Rep. 424; *Willis v. Lockett*, (Tex. Civ. App. 1894) 26 S. W. Rep. 419; *Galveston, etc., R. Co. v. McMonigal*, (Tex. Civ. App. 1893) 25 S. W. Rep. 341; *Texas, etc., R. Co. v. Robinson*, 4 Tex. Civ. App. 121; *Bowden v. Crow*, 2 Tex. Civ. App. 591; *Jacobs v. Shannon*, 1 Tex. Civ. App. 395; *Mayer v. Walker*, 82 Tex. 222; *Shumard v. Johnson*, 66 Tex. 70; *Gulf, etc., R. Co. v. Box*, 81 Tex. 670; *Maverick v. Maury*, 79 Tex. 435; *Railway v. Kell*, (Tex. App. 1890) 16 S. W. Rep. 936; *Silberberg v. Pearson*, 75 Tex. 287; *Milburn Wagon Co. v. Kennedy*, 75 Tex. 212; *Hays v. Hays*, 66 Tex. 606; *Edwards v. Smith*, 71 Tex. 156; *Beeks v. Odom*, 70 Tex. 183; *Blackwell v. Hunnicutt*, 69 Tex. 273; *Freiberg v. Johnson*, 71 Tex. 558; *Neyland v. Bendy*, 69 Tex. 711; *Stephens v. Anderson*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1000; *Voorheis v. Waller*, (Tex. Civ. App. 1896) 35 S. W. Rep. 807; *Shilling v. Shilling*, (Tex. Civ. App. 1896) 35 S. W. Rep. 420; *Burkitt v. Twyman*, (Tex. Civ. App. 1896) 35 S. W. Rep. 421; *Texas Land, etc., Co. v. Watkins*, (Tex. Civ. App. 1896) 34 S. W. Rep. 996; *Missouri, etc., R. Co. v. Thompson*, 11 Tex. Civ. App. 658; *Missouri, etc., R. Co. v. Kirkland*, 11 Tex. Civ. App. 528; *Decatur Cotton Seed Oil Mill Co. v. Johnson*, (Tex. Civ. App. 1896) 35 S. W. Rep. 951; *Reichstetter v. Bostick*, (Tex. Civ. App. 1895) 33 S. W. Rep. 158; *Waul v. Hardie*, 17 Tex. 553; *Thompson v. Payne*, 21 Tex. 621; *Willis v. Bullitt*, 22 Tex. 330; *O'Connell v. State*, 18 Tex. 343; *Robinson v. Varnell*, 16 Tex. 382.

Utah. — *U. S. v. Peay*, 5 Utah 263.

Virginia. — *Crawford v. Morris*, 5 Gratt. (Va.) 90.

Washington. — *McQuillan v. Seattle*, 13 Wash. 600; *Box v. Kelso*, 5 Wash. 360.

West Virginia. — *State v. Donohoo*, 22 W. Va. 761; *State v. Robinson*, 20 W. Va. 714.

Wisconsin. — *Knoll v. State*, 55 Wis. 249; *Clifford v. State*, 58 Wis. 477; *Sullivan v. State*, 75 Wis. 650; *Winn v. State*, 82 Wis. 571; *Porath v. State*, 90 Wis. 537; *Schaefer v. Osterbrink*, 67 Wis. 495; *Stennett v. Bradley*, 70 Wis. 278; *Thrasher v. Postel*, 79 Wis. 503; *Lueck v. Heisler*, 87 Wis. 644; *Lela v. Domaske*, 48 Wis. 623; *Stuckey v. Fritsche*, 77 Wis. 329; *Hepler v. State*, 58 Wis. 49; *Roebke v. Andrews*, 26 Wis. 312; *Austin v. Moe*, 68 Wis. 458; *Tomlinson v. Wallace*, 16 Wis. 224;

ject of a request to charge, and failing in this they cannot assign error.¹

Charge Uncertain or Needing Limitation. — The rule making requests for instructions necessary is applicable even though the charge given is obscure or involved,² or indefinite, vague, and uncertain,³ or ambiguous,⁴ or although the charge given by the court needs limitation and modification.⁵

Tendency to Mislead. — The mere fact that an instruction given has a tendency to mislead is no ground for reversal in the absence of a request for fuller and more specific instructions. The cause will be reversed only when it is plain that the jury have been misled.⁶

(2) *Insufficiency of Saving Exceptions.* — The mere saving of

Stewart v. Ripon, 38 Wis. 584; *Newton v. Whitney*, 77 Wis. 515; *Weisenberg v. Appleton*, 26 Wis. 56; *Lachner v. Salomon*, 9 Wis. 129; *Chappell v. Cady*, 10 Wis. 111; *Owen v. Long*, (Wis. 1897) 72 N. W. Rep. 364.

Wyoming. — *Bunce v. McMahon*, (Wyoming 1895) 42 Pac. Rep. 23.

United States. — *Pennock v. Dialogue*, 2 Pet. (U. S.) 1; *Mutual L. Ins. Co. v. Snyder*, 93 U. S. 394; *Seabury v. Field*, 1 McAll. (U. S.) 60; *U. S. v. Fourteen Packages of Pins, Gilp.* (U. S.) 235; *U. S. Express Co. v. Kountze*, 8 Wall. (U. S.) 342; *Hudson v. Charleston, etc., R. Co.*, 55 Fed. Rep. 252; *Goldsbey v. U. S.*, 160 U. S. 70; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258; *Texas, etc., R. Co. v. Volk*, 151 U. S. 73; *Carter v. Carusi*, 112 U. S. 478; *Shutte v. Thompson*, 15 Wall. (U. S.) 151; *Hall v. Weare*, 92 U. S. 728.

1. *Pennock v. Dialogue*, 2 Pet. (U. S.) 1. See cases cited in preceding note.

Even where the court has stated that an instruction of a certain character will be given, it has been held that the party is not thereby excused from making a request for such instruction at the proper time. *Carleton v. State*, 43 Neb. 373; *International, etc., R. Co. v. Smith*, (Tex. 1886) 1 S. W. Rep. 565.

The Maintenance of This Rule is essential to a correct and careful administration of justice when the appellate court is limited to a consideration of exceptions in points of law, and cannot look into the whole case to see that substantial justice has been done between the parties. *Madsden v. Phoenix F. Ins. Co.*, 1 S. Car. 29.

2. *Pulliam v. Newberry*, 41 Ala. 168; *State v. Brinyea*, 5 Ala. 241; *Hughes v. Hughes*, 31 Ala. 519; *Jones v. Fort*, 36

Ala. 449; *Abraham v. Nunn*, 42 Ala. 57; *Fife v. Com.*, 29 Pa. St. 429.

A charge which is not abstract and which asserts a correct legal proposition, though it be objectionable for obscurity or calculated to mislead the jury, is not an error which will work a reversal. The party who supposes himself injured by it should ask a qualified or explanatory charge. *Jones v. Fort*, 36 Ala. 449.

3. *Sioux City, etc., R. Co. v. Brown*, 13 Neb. 317; *Warner v. Myrick*, 16 Minn. 91; *Page v. Sumpter*, 53 Wis. 652; *State v. Falk*, 46 Kan. 500; *People v. Olsen*, 80 Cal. 122; *Rousel v. Stanger*, 73 Tex. 670.

4. *Stratton v. Staples*, 59 Me. 94; *McQuillan v. Seattle*, 13 Wash. 600; *Schoellhamer v. Rometsch*, 26 Oregon 394; *McCormick v. Loudon*, 64 Minn. 509; *Schuylkill, etc., Imp. Co. v. Munson*, 14 Wall. (U. S.) 442.

Where a charge is merely ambiguous, a party dissatisfied with it ought to ask the court to make it clear before the jury leave the bar; he should not acquiesce in the correctness of the instruction and after the verdict is against him claim the benefit of the ambiguity as error. *Schuylkill, etc., Imp. Co. v. Munson*, 14 Wall. (U. S.) 442.

5. *State v. Phinney*, 42 Me. 384; *Malone v. State*, 77 Ga. 767; *Wells v. Morrison*, 91 Ind. 52; *State v. Tweedy*, 11 Iowa 350; *Gwinn v. Crawford*, 42 Iowa 67; *Bartlett v. Board of Education*, 59 Ill. 364; *Haymaker v. Adams*, 1 Mo. App. Rep. 409.

6. *Casky v. Haviland*, 13 Ala. 321; *Durrett v. State*, 62 Ala. 434; *Hodges v. Branch Bank*, 13 Ala. 455; *Towns v. State*, 111 Ala. 1; *Churchill v. Grone-wig*, 81 Iowa 449. *Contra*, *Peirson v. Duncan*, 162 Pa. St. 187; *International, etc., R. Co. v. Philips*, 63 Tex. 590.

exceptions to a charge on the ground that it is not sufficiently full and specific, without any request for further instructions, presents no error on appeal.¹

(3) *Applications of Rule.*—Applying the rule stated, it has been held that in the absence of a specific request, error cannot be assigned of the court's failure to charge on the measure of damages,² or that the instructions as to the measure of damages were not sufficient,³ or that the court failed to charge specially on probable cause,⁴ or to define its meaning,⁵ or that there was a failure to charge on the legal presumption of payment,⁶ or as to

1. *Georgia.* — Poullain v. Poullain, 76 Ga. 420.

Indiana. — Du Souchet v. Dutcher, 113 Ind. 249; Fitzgerald v. Goff, 99 Ind. 28.

Maine. — Emery v. Vinall, 26 Me. 295.

New York. — Dows v. Rush, 28 Barb. (N. Y.) 157.

Ohio. — Wright v. Cincinnati St. R. Co., 9 Ohio Cir. Ct. Rep. 503; Schryver v. Hawkes, 22 Ohio St. 308; Jones v. State, 20 Ohio 34.

South Carolina. — Caveny v. Neely, 43 S. Car. 70.

Texas. — Browning v. State, 1 Tex. App. 96; Foster v. State, 1 Tex. App. 363; Porter v. State, 1 Tex. App. 479; Goode v. State, 2 Tex. App. 520; Schell v. State, 2 Tex. App. 31; Forrest v. State, 3 Tex. App. 232; Work v. State, 3 Tex. App. 234.

Wisconsin. — Tomlinson v. Wallace, 16 Wis. 224; Newton v. Whitney, 77 Wis. 515.

2. Willey v. Norfolk Southern R. Co., 96 N. Car. 408; Gulf, etc., R. Co. v. Harmonson, (Tex. Civ. App. 1893) 22 S. W. Rep. 764; Maverick v. Maury, 79 Tex. 435; Galveston, etc., R. Co. v. Worthy, (Tex. Civ. App. 1894) 27 S. W. Rep. 426; Browning v. Wabash Western R. Co., (Mo. 1893) 24 S. W. Rep. 731; Harris v. Northern Indiana R. Co., 20 N. Y. 232; Texas, etc., R. Co. v. Cody, 30 U. S. App. 183.

Where the judge omits to instruct the jury to distinguish between certain damages for which the defendant is liable, and others arising from the same transaction for which he is not, the defendant should call attention to the distinction and request the judge to charge accordingly. Harris v. Northern Indiana R. Co., 20 N. Y. 232.

Matters in Mitigation of Damages. — Failure to instruct as to matters which may be considered in mitigation of

damages is no error in the absence of a request for such instruction. Kelley v. Kelley, 8 Ind. App. 606; Tetherow v. St. Joseph, etc., R. Co., 98 Mo. 74.

3. Freiberg v. Elliott, (Tex. 1888) 8 S. W. Rep. 322; Galveston Oil Co. v. Malin, 60 Tex. 645; Buzzell v. Emerton, 161 Mass. 176; Page v. Finley, 8 Oregon 45; Taylor v. Springfield, 61 Mo. App. 263; Clapp v. Minneapolis, etc., R. Co., 36 Minn. 6.

The failure of the trial court to instruct the jury that in assessing the damages of the plaintiff they should not take into consideration any aggravation of such damages which was caused by the neglect of the plaintiff to give timely attention to his injuries, amounts only to a nondirection, and no such instruction is requested. Taylor v. Springfield, 61 Mo. App. 263.

Interest on Damages. — The omission to charge for interest on damages recovered cannot be considered an error in the absence of a request for special instructions on that subject. Fink v. Gulf, etc., R. Co., (Tex. Civ. App. 1893) 23 S. W. Rep. 330.

4. Peterson v. Toner, 80 Mich. 350; Lueck v. Heisler, 87 Wis. 644.

Omission, in an action for malicious prosecution, to charge as to the meaning of "probable cause," and as to the application of the law to the facts on that point, is no error in the absence of a request for instructions on that point. Peterson v. Toner, 80 Mich. 350.

5. Peterson v. Toner, 80 Mich. 350.

6. Abrahams v. Kelly, 2 S. Car. 237. In this case the court said: "The second proposition is to the effect that the legal presumption of payment does not arise unless the full period of twenty years has elapsed. It does not appear that this proposition was brought to the notice of the circuit judge at the trial.

* * * The presiding judge is not

what constitutes a legal tenancy,¹ or on the law of limitations,² or on infancy as a defense,³ or on the effect of fraudulent intent,⁴ or on the law of estoppel,⁵ or on the legal effect of written instruments,⁶ or on the law of rescission of contracts,⁷ or on what constitutes notice,⁸ or on the effect of receipts in full,⁹ or on want of mental capacity,¹⁰ or on the law of contributory negligence,¹¹ or for a failure of the court to define negligence.¹² So error cannot be predicated of a failure to instruct the jury that they are judges of the law and the facts in a criminal case (in jurisdictions where such is the law),¹³ or on a failure to refer in the instructions to admissions of one of the parties in the suit given in evidence by the other,¹⁴ or on a failure to charge as to the legal effect of certain evidence,¹⁵ or that an instruction withdrawing erroneous evidence was not sufficiently explicit,¹⁶ or for a failure to direct the jury not to consider evidence improperly

bound to submit to the jury any particular proposition of law unless his attention is called to it, and a request made to that effect."

1. *Crail v. Crail*, 6 Pa. St. 480.

2. *Hocker v. Day*, 80 Tex. 529; *Rackley v. Fowlkes*, (Tex. Civ. App. 1896) 36 S. W. Rep. 75.

What Constitutes Adverse Possession Under Statutes of Limitation. — The mere fact that the court, in instructing the jury, did not specify all the elements constituting possession under the statute of limitations, is not error where no specific instruction on that point was requested. *Wood v. Figard*, 28 Pa. St. 403.

Where the charge on the issue of adverse possession was merely defective in not defining it, and in failing to state that the limitation would be interrupted by the bringing of suit, error cannot be assigned on such defects in the absence of a request for an instruction correcting the same. *Robinson v. McIver*, (Tex. Civ. App. 1893) 23 S. W. Rep. 915.

3. *Lynch v. Johnson*, (Mich. 1896) 67 N. W. Rep. 908.

4. *Rankin v. West*, 25 Mich. 195.

5. *Little v. Williams*, (Mich. 1895) 65 N. W. Rep. 568.

6. *Springfield State Nat. Bank v. Bennett*, 8 Ind. App. 679; *Barnett v. State*, 100 Ind. 175.

Limitation of Rule. — If the liability of the party is determined solely by the legal construction to be put upon the instrument, it would seem that a failure to charge as to its nature and effect would be error, whether any request for instructions on that subject

was made or not. *Badger v. Cumberland Bank*, 26 Me. 428.

7. *McPherson v. Wiswell*, 19 Neb. 117.

8. *Street v. Lynch*, 38 Ga. 631.

Constructive Notice. — Failure to charge on the law of constructive notice is no error in the absence of a request for a specific instruction on that point. *Brotherton v. Weathersby*, 73 Tex. 471.

9. *Howland v. Bartlett*, 86 Ga. 669.

10. *Berryman v. Schumaker*, 67 Tex. 312.

11. *Orr v. Garabold*, 85 Ga. 373; *Gulf, etc., R. Co. v. Pendery*, (Tex. Civ. App. 1894) 27 S. W. Rep. 213.

12. *Galveston, etc., R. Co. v. Waldo*, (Tex. Civ. App. 1894) 26 S. W. Rep. 1004; *Campbell v. Warner*, (Tex. Civ. App. 1894) 24 S. W. Rep. 703; *Galveston, etc., R. Co. v. Arispe*, 81 Tex. 517.

Ordinary Care. — Where a party desires a definition of "ordinary care," he should ask an instruction to that effect. *Quirk v. St. Louis United Elevator Co.*, 126 Mo. 279.

Reasonable Care and Diligence. — In an action for negligence, where the court uses the words "reasonable care and diligence" without giving any definition thereof, error cannot be assigned if the court is not requested to define those words. *Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340.

13. *Keyes v. State*, 122 Ind. 527.

14. *Hawkins v. Kermod*, 85 Ga. 116.

15. *Garrett v. Jackson*, 20 Pa. St. 331; *Lancaster County Bank v. Albright*, 21 Pa. St. 228; *Dingee v. Jackson*, 23 Pa. St. 176; *Hollywood v. Reed*, 55 Mich. 308. See also *Gheen v. Hepburn*, 1 Walk. (Pa.) 148.

16. *Moore v. Shields*, 121 Ind. 267.

admitted,¹ or for a failure to limit the effect of evidence admitted only for a certain purpose,² or for a failure to charge on particular testimony,³ or to state the testimony to the jury as fully as counsel may wish,⁴ or for failure to direct a verdict.⁵

(4) *Exceptions to Rule* — (a) *In General.* — Where it is apparent from the bill of exceptions that the court would have refused an instruction on a certain point if asked, error in not giving it will be reviewed, although no request therefor was made.⁶ And this is so where the cause of action is partially based on an illegal and immoral consideration,⁷ or is barred by some act of the plaintiff,⁸ or where the court passes over one point which is pre-

1. Russell v. Nall, 79 Tex. 664.

2. Nininger v. Knox, 8 Minn. 140; People v. Ah Yute, 53 Cal. 613; People v. Collins, 48 Cal. 277; People v. Gray, 66 Cal. 276; People v. Connelly, (Cal. 1894) 38 Pac. Rep. 42; Dow v. Merrill, 65 N. H. 107; Roebke v. Andrews, 26 Wis. 312; Boggess v. Boggess, 127 Mo. 305; Shumard v. Johnson, 66 Tex. 70; Walker v. Brown, 66 Tex. 556; Roos v. Lewyn, 5 Tex. Civ. App. 593; Mayer v. Walker, 82 Tex. 222; Stone v. Redman, 38 Me. 578.

Instances. — Statements made to the prisoner in respect to his connection with the alleged offense are admissible to show his conduct when the statements were made, but not as evidence of the truth of the statements; but the failure of the court to instruct the jury that those statements are not admissible for the latter purpose is not erroneous, unless the court was requested to give such instructions. People v. Ah Yute, 53 Cal. 613.

A failure of the court to instruct that a letter received in evidence was admissible for only one purpose is not error in the absence of a request for the instruction. Dow v. Merrill, 65 N. H. 107.

So where evidence is admissible as to one of several defendants only, it is the duty of the defendants against whom it is not admissible to request an instruction limiting the effect of such evidence to the defendant against whom alone it is admissible. Failure of the court to do so of its own motion is not assignable as error. Boggess v. Boggess, 127 Mo. 305.

3. Kurtz v. Haines, (Pa. 1888) 15 Atl. Rep. 716.

4. Boykin v. Perry, 4 Jones L. (N. Car.) 325; State v. Pritchett, 106 N. Car.

675; State v. Morris, 3 Hawks (N. Car.) 388; Sample v. Robb, 16 Pa. St. 305.

If evidence favorable to the defendant be omitted by the judge in recapitulating the testimony, it is the duty of the prisoner's counsel to call it to the attention of the court in order that it may be supplied; after verdict an exception grounded on such motion cannot be sustained. State v. Grady, 83 N. Car. 643; State v. Reynolds, 87 N. Car. 545; State v. Gould, 90 N. Car. 658.

5. Readdy v. Shamokin, 137 Pa. St. 98; Wray v. Spence, 145 Pa. St. 399; Cannell v. Smith, 142 Pa. St. 25; Carr v. H. C. Frick Coke Co., 170 Pa. St. 62; Pennsylvania R. Co. v. Page, 21 W. N. C. (Pa.) 52; Wiggins v. Guthrie, 101 N. Car. 661; Reading v. Metcalf, Hard. (Ky.) 544.

6. International, etc., R. Co. v. Underwood, 64 Tex. 463.

7. Viser v. Bertrand, 14 Ark. 267, in which it was held that the court should of its own motion instruct that there can be no recovery for so much of a claim as was based on an illegal and immoral consideration, "because, otherwise, if both parties to an immoral contract were content not to raise such objection, the courts might be compelled to adjudicate their alleged rights under contracts of that description which the law would neither enforce nor rescind."

8. Bunnell v. Greathead, 49 Barb. (N. Y.) 106, where it was held that on the trial of an action for crim. con. where it appeared that the husband connived at the intercourse, it was reversible error not to instruct that such connivance was a bar to the action, although no request so to do was made because the real question at issue had not been decided.

liminary to get at another which could not fairly arise until the first was disposed of.¹

(b) **Rule in Criminal Cases in Tennessee, Kentucky, and Oregon.** — In Tennessee the accused is entitled, in all criminal prosecutions; "to a full, fair, and plain statement by the court, to the jury, of the law applicable to his case,"² and an omission to charge fully, though not requested, is ground for new trial³ unless it is clear that no injury could have resulted therefrom.⁴ In Kentucky and Oregon it is the duty of the court in all criminal cases to instruct the jury fully upon all the law applicable to the case.⁵

(c) **Rule in Criminal Cases in California.** — In California, in criminal cases, the court must charge the jury fully with respect to such matters of law as are applicable to the case, and if the charge is sufficiently comprehensive in this regard it is not too general, particularly if more specific charges are not asked.⁶

(d) **Rule in Criminal Cases in Missouri and Texas.** — In Missouri the court is required by statute, in all criminal cases of whatever grade, to instruct on all questions of law arising in the case, essential to the information of the jury;⁷ and the absence of a request,⁸ or

1. *McNeill v. Massey*, 3 Hawks (N. Car.) 91.

2. *Lang v. State*, 16 Lea (Tenn.) 433; *Potter v. State*, 85 Tenn. 88.

In **Capital Cases.** — While it is true generally that a failure of the circuit judge to charge fully, when there is no essential point omitted, is not error unless it appear that further instructions were asked, still, upon the trial of a capital offense, it is error if the court, although expounding the law correctly as far as the charge goes, omits to instruct the jury fully and explicitly upon the legal effect of all the circumstances developed upon the trial which would tend to determine the character or degree of the prisoner's guilt. *Nelson v. State*, 2 Swan (Tenn.) 237.

Application of the Rule. — Where, on a trial for murder, there is proof that the deceased made threats against the defendant, some of which were communicated to him, and there is proof also tending to show that the deceased was a dangerous man and brought about the difficulty and was in fault at the time of the killing, the failure of the court to charge the law applicable to such threats is an error equivalent to the affirmative injury of an erroneous charge, and the judgment will be reversed although no further instructions were asked. *Potter v. State*, 85 Tenn. 88.

3. *Potter v. State*, 85 Tenn. 88.

4. *Good v. State*, 1 Lea (Tenn.) 293; *Honeycutt v. State*, 8 Baxt. (Tenn.) 372; *Butler v. State*, 7 Baxt. (Tenn.) 35. See also *Parham v. State*, 10 Lea (Tenn.) 502.

Self-defense. — An omission of a full charge, in a murder trial, on self-defense, which it is apparent could not have worked an injury, is not reversible error. *Honeycutt v. State*, 8 Baxt. (Tenn.) 372.

Grades of Offense. — Failure to charge on a lesser degree of the offense charged will not work a reversal if the defendant could not have been prejudiced. *Williams v. State*, 3 Heisk. (Tenn.) 379; *Ray v. State*, 3 Heisk. (Tenn.) 379, note. Even though the statute (Act of 1877, c. 85) makes it the duty of the court to charge the law as to each grade of the felony without request on the part of the defendant. *Good v. State*, 1 Lea (Tenn.) 293.

5. *Heilman v. Com.*, 84 Ky. 457; *State v. Cody*, 18 Oregon 523.

If the court fails to instruct fully, it is not necessary for the accused to except to the omission to do so in order to save his rights. *State v. Cody*, 18 Oregon 522.

6. *People v. Byrnes*, 30 Cal. 207.

7. Rev. Stat. 1889, § 4208.

8. *State v. Banks*, 73 Mo. 592; *State v. Brañstetter*, 65 Mo. 155; *State v. Stonum*, 62 Mo. 596; *State v. Taylor*, 118 Mo. 153; *State v. Palmer*, 88 Mo. 572.

the fact that a request is incorrectly drawn,¹ will not excuse the court from so doing.² It is the duty of the trial court, in a criminal case, to give correct instructions whether asked or not, and if it fails to do so the judgment will be reversed on appeal.³ The statute, however, is not violated by an omission to instruct on the effect of impeaching testimony,⁴ or on good character,⁵ or on the effect of extrajudicial confessions.⁶ "As to collateral matters, it is for the respective parties to ask such instructions as they may be entitled to."⁷

In Texas it is not necessary for the court, in misdemeanor cases, to instruct the jury in the absence of a request in writing.⁸ But in all cases of felony the statute makes it necessary for the court to deliver a written charge in which it shall "distinctly set forth the law applicable to the case,"⁹ and this the court is bound to do whether requested or not.¹⁰ The defendant is entitled to a distinct and affirmative, and not merely an implied or negative, presentation of the case.¹¹ It is the fundamental policy of the code, that the law and all the law applicable to the evidence in the case shall be presented to the jury,¹² and if the court gives such instructions as are applicable to every legitimate deduction the jury may draw from the evidence, the statutory requirement

1. *State v. Jones*, 61 Mo. 232; *State v. Branstetter*, 65 Mo. 155.

2. **Applications of the Rule—Alibi.**—Where there is any evidence tending to prove an alibi, it is the duty of the court to give instructions on that subject whether requested or not. *State v. Taylor*, 118 Mo. 153.

Different Degrees of Murder.—Where there was evidence which justified the giving of instructions on the different degrees of murder, the court should have given them whether requested or not. *State v. Palmer*, 88 Mo. 572.

3. *State v. Banks*, 73 Mo. 592.

4. *State v. Kilgore*, 70 Mo. 546.

5. *State v. Nickens*, 122 Mo. 607 (Sherwood, J., dissenting).

6. *State v. Brooks*, 92 Mo. 542, where it was held that a failure to instruct, on a murder trial, that no conviction could be had upon the extrajudicial confession of the defendant alone, but that the jury must look for corroboration as to the *corpus delicti* in the other evidence, is not erroneous and not a violation of the statute.

7. *State v. Kilgore*, 70 Mo. 546.

8. Texas Code Crim. Pro. (1895), art. 719; *Lucia v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 358; *Sparks v. State*, 23 Tex. App. 447; *Waechter v. State*, 34 Tex. Crim. Rep. 297; *David-*

son v. State, 27 Tex. App. 262; *Hurley v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 371; *Lyon v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 947; *Porter v. State*, 1 Tex. App. 477; *Heilbron v. State*, 2 Tex. App. 538.

Excluding Illegal Evidence.—It is the duty of counsel to request an instruction directing the jury to disregard illegal evidence, if he considers it prejudicial. *Hurley v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 371.

9. Texas Code Crim. Pro. (1895), art. 715.

10. *Maria v. State*, 28 Tex. 698; *Jenkins v. State*, 1 Tex. App. 349; *Villareal v. State*, 26 Tex. 107; *Fulcher v. State*, 41 Tex. 233; *Sanders v. State*, 41 Tex. 306; *Curry v. State*, 4 Tex. App. 574; *Robinson v. State*, 5 Tex. App. 519; *Miers v. State*, 34 Tex. Crim. Rep. 161; *Lister v. State*, 3 Tex. App. 18; *Wasson v. State*, 3 Tex. App. 474; *Barbee v. State*, 23 Tex. App. 199; *Moore v. State*, (Tex. Crim. App. 1896) 33 S. W. Rep. 980. Compare *Greenwood v. State*, 35 Tex. 590.

11. *Greta v. State*, 9 Tex. App. 434; *Jackson v. State*, 15 Tex. App. 84; *White v. State*, 18 Tex. App. 57.

12. *Reynolds v. State*, 8 Tex. App. 412; *Johnson v. State*, 27 Tex. 758; *Jobe v. State*, 1 Tex. App. 186.

is satisfied; ¹ more than that is not required. ² Exceptions, however, are necessary to save error in omitting to instruct on some necessary point unless it is apparent that the defendant might have been injured thereby. ³

c. RULE AS TO TOTAL NONDIRECTION — (1) Rule that Court Need Not Instruct at All Unless Requested. — There is considerable diversity of opinion as to whether a total failure to instruct is

1. Dawson v. State, 33 Tex. 491; Thrasher v. State, 3 Tex. App. 281; Noland v. State, 3 Tex. App. 598; Holden v. State, 1 Tex. App. 226; Bishop v. State, 43 Tex. 391.

2. Smith v. State, 7 Tex. App. 414.

Constituents of Offense. — On a trial for an assault with intent to commit rape, it is the duty of the court to define to the jury, in the charge, the constituents of the offense of rape; and a failure to do this will constitute ground for reversal. Fulcher v. State, 41 Tex. 233.

Self-defense. — The defendant is entitled to have the law of self-defense explained correctly to the jury, in all the phases to which it may be applicable to the evidence. Jackson v. State, 15 Tex. App. 84; Ashworth v. State, 19 Tex. App. 182; Guffee v. State, 8 Tex. App. 187; King v. State, 13 Tex. App. 277; Edwards v. State, 5 Tex. App. 593; North v. State, 12 Tex. App. 111; Sterling v. State, 15 Tex. App. 249; Foster v. State, 8 Tex. App. 248; Kemp v. State, 11 Tex. App. 174.

Lesser Grades of Crime. — A failure to define murder in the second degree, in a case where the jury, upon the evidence, might have found the defendant guilty of the lesser offense, is cause for reversal whether instructions on that point were asked or not. Sanders v. State, 41 Tex. 306. See also Villarreal v. State, 26 Tex. 107.

Facts to Rebut Presumption of Fraud. — Where, on the trial of one charged with theft, the testimony is of such a character as to require the court to inform the jury what facts would rebut the presumption of a fraudulent taking, an omission to give such instruction is material error and ground for reversal. Bishop v. State, 43 Tex. 390.

Limiting Effect of Evidence. — On a trial for theft, evidence of other offenses having been admitted, the cause will be reversed for a failure to charge that such evidence is admitted only for purposes of impeachment, whether there is any request or not.

Warren v. State, 33 Tex. Crim. Rep. 502. So on an indictment for burglary, where the defendant testified that he had been indicted for theft, it was the duty of the court to instruct that such evidence should be considered only as affecting his credibility. Sexton v. State, 33 Tex. Crim. Rep. 416.

Intent. — On a trial for assault, a charge is erroneous which authorizes a conviction without the finding of an intent on the part of the defendant committing the assault. Crawford v. State, 21 Tex. App. 454. But where the court has given a correct general charge as to the specific intent necessary to the commission of the crime, if additional instructions are desired on the effect of drunkenness upon his intent at the time of committing the assault, they must be requested. Bramlette v. State, 21 Tex. App. 611.

Insanity as a Defense. — Where insanity is set up as a defense and there is evidence tending to establish it, in failing to submit a direct, positive, and affirmative instruction upon insanity as a defense, and in failing to instruct the jury that "no act done in a state of insanity can be punished as an offense," the trial court fails to charge all the law of the case. Smith v. State, 19 Tex. App. 96.

Jury as Judges of Facts. — In a felony case the jury should always be instructed that they are the exclusive judges of the facts proved, and of the weight to be given to the testimony. Barbee v. State, 23 Tex. App. 199.

Circumstantial Evidence. — Failure to instruct the jury upon circumstantial evidence is not error when the state is not relying upon that character of evidence. It is only when the inculpatory evidence is exclusively circumstantial that such a charge is required. House v. State, 19 Tex. App. 227; Jack v. State, 20 Tex. App. 656.

3. Bell v. State, 17 Tex. App. 538; Gilly v. State, 15 Tex. App. 287. See also Pitts v. State, (Tex. Crim. App. 1894) 24 S. W. Rep. 896.

error in the absence of requests for instructions. In *North Carolina* and *Arizona* it has been said that even in criminal cases the court is not bound to give any instructions unless requested,¹ and it has been so held in *Wisconsin*.² In *New York*, *Texas*, *Ohio*, and *Maryland*, there are dicta in civil cases to the effect that the court need not give any instructions in the absence of a request therefor,³ and it has been so held in *Wisconsin*, *Virginia*, *Missouri*, and *Kentucky*.⁴

(2) *Rule that Court Must Not Give Any Instruction Unless Requested.* — In *Mississippi* the court cannot instruct the jury at all, in the absence of a request for instructions.⁵

(3) *Rule that Court Must Give Instructions Substantially Covering the Case, Whether Requested or Not.* — In a number of jurisdictions, however, a radically different view of the court's duty is taken.

In *Georgia*, *Iowa*, *Michigan*, and *Nebraska*, the rule seems to be well settled, in both civil and criminal cases, that the law of the case must be given to the jury to the extent of fully covering the substantial issues made by the evidence, whether requested or not;⁶

1. *State v. Morris*, 3 Hawks. (N. Car.) 388. But see later *North Carolina* cases cited *infra*, VI. 3. c. (3) *Rule that Court Must Give Instructions Substantially Covering the Case, Whether Requested or Not.* *Chung Sing v. U. S.*, (Arizona 1894) 36 Pac. Rep. 205.

2. *Hepler v. State*, 58 Wis. 49.

3. *Haupt v. Pohlmann*, 16 Abb. Pr. (N. Y. Super. Ct.) 306; *Berry v. Texas*, etc., R. Co., 72 Tex. 620; *Taft v. Wildman*, 15 Ohio 129; *Coates v. Sangston*, 5 Md. 121.

4. *Stuckey v. Fritsche*, 77 Wis. 329; *Womack v. Circle*, 29 Gratt. (Va.) 208; *Drury v. White*, 10 Mo. 354. See also dicta in *Nolan v. Johns*, 126 Mo. 166; *Farmer v. Farmer*, 129 Mo. 530; *Simonds v. Oliver*, 23 Mo. 32; *Clark v. Hammerle*, 27 Mo. 55; *Reading v. Metcalf*, Hard. (Ky.) 544; *Owings v. Trotter*, 1 Bibb (Ky.) 157. See also dictum in *Clarke v. Baker*, 7 J. J. Marsh. (Ky.) 194.

In *Stuckey v. Fritsche*, 77 Wis. 329, it was held that a statute requiring the judge, before giving his charge, to reduce it to writing, does not require the jury to be instructed in every case, but was only intended to provide for written instructions when any are given, and that if no specific exceptions are taken to a refusal to charge, and no request to charge is made, it will be assumed that the defendant assented to the submission of the case without instructions.

In *Womack v. Circle*, 29 Gratt. (Va.) 208, the jury were left totally uninstructed even though requests for instructions were made, the requests being erroneous, and it was held that this was not error.

In *Nolan v. Johns*, 126 Mo. 166, it is said: "It is now well-settled law in this state that trial courts in civil cases are not required to instruct unless requested so to do."

5. See *supra*, VI. 2. *Right of Court to Instruct on Its Own Motion.*

6. *Georgia.* — *Central R. Co. v. Harris*, 76 Ga. 502; *Freeman v. Hamilton*, 74 Ga. 318; *Keener v. State*, 18 Ga. 194. See also *Amos v. Amos*, 12 Ga. 100; *Formby v. Pryor*, 15 Ga. 258.

Iowa. — *Owen v. Owen*, 22 Iowa 270; *State v. Brainard*, 25 Iowa 572; *Upton v. Paxton*, 72 Iowa 299; *State v. Donahoe*, 78 Iowa 486; *State v. O'Hagan*, 38 Iowa 504. See also *State v. Clark*, 78 Iowa 492; *State v. Helvin*, 65 Iowa 289.

Michigan. — *Barton v. Gray*, 57 Mich. 622; *People v. Murray*, 72 Mich. 10.

Nebraska. — *York Park Bldg. Assoc. v. Barnes*, 39 Neb. 834; *Sandwich Mfg. Co. v. Shiley*, 15 Neb. 109; *Aultman v. Martin*, 37 Neb. 826; *Long v. State*, 23 Neb. 33; *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578; *German Nat. Bank v. Leonard*, 40 Neb. 676.

"An entire failure to instruct the jury in regard to the law of the case is

that it is the duty of the judge to see that every case is so presented to the jury that they have clear and intelligent notions of what they are to decide;¹ and that the omission to cover the case substantially must operate to reverse the judgment.²

In *Kansas* it is the duty of the court to instruct on questions of law which it deems applicable to the case as made by the pleadings and evidence, and if counsel thinks that other instructions are necessary he asks for them.³

In *Vermont* there are dicta to the effect that no requests are needed in any case for the purpose of protecting the parties' rights to instructions,⁴ and it has been held that the trial judge is bound to charge upon a point material to the decision of the case upon which there is evidence, and to charge correctly and fully, whether requested or not.⁵

In *North Carolina* the statute⁶ provides that it shall be the duty of the judge to "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." Under this statute it is the duty of the judge, in charging the jury, to eliminate the immaterial facts of the case, array the facts on both sides, and apply the principles of law to each, so that the jury may decide the case according to the "credibility of the witnesses and the weight of the evidence,"⁷ and "to state clearly

very different from an omission to instruct in regard to some particular phase of the case, or some particular question arising upon the trial. In the latter case a proper instruction upon the subject must be requested before error can be predicated upon a failure to instruct; but the law imposes upon the court the duty of stating to the jury the law applicable to the case, and an entire failure to state the law to the jury has the effect of submitting to the jury the determination not only of facts but of the law. In this case there was a total failure to instruct the jury upon the law of the case. This would not be prejudicially erroneous if it were apparent that the jury had come to a correct conclusion. *Sandwich Mfg. Co. v. Shiley*, 15 Neb. 109. But the error is prejudicial if it is apparent that the jury has taken a wrong view of the law. We must, therefore, examine the record in order to determine that question." *York Park Bldg. Assoc. v. Barnes*, 39 Neb. 834.

1. *Owen v. Owen*, 22 Iowa 270; *Barton v. Gray*, 57 Mich. 622; *People v. Murray*, 72 Mich. 10.

2. *Central R. Co. v. Harris*, 76 Ga. 502.

3. *Douglass v. Geiler*, 32 Kan. 499.

4. Taft, J., in *State v. Hopkins*, 56 Vt. 250; Veazey, J., in *Westmore v. Sheffield*, 56 Vt. 239; *Vaughan v. Porter*, 16 Vt. 266.

5. *Donahue v. Windsor County Mut. F. Ins. Co.*, 56 Vt. 374. Compare *State v. Hanlon*, 62 Vt. 334, which apparently lays down a different rule. In this case it was held not erroneous to neglect to charge that the jury might find the defendant guilty of a simple assault if they found him not guilty of rape, of which he was accused. The court said: "He made no request on this subject, and was not injured by a charge which allowed his acquittal unless the jury, on the evidence, found the higher crime charged established."

But Unless Request Be Made for a Certain Minuteness of Charge, if what the court does say to the jury is sound and proper in law in its application to the subject and case in hand, exception will not be sustained for failure of the court to say more unless by such failure the jury would be misled. *Walker v. Wait*, 50 Vt. 668.

6. *North Carolina Code Civ. Pro.*, § 413.

7. *State v. Jones*, 87 N. Car. 547; *State v. Dunlop*, 65 N. Car. 288; *State v. Rogers*, 93 N. Car. 523.

and distinctly the particular issues arising on the evidence and on which the jury are to pass, and to instruct them as to the law applicable to every state of facts which upon the evidence they may find to be the true one.”¹ It will not be sufficient merely to repeat testimony without stating the law applicable thereto,² nor will an instruction which deals in generalities and abstract propositions of law satisfy the requirements of the statute.³ Where, however, the facts of a case are few and intelligible, and there is no question of law to be charged by the court, it is unnecessary to recapitulate the facts, nor need the judge do so unless requested.⁴

In *Colorado* if, in an action triable by the court either with or without a jury, only certain specific questions of fact are required to be answered, subject to the power of the court to accept or reject the answers in whole or in part, the court need not instruct the jury.⁵

In *Washington*, under a statute requiring the court to instruct that

1. *State v. Rogers*, 93 N. Car. 523.

2. *State v. Boyle*, 104 N. Car. 800; *Bailey v. Poole*, 13 Ired. L. (N. Car.) 404. In this case the court said: “We do not consider a judge, under the Act of 1794, in delivering his charge on the facts of a case, to be a mere machine to detail to the jury the evidence just as it occurred, and in the order it occurred; but it is his duty, when he does charge upon it, to collate it and bring it together in one view on each side, with such remarks and illustrations as may properly direct their attention.”

3. *State v. Jones*, 87 N. Car. 547, in which it was said that merely reading headnotes of reported cases without making application of them to the facts of the case does not meet the requirements of the statute, and furnishes sufficient ground for new trial.

4. *Holly v. Holly*, 94 N. Car. 100. In this case it is said: “What is evidently meant by the ‘charge’ to the jury are the instructions given by the judge, upon the law applicable to the facts of the case; but when there is no principle of law involved, he cannot be said to charge the jury in the sense of the statute. * * * *Cui bono* recapitulate the facts of a case, where there is no principle of law depending upon them, and it is a pure question of fact, lying entirely within the province of the jury?”

“This statutory requirement, enacted first, substantially as it now appears, in 1796, has always since then

been regarded as imposing on the judges to whom it applied a very important, necessary, and, in many cases, difficult duty to discharge properly. The purpose of it is to have the law made intelligible to the jury—to have them on such trials instructed by the court clearly, explicitly, and correctly as to the law bearing upon the evidence submitted to them as a whole, and upon every material aspect of it, whether there be many or few such aspects; and likewise to have the court, while it carefully abstains from the slightest expression of any opinion as to the weight of the evidence, or that a fact is or is not fully or sufficiently proven, help the jury by a ‘plain and correct statement of the evidence to apprehend, comprehend, appreciate, apply, and determine’ the weight of it properly. Such statement of the evidence should embrace an explanation of its nature, purpose, bearings, and groupings, and freeing it from possible misapprehension occasioned by inadvertence, mistake, or the undue zeal of counsel in their arguments to the jury, or otherwise. The office of the judge in such connection is to help the jury to see the evidence bearing on the issue and the law arising thereon clearly, stripped of redundant, improper, and merely confusing matters and things, whether of evidence, argument of counsel, or law.” *State v. Boyle*, 104 N. Car. 818, wherein the opinion was delivered by Merrimon, C. J.

5. *Saint v. Guerrero*, 17 Colo. 448.

no inference shall be drawn from the defendant's failure to testify, it is reversible error not to do so.¹

4. Requirements Governing Request—*a.* AS TO MATTER OF SUBSTANCE. — It is the duty of each party to see that his own instructions are in themselves proper.²

Must Be Correct as Entirety. — To entitle a party to an instruction asked, it must be correct as an entirety.³ If not correct in all its

1. *State v. Myers*, 8 Wash. 177. (Scott and Hoyt, JJ., dissenting.)

2. *Danman v. Bloomer*, 11 Ill. 177.

3. *Alabama*. — *Long v. Rodgers*, 19 Ala. 321; *Baker v. State*, 49 Ala. 350; *Preston v. Dunham*, 52 Ala. 217; *Slater v. Carter*, 35 Ala. 679.

California. — *Marriner v. Dennison*, 78 Cal. 202; *Garlick v. Bowers*, 66 Cal. 122; *Thompson v. Paige*, 16 Cal. 77.

Connecticut. — *Marlborough v. Sisson*, 23 Conn. 54; *State v. Stanton*, 37 Conn. 423; *Charter v. Lane*, 62 Conn. 121; *Seeley v. Litchfield*, 49 Conn. 138.

Florida. — *Wooten v. State*, 24 Fla. 335.

Georgia. — *Atlanta v. Buchanan*, 76 Ga. 585.

Illinois. — *Denman v. Bloomer*, 11 Ill. 177.

Indiana. — *Goodwin v. State*, 96 Ind. 566; *Lawrenceburgh, etc., R. Co. v. Montgomery*, 7 Ind. 474; *Roots v. Tyner*, 10 Ind. 87; *McCammon v. Cunningham*, 108 Ind. 545; *Christian v. State*, 7 Ind. App. 417; *Over v. Schiffeling*, 102 Ind. 191; *Musgrave v. State*, 133 Ind. 297; *Howard County v. Legg*, 93 Ind. 523.

Kansas. — *Douglass v. Wolf*, 6 Kan. 88; *Mayberry v. Kelley*, 1 Kan. 116; *Kansas Ins. Co. v. Berry*, 8 Kan. 159; *State v. Cassady*, 12 Kan. 551; *Dickson v. Randal*, 19 Kan. 214.

Maine. — *Thomaston v. Warren*, 28 Me. 289; *Tibbetts v. Baker*, 32 Me. 25; *Bryant v. Crosby*, 40 Me. 9; *Grand Trunk R. Co. v. Latham*, 63 Me. 177; *Snow v. Penobscot River Ice Co.*, 77 Me. 55; *Tower v. Haslam*, 84 Me. 86; *State v. Cleaves*, 59 Me. 298.

Maryland. — *Whiteford v. Burckmyer*, 1 Gill (Md.) 127; *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. (Md.) 159; *Baltimore, etc., R. Co. v. Resley*, 7 Md. 297; *Doyle v. Baltimore County*, 12 Gill & J. (Md.) 484; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; *Kettlenell v. Peters*, 23 Md. 316; *Stewart v. Spedden*, 5 Md. 433; *Preston v. Leighton*, 6 Md. 88; *Garvey v. Wayson*, 42 Md. 178.

Nevada. — *State v. Anderson*, 4 Nev. 265.

New York. — *Doughty v. Hope*, 3 Den. (N. Y.) 594; *Newman v. Cordell*, 43 Barb. (N. Y.) 448; *Keller v. New York Cent. R. Co.*, 24 How. Pr. (N. Y. Ct. App.) 172; *Zabriskie v. Smith*, 13 N. Y. 332; *Cronk v. Canfield*, 31 Barb. (N. Y.) 171; *Haggart v. Morgan*, 5 N. Y. 422; *Magee v. Badger*, 30 Barb. (N. Y.) 246; *Jones v. Osgood*, 6 N. Y. 233; *Van Kirk v. Wilds*, 11 Barb. (N. Y.) 520; *Gardner v. Clark*, 17 Barb. (N. Y.) 538; *Halsey v. Rome, etc., R. Co.*, (Supreme Ct.) 12 N. Y. St. Rep. 319.

Ohio. — *Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 270; *Walker v. Devlin*, 2 Ohio St. 593; *Inglebright v. Hammond*, 19 Ohio 346; *French v. Milard*, 2 Ohio St. 44; *Eckels v. State*, 20 Ohio St. 515; *Cleveland, etc., R. Co. v. Sargent*, 19 Ohio St. 442.

Pennsylvania. — *Bishop v. Goodhart*, 135 Pa. St. 374.

South Carolina. — *Gunter v. Graniteville Mfg. Co.*, 15 S. Car. 454; *State v. Tarrant*, 24 S. Car. 593.

Tennessee. — *Sommers v. Mississippi, etc., R. Co.*, 7 Lea (Tenn.) 205; *Hills v. Goodyear*, 4 Lea (Tenn.) 233.

Texas. — *Hardy v. De Leon*, 5 Tex. 211; *Ratcliff v. Baird*, 14 Tex. 439; *Lanyon v. Edwards*, (Tex. Civ. App. 1894) 26 S. W. Rep. 524; *Dallas Consol. Traction R. Co. v. Hurley*, 10 Tex. Civ. App. 246; *Houston, etc., R. Co. v. Kelly*, (Tex. Civ. App. 1896) 34 S. W. Rep. 809; *Burnham v. Logan*, 88 Tex. 1.

Vermont. — *Underwood v. Hart*, 23 Vt. 120.

Wisconsin. — *Castello v. Landwehr*, 28 Wis. 522; *Mason v. H. Whitbeck Co.*, 35 Wis. 164; *Sterling v. Ripley*, 3 Chand. (Wis.) 166.

United States. — *Catts v. Phalen*, 2 How. (U. S.) 382; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *U. S. v. Hough*, 103 U. S. 71; *Violet v. Patton*, 5 Cranch (U. S.) 142; *Brooks v. Marbury*, 11 Wheat. (U. S.) 78; *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151;

parts, both as to law and facts, it may properly be refused,¹ although the court may at its option comply with the request so far as it is correct.²

Series of Propositions. — If the court is asked to charge a series of propositions presented in gross, any one or more of which is unsound, it may reject the whole.³ To save an error in the refusal to give a proper special charge, it should not be asked in the aggregate with other charges in any one of which there is anything objectionable.⁴ So if a single proposition presented requires any modification or amendment, the court may properly refuse to give it in charge.⁵

Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25; *Patterson v. Jenks*, 2 Pet. (U. S.) 216; *Elliott v. Peirsol*, 1 Pet. (U. S.) 328; *U. S. v. Bank of Metropolis*, 15 Pet. (U. S.) 377; *Haffin v. Mason*, 15 Wall. (U. S.) 671; *Scott v. Ratliffe*, 5 Pet. (U. S.) 81; *Winn v. Patterson*, 9 Pet. (U. S.) 663.

1. *Doughty v. Hope*, 3 Den. (N. Y.) 594; *Gardner v. Clark*, 17 Barb. (N. Y.) 538; *Newman v. Cordell*, 43 Barb. (N. Y.) 448; *Wright v. Paige*, 36 Barb. (N. Y.) 438; *State v. Cleaves*, 59 Me. 298; *Underwood v. Hart*, 23 Vt. 120; *Amsden v. Atwood*, 69 Vt. 527; *Oliver v. State*, 38 Fla. 46.

A party may group into one instruction as many and as complicated facts as he pleases to assume his testimony will prove, and may ask the court to instruct the jury on the legal result of that mass of facts, but if among the enumerated facts there are such as it is not competent for the jury to act on, he must fail in his application. *Whiteford v. Burckmyer*, 1 Gill (Md.) 127.

2. *Marlborough v. Sisson*, 23 Conn. 55.

3. *Alabama*. — *Eagle, etc., Mfg. Co. v. Gibson*, 62 Ala. 369; *Slater v. Carter*, 35 Ala. 679; *Price v. State*, 107 Ala. 161.

Arkansas. — *Hicks v. Maness*, 19 Ark. 701.

California. — *Williamson v. Tobey*, 86 Cal. 497; *Smith v. Richmond*, 19 Cal. 476.

Connecticut. — *Marlborough v. Sisson*, 23 Conn. 54.

Florida. — *Baker v. Chatfield*, 23 Fla. 540; *Metzger v. State*, 18 Fla. 481.

Georgia. — *Hunt v. Pond*, 67 Ga. 578.

Maine. — *Atkinson v. Snow*, 30 Me. 365.

Maryland. — *Blumhardt v. Rohr*, 70 Md. 328; *Marshall v. Haney*, 4 Md. 498.

Michigan. — *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Sword v. Keith*, 31 Mich. 247.

Minnesota. — *Castner v. The Steamboat Dr. Franklin*, 1 Minn. 73; *Bond v. Corbett*, 2 Minn. 248; *Mankato v. Meagher*, 17 Minn. 265; *Simmons v. St. Paul, etc., R. Co.*, 18 Minn. 184.

New Jersey. — *Consolidated Traction Co. v. Chenoweth*, 58 N. J. L. 416.

New York. — *Gutwillig v. Zuberbieber*, 41 Hun (N. Y.) 361; *Magee v. Badger*, 34 N. Y. 247; *Palmer v. Holland*, 51 N. Y. 416; *Sommer v. Oppenheim*, 19 Misc. Rep. (N. Y. Supreme Ct.) 605.

Ohio. — *Inglebright v. Hammond*, 19 Ohio 337; *Fuller v. Coats*, 18 Ohio St. 343.

Texas. — *Yarborough v. Weaver*, 6 Tex. Civ. App. 215; *Sabine, etc., R. Co. v. Ewing*, 1 Tex. Civ. App. 531; *Fordyce v. Yarborough*, 1 Tex. Civ. App. 260; *Burnham v. Logan*, 88 Tex. 1; *Riviere v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1074.

Vermont. — *Underwood v. Hart*, 23 Vt. 120.

United States. — *Mann Boudoir Car Co. v. Dupre*, 54 Fed. Rep. 646; *Johnston v. Jones*, 1 Black (U. S.) 209; *Harvey v. Tyler*, 2 Wall. (U. S.) 328; *Lincoln v. Claffin*, 7 Wall. (U. S.) 132; *Beaver v. Taylor*, 93 U. S. 46; *Worthington v. Mason*, 101 U. S. 149; *U. S. v. Hough*, 103 U. S. 71; *Springer v. U. S.*, 102 U. S. 586; *Beaver v. Taylor*, 93 U. S. 46; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *Eastern Transp. Line v. Hope*, 95 U. S. 297.

4. *Mann Boudoir Car Co. v. Dupre*, 54 Fed. Rep. 646.

5. *Godbold v. Blair*, 27 Ala. 592; *Johnson v. King*, 20 Ala. 270; *Parttridge v. Forsyth*, 29 Ala. 200; *Mitchell v. Charleston Light, etc., Co.*, 45 S. Car. 146; *Bagley v. Smith*, 10 N. Y.

Separating Request into Parts. — The court is not called upon to separate a request to charge into parts, charging such as are sound, and rejecting such as are unsound.¹

Qualification of Request. — Nor is the court bound to modify, limit, or qualify an instruction so as to remedy its defects and remove its infirmities.² It may refuse the request entirely, and leave the

489; *Carpenter v. Stilwell*, 11 N. Y. 61; *Keller v. New York Cent. R. Co.*, 2 Abb. App. Dec. (N. Y.) 480.

1. *Arkansas*. — *Stanton v. State*, 13 Ark. 317.

California. — *Williamson v. Tobey*, 86 Cal. 497; *Smith v. Richmond*, 19 Cal. 476.

Georgia. — *Urquhart v. Leverett*, 69 Ga. 92.

Kansas. — *Topeka v. Tuttle*, 5 Kan. 426.

Maryland. — *Doyle v. Baltimore County*, 12 Gill & J. (Md.) 484; *Gray v. Crook*, 12 Gill & J. (Md.) 236; *Budd v. Brooke*, 3 Gill (Md.) 198; *Birney v. New York, etc.*, Tel. Co., 18 Md. 341.

Minnesota. — *Castner v. The Steamboat Dr. Franklin*, 1 Minn. 73.

Mississippi. — *Doe v. King*, 3 How. (Miss.) 125; *Dickson v. Moody*, 2 Smed. & M. (Miss.) 17.

New York. — *Keller v. New York Cent. R. Co.*, 24 How. Pr. (N. Y. Ct. App.) 172; *Bagley v. Smith*, 10 N. Y. 489.

South Carolina. — *Gunter v. Graniteville Mfg. Co.*, 15 S. Car. 454; *Mitchell v. Charleston Light, etc., Co.*, 45 S. Car. 146; *Carter v. Columbia, etc., R. Co.*, 19 S. Car. 28.

Texas. — *Yarborough v. Weaver*, 6 Tex. Civ. App. 215; *Wells v. Barnett*, 7 Tex. 584; *Brownson v. Scanlon*, 59 Tex. 222; *Hamburg v. Wood*, 66 Tex. 168; *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 394; *Burnham v. Logan*, 88 Tex. 1; *Sabine, etc., R. Co. v. Ewing*, 1 Tex. Civ. App. 531; *Rosenthal v. Middlebrook*, 63 Tex. 333; *International, etc., R. Co. v. Neff*, (Tex. Civ. App. 1894) 26 S. W. Rep. 784; *Missouri Pac. R. Co. v. King*, 2 Tex. Civ. App. 122; *McWhirter v. Allen*, 1 Tex. Civ. App. 649. But see *Burnham v. Logan*, 88 Tex. 1, in which it was held error to refuse an instruction because one paragraph thereof was erroneous, where the erroneous part could be separated from that which was correct.

Virginia. — *Brooke v. Young*, 3 Rand. (Va.) 106.

Wisconsin. — *Stucke v. Milwaukee, etc., R. Co.*, 9 Wis. 202.

United States. — *Smith v. Carrington*, 4 Cranch (U. S.) 62.

In preparing instructions parties must take the risk of putting them in proper form for the court to act upon separately; and if two propositions be so united that the court must pass upon both at the same time, one being correct and the other not, the judge will not be required to reconstruct his charge so as to cull out that which ought to be given, but may refuse the entire charge as written. *Burnham v. Logan*, 88 Tex. 1.

It is improper to request the court to give the jury an opinion involving matter of fact; and when such a request is made the court is not bound to separate the law from the fact and instruct on the former. *Smith v. Carrington*, 4 Cranch (U. S.) 62.

2. *Alabama*. — *McWilliams v. Rodgers*, 56 Ala. 87; *Caldwell v. Parmer*, 56 Ala. 405; *Green v. State*, 59 Ala. 68; *Dotson v. State*, 62 Ala. 141; *Duvall v. State*, 63 Ala. 12; *Farrish v. State*, 63 Ala. 164; *City Nat. Bank v. Burns*, 68 Ala. 267; *Leach v. Bush*, 57 Ala. 145; *Swallow v. State*, 20 Ala. 30; *Rives v. M'Losky*, 5 Stew. & P. (Ala.) 330; *Carmichael v. Brooks*, 9 Port. (Ala.) 330; *Morrison v. Wright*, 7 Port. (Ala.) 67.

Georgia. — *Head v. Bridges*, 67 Ga. 227.

Illinois. — *Rolfe v. Rich*, 149 Ill. 436; *Ames, etc., Co. v. Stachurski*, 46 Ill. App. 310; *Vanlandingham v. Huston*, 9 Ill. 125.

Indiana. — *Over v. Schiffling*, 102 Ind. 194; *Goodwin v. State*, 96 Ind. 566; *Ricketts v. Harvey*, 106 Ind. 566; *Louisville, etc., R. Co. v. Shanks*, 132 Ind. 397; *Mosier v. Stoll*, 119 Ind. 252; *Rogers v. Leyden*, 127 Ind. 55; *Howlett v. Dilts*, 4 Ind. App. 29; *Kluse v. Sparks*, 10 Ind. App. 444; *Toops v. State*, 92 Ind. 16; *Goodwine v. State*, 5 Ind. App. 65.

Iowa. — *Tifield v. Adams*, 3 Iowa 487; *Keenan v. Missouri State Mut. Ins. Co.*, 12 Iowa 126; *Grimes v. Martin*, 10 Iowa 347; *Morrison v. Myers*, 11 Iowa 538.

Texas. — *Wells v. Barnett*, 7 Tex.

party to assume the hazard of its entire correctness.¹

Instruction Needing Explanation or Modification. — If the instruction is ambiguous,² or if it is involved and difficult of comprehension,³ or if it is too narrow,⁴ or too broad,⁵ or if for any other reason it should need explanation or modification to prevent its misleading or confusing the jury,⁶ or to make it applicable to the case,⁷ it may properly be refused.⁸

584; *Hardy v. De Leon*, 5 Tex. 211; *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382; *G. H. & S. A. R. Co. v. Schrader*, 1 Tex. App. Civ. Cas., § 1148; *Pfeuffer v. Wilderman*, 1 Tex. App. Civ. Cas., § 1171.

Virginia. — *Rosenbaums v. Weeden*, 18 Gratt. (Va.) 785; *Kincheloe v. Tracewells*, 11 Gratt. (Va.) 587.

West Virginia. — *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 371; *Henry v. Davis*, 7 W. Va. 715.

1. *Tifield v. Adams*, 3 Iowa 487; *Keenan v. Missouri State Mut. Ins. Co.*, 12 Iowa 126.

The court is never bound to regard written requests to charge unless they are couched in such terms as to be sound to the full extent. The fact that some sound law might be extracted from the request, or that in general terms they may be sound law with certain qualifications, is not enough; they must be wholly sound law and without any necessary qualification, or it will not be error to refuse them. *Vaughan v. Porter*, 16 Vt. 266.

2. *Partridge v. Forsyth*, 29 Ala. 200; *Rolston v. Langdon*, 26 Ala. 661; *Ross v. Ross*, 20 Ala. 105; *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. (Va.) 230.

3. *Whiteford v. Burckmyer*, 1 Gill (Md.) 127; *Stockton v. Frey*, 4 Gill (Md.) 406; *Levasser v. Washburn*, 11 Gratt. (Va.) 572; *Kincheolor v. Tracewells*, 11 Gratt. (Va.) 587; *Partridge v. Forsyth*, 29 Ala. 200; *Salomon v. State*, 28 Ala. 83.

4. *Roots v. Tyner*, 10 Ind. 87.

5. *Dempsey v. Reinsedler*, 22 Mo. App. 43; *Walker v. Gilbert*, 2 Daly (N. Y.) 80; *Hollywood v. People*, 3 Keyes (N. Y.) 55; *Wright v. Paige*, 3 Keyes (N. Y.) 581; *Brignoli v. Chicago*, etc., R. Co., 4 Daly (N. Y.) 182; *People v. Holmes*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 25; *Doe v. King*, 3 How (Miss.) 125. *Compare Amer v. Longstreth*, 10 Pa. St. 145.

If the request embraces a single view or idea which ought not to be presented it may be refused. *People v. Holmes*,

6 Park. Cr. Rep. (N. Y. Supreme Ct.) 25.

On the trial of an action for rent reserved in a lease, it appeared that the tenant's goods had been injured by rain leaking through the roof, and that the landlord had agreed to apply the tenant's damages on account of the rent as it fell due, which were to be ascertained by selling the damaged goods at auction. The defendant's counsel requested the judge to charge the jury that if they "found that the plaintiff had agreed to ascertain such damages by having the damaged goods sold at auction and deducting the amount so obtained from the invoice price of the same, and to apply the amount so ascertained in payment of the rent as it fell due, and that all that was done," then they should find a verdict for the defendants. It was held that the judge properly refused so to charge, as the proposition did not involve the necessity of the jury's finding a mutual agreement, but only an undertaking on the part of one party, which would be without consideration and void. *Walker v. Gilbert*, 2 Daly (N. Y.) 80.

6. *Swallow v. State*, 20 Ala. 30; *Dunlap v. Robinson*, 28 Ala. 100; *Adams v. State*, 52 Ala. 379; *McWilliams v. Rodgers*, 56 Ala. 87; *City Nat. Bank v. Burns*, 68 Ala. 267; *Godbold v. Blair*, 27 Ala. 592; *Hall v. Hunter*, 4 Greene (Iowa) 539.

7. *Condiff v. Kansas City*, etc., R. Co., 45 Kan. 256; *Douglass v. Wolf*, 6 Kan. 88; *Dickson v. Randal*, 19 Kan. 214; *Long v. Rodgers*, 19 Ala. 321.

8. *Virginia* — *West Virginia*. — In these two states the latest decisions are not in accord with the rule stated in the text. In *Baltimore*, etc., R. Co. v. *Polly*, 14 Gratt. (Va.) 447; *Ward v. Churn*, 18 Gratt. (Va.) 801, it was held that where an instruction is equivocal, being correct on one construction of it, the court should not refuse to give it, but should give it with such explanations as to insure its being understood by the jury. In *Rosenbaums v.*

b. AS TO PRESENTING REQUESTS IN WRITING. — In many and probably most jurisdictions, requests for instructions are required by statute to be made in writing, and if this is not done the court may properly refuse to give the request in charge.¹ In the absence of a statute or rule of court requiring a written request, an oral one, it is apprehended, would be sufficient; but in any event it is obviously the better practice to prefer requests in writing, in order to prevent mistakes and unnecessary disputes between the court and counsel as to what was requested.²

c. AS TO SIGNING AND NUMBERING REQUESTS. — See *infra*, VIII. *Marking "Given" or "Refused," Numbering and Signing Instructions.*

5. Time of Presenting Requests — *a.* DISCRETION OF COURT AS TO GRANTING REQUESTS NOT PRESENTED IN TIME. — It is thought proper to premise a discussion of this subject with the statement that it is generally within the sound discretion of the court to entertain a request to charge, although not made within the time required by some statutory provision or rule of court, or by the ordinary rules of practice independently of statute.³ The

Weeden, 18 Gratt. (Va.) 785, it was held that the court may modify an equivocal instruction. In *Carrico v. West Virginia Cent., etc., R. Co.*, 35 W. Va. 389, it was held that where an instruction is ambiguous and equivocal, and would not readily be comprehended by the average jurymen, the court should not refuse to grant it if by so doing the jury might be misled; but if it is correct upon one construction of it, the court should properly modify it so as to remove the ambiguity, and after such modification grant it; and in *Peshine v. Shepperson*, 17 Gratt. (Va.) 472, it was held that though an instruction is not fully correct, yet, if the general refusal of it may mislead the jury, the court should accompany the refusal with an explanation to the jury, and should give them an instruction stating the correct proposition.

1. *Alabama*. — *Bellinger v. State*, 92 Ala. 86; *Wyatts v. Bell*, 41 Ala. 222; *Tuttle v. Walker*, 69 Ala. 172.

Georgia. — *Central R. Co. v. Richards*, 62 Ga. 306; *Sims v. James*, 62 Ga. 260; *Williams v. Gunnels*, 66 Ga. 521; *Rogers v. Rogers*, 74 Ga. 598; *Fields v. Carlton*, 75 Ga. 556; *Wilson v. First Presb. Church*, 56 Ga. 554; *Jackson v. Jackson*, 47 Ga. 101.

Illinois. — *Harding v. Sandy*, 43 Ill. App. 442; *Hartford Deposit Co. v. Peterson*, 67 Ill. App. 142.

Kansas. — *Tays v. Carr*, 37 Kan. 141.

North Carolina. — *State v. Horton*, 100 N. Car. 443.

Tennessee. — *Williams v. Miller*, 2 Lea (Tenn.) 405.

Texas. — *Griffin v. Chadwick*, 44 Tex. 406; *Hobbs v. State*, 7 Tex. App. 117.

Motion to Direct a Verdict. — According to some decisions a motion to direct a verdict is not an instruction within the rule requiring requests for instructions to be made in writing. *Foley v. Chicago, etc., R. Co.*, 64 Iowa 644; *Young v. Burlington Wire Mattress Co.*, 79 Iowa 415; *Atchison, etc., R. Co. v. Myers*, 76 Fed. Rep. 443.

In *Illinois* the court takes the contrary view. *Swift v. Fue*, 167 Ill. 443; *Greenwich Ins. Co. v. Raab*, 11 Ill. App. 636. See also *Wenona Coal Co. v. Holmquist*, 152 Ill. 581.

Requests Written in Pencil. — If the requests are written in pencil this will be a sufficient compliance with the statutory requirement. *Harvey v. Tama County*, 53 Iowa 228.

Reading from Statutes. — A rule which requires requests to be made in writing is not complied with by reading from statutes and orally requesting that they be charged. *State v. Davis*, (S. Car. 1897) 27 S. E. Rep. 905.

2. *Williams v. Miller*, 2 Lea (Tenn.) 405.

3. *State v. Barbee*, 92 N. Car. 820; *Shober v. Wheeler*, 113 N. Car. 370;

remainder of this section will be devoted to a discussion of what the parties may demand of right — not what they may obtain through some act of grace on the part of the court.

b. VIEW THAT REQUESTS NOT PRESENTED IN TIME ARE PROPERLY REFUSED — General Rule. — In many jurisdictions the time of presenting requests for special instructions is prescribed by statutes, rules of court, or settled practice. In some of them these provisions are rigidly enforced, while in others, as will be seen in a subsequent section, much latitude is left to the trial judge in enforcing them. In interpreting these provisions the courts generally hold that a party who desires special instructions to be given to the jury, must deliver them to the court within the time fixed, and is not entitled to have any consideration given to his requests submitted later.¹

Bradley v. Drayton, 48 S. Car. 234; *Sanborn v. School Dist. No. 10*, 12 Minn. 17; *Ela v. Cockshott*, 119 Mass. 416; *State v. Bickel*, 7 Mo. App. 572; *Manhattan L. Ins. Co. v. Francisco*, 17 Wall. (U. S.) 680.

In *Cluskey v. St. Louis*, 50 Mo. 89, it was held irregular to grant requests for instructions after the close of the argument, but not a ground for reversal unless injury resulted.

1. *Indiana.* — *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544; *Noblesville v. Vestal*, 118 Ind. 80; *Benson v. State*, 119 Ind. 488; *Surber v. State*, 99 Ind. 73; *Grubb v. State*, 117 Ind. 280; *Foxwell v. State*, 63 Ind. 539; *Kackley v. Evansville, etc., R. Co.*, 7 Ind. App. 171; *German F. Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623; *Lake Erie, etc., R. Co. v. Brafford*, 15 Ind. App. 655; *Ransbottom v. State*, 144 Ind. 250; *Hege v. Newsom*, 96 Ind. 426; *Evansville, etc., R. Co. v. Crist*, 116 Ind. 446; *Terry v. Shively*, 93 Ind. 413; *Fitzgerald v. Jerolaman*, 10 Ind. 338.

Minnesota. — See *Sanborn v. School Dist. No. 10*, 12 Minn. 17; *Shartle v. Minneapolis*, 17 Minn. 308.

Missouri. — *Payne v. Payne*, 57 Mo. App. 130; *Cluskey v. St. Louis*, 50 Mo. 89. See also *Buck v. People's St. R., etc., Co.*, 108 Mo. 179, in which it was held that "the Circuit Court is not bound, merely because asked, to give an instruction presented for the first time, as here, during the closing argument to the jury." *Sherwood and Black, JJ.*, dissented, being of opinion that the court should give any pertinent and correct instruction, if requested, at any time before the cause finally goes to the jury.

North Carolina. — *Shober v. Wheeler*, 113 N. Car. 370; *State v. Rowe*, 98 N. Car. 629; *Davis v. Council*, 92 N. Car. 725; *State v. Barbee*, 92 N. Car. 820; *Ward v. Albemarle, etc., R. Co.*, 112 N. Car. 168; *Taylor v. Plummer*, 105⁹ N. Car. 56; *Marsh v. Richardson*, 106 N. Car. 539; *Powell v. Wilmington, etc., R. Co.*, 68 N. Car. 395; *Posey v. Patton*, 109 N. Car. 455; *Merrell v. Whitmire*, 110 N. Car. 367; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. Car. 472; *Luttrell v. Martin*, 112 N. Car. 593.

Pennsylvania. — *Kinley v. Hill*, 4 W. & S. (Pa.) 426.

Vermont. — *Stanton v. Bannister*, 2 Vt. 464; *Wetherby v. Foster*, 5 Vt. 136; *Vaughan v. Porter*, 16 Vt. 266; *Wilmot v. Howard*, 39 Vt. 447; *Cady v. Owen*, 34 Vt. 598.

United States. — *Manhattan L. Ins. Co. v. Francisco*, 17 Wall. (U. S.) 672; *U. S. v. Gibert*, 2 Sumn. (U. S.) 22.

Special Interrogatories to Jury. — As to time of submitting these, see article SPECIAL FINDINGS OF JURIES.

Time of Submitting Propositions of Law on Trial by Court. — The written propositions of law allowed by Illinois Rev. Stat. 1874, p. 780, § 42, to be submitted in trials by the court, to be marked "held" or "refused," should be submitted upon the trial, so that the court may consider them in arriving at its decision. A provision that they may be submitted "within such time as the court may require" does not authorize the court to give leave to submit such propositions after final decision. *Allman v. Lumsden*, 159 Ill. 219.

It is not competent to submit such propositions after final judgment.

Reason of Rule. — The rules stated are intended to guard the court and the opposite party against surprise. They do not deprive either party of a right to the opinion of the court upon any material proposition which he may desire to have presented to the jury. They merely regulate the exercise of that right.¹ The judge should be given a fair opportunity and sufficient time for the consideration of the propositions involved.²

Application of Rule. — Accordingly requests preferred during the course of the argument,³ or during the course of the general charge,⁴ or after the judge has concluded his general charge,⁵ or after the cause has gone to the jury,⁶ or after the jury have come in and disagreed,⁷ or after rendition of verdict,⁸ have, according to the varied practices, been held to come too late. So in some jurisdictions, where statutes or rules of court provide that requests shall be presented before the general charge is delivered, it is held that the court may disregard requests for instructions presented after delivery of the general charge.⁹

c. VIEW THAT IT MAY BECOME ERROR TO REFUSE INSTRUCTIONS NOT PRESENTED IN TIME. — As already intimated in a preceding section, courts in some jurisdictions having similar provisions as to the time of presenting requests, and courts in other jurisdictions where there are no statutory regulations or rules of court on this subject, are not disposed to adopt any hard and fast rule to cover any and all possible combinations of circumstances. Where instructions are required to be presented to the court within a certain time, either by statute, or by rule of court, or by rule settled by adjudicated cases in the jurisdiction where the cause arises, it will ordinarily not be erroneous to refuse

Kraemer v. Leister, 35 Ill. App. 391.
Or on a motion for new trial. Loudon v. Mullins, 52 Ill. App. 410.

1. Manhattan L. Ins. Co. v. Francisco, 17 Wall. (U. S.) 672.

2. Posey v. Patton, 109 N. Car. 455.

At the close of the evidence counsel may well be supposed to have determined upon the propositions of law upon which they intend to put their case, and these should then be presented to the judge to be considered by him. Powell v. Wilmington, etc., R. Co., 68 N. Car. 395.

3. Luttrell v. Martin, 112 N. Car. 593; Merrell v. Whitmire, 110 N. Car. 367; Ward v. Albemarle, etc., R. Co., 112 N. Car. 168; Evansville, etc., R. Co. v. Crist, 116 Ind. 446.

4. Marsh v. Richardson, 106 N. Car. 539.

5. Posey v. Patton, 109 N. Car. 455.

The court is not bound to notice a request made after argument and

charge, and this is especially true where the charge adopted the position taken by counsel on both sides, as, for instance, that certain testimony was to be treated as impeaching evidence only, and the request was to charge that it was evidence in chief, thus giving to it a new character and application. Wilmot v. Howard, 39 Vt. 447.

6. State v. Barbee, 92 N. Car. 820; State v. Rowe, 98 N. Car. 629.

7. Cady v. Owen, 34 Vt. 598.

8. Davis v. Council, 92 N. Car. 725.

9. Fitch v. Belding, 49 Conn. 469; Engeman v. State, 54 N. J. L. 247; Flint v. Nelson, 10 Utah 261.

But it is error to refuse an instruction asked during the opening and only argument, as being too late, under a statutory provision that "when the argument is concluded either party may request instructions." McCaleb v. Smith, 22 Iowa 242.

requests presented after the required time.¹ But it is considered that a too rigid and unbending enforcement of the rule will sometimes work injustice and that it should be relaxed when the ends of justice so require. If peculiar circumstances exist which would render the enforcement of the rule unjust to one of the parties it should be disregarded.² The form which the general charge itself takes may render further instructions necessary.³

1. *California*.— *People v. Demasters*, 105 Cal. 673; *Waldie v. Doll*, 29 Cal. 555; *People v. Sears*, 18 Cal. 635; *Anderson v. Parker*, 6 Cal. 197.

Where Cause Is Submitted Without Argument.— Where the cause is submitted without argument, a rule of court requiring requests for instructions to be made before the close of the argument is not applicable. *Tinney v. Endicott*, 5 Cal. 102.

Illinois.— *Prindeville v. People*, 42 Ill. 217. But see *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, where it was held that a request for an instruction should not be refused on the ground that it is not presented in time, in the absence of a written rule of court limiting the time for presenting requests. A rule could only exist in writing of record, as, when thus adopted, it has the force of law. The rule could not exist in the breast of the judge alone, but must be announced as a rule made of record, and is then applicable to all cases without discretion, unless an exercise of discretion is reserved in the rule.

Kansas.— *Foster v. Turner*, 31 Kan. 63.

Massachusetts.— *Phillips, Appellant*, 132 Mass. 233; *Ela v. Cockshott*, 119 Mass. 416; *Brick v. Bosworth*, 162 Mass. 338; *Leydecker v. Brintuall*, 158 Mass. 298.

Michigan.— *People v. Garbutt*, 17 Mich. 25; *Crippen v. Hope*, 38 Mich. 344.

Virginia.— *Williams v. Com.*, 85 Va. 607.

West Virginia.— *Sterling Organ Co. v. House*, 25 W. Va. 65; *Tully v. Despard*, 31 W. Va. 370; *Jarrett v. Stevens*, 36 W. Va. 445.

Contra — Kentucky.— In this state it has been held that a rule of court prohibiting a party from obtaining the instruction of the court to the jury on any matter of law relevant to the case, at any time before the jury retire from the box, ought not to be made, and if made ought not to be adhered to. *Bell v. North*, 4 Litt. (Ky.) 133.

2. *Sterling Organ Co. v. House*, 25 W. Va. 65; *Hill v. Wright*, 23 Ark. 530; *Pickett v. Wallace*, 54 Cal. 148; *People v. Demasters*, 105 Cal. 673; *People v. Keefer*, 18 Cal. 636; *State v. Hutchings*, 24 S. Car. 145.

"Rules of court are but a means to accomplish the ends of justice; 'and it is always in the power of the court to suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require it.'" *Pickett v. Wallace*, 54 Cal. 148.

Time of Submitting Instructions to Opposite Party — Relaxation of Rule.—

A rule of court which requires each counsel to submit such instructions as he intends to ask, to opposite counsel, before final argument, may in many cases work injustice. Instructions upon a material point in a criminal case should not be refused because not submitted to the opposing counsel before his final argument, in obedience to a rule of court requiring it. *People v. Williams*, 32 Cal. 280.

3. *People v. Garbutt*, 17 Mich. 25; *Pfeffle v. Second Ave. R. Co.*, 34 Hun (N. Y.) 499; *Chapman v. McCormick*, 86 N. Y. 479.

"The refusal to accept a request to charge is a fatal error in the conduct of a trial. *Chapman v. McCormick*, 86 N. Y. 479. It is true in that case no requests to charge had been presented prior to the commencement of the charge. It seems to be quite apparent that in principle it makes no difference whether the requests to charge are presented before or after the charge is delivered. In *Raymond v. Richmond*, the right to ask after the charge additional directions was recognized and sustained. See 88 N. Y. 671; and Ct. of App. Cas., N. Y. City Bar Assoc., vol. 16. While it is quite apparent that in many instances the charge itself may present an unforeseen view and create an unforeseen necessity which may demand from counsel, in the careful conduct of their case and in the

Omissions or Errors in General Charge.—In accordance with these views it has been held that if at the close of a charge it appears that the court has omitted to charge on some point which a fair and impartial presentation of the case requires to be placed before the jury, the court should entertain a request for a further instruction supplying the omission.¹ This is especially true where the court fails to lay down the familiar rules of law which it is always expected will be given in cases to which they are applicable.² So it may be that the court has instructed the jury erroneously, and in that case counsel should be permitted to bring the errors to the attention of the court and ask for proper instructions.³ But the request should be made immediately after the close of the charge.⁴

Interrupting Court or Counsel.—It is not proper to make requests for instruction during argument of counsel or while the court is

protection of their client's rights, the preparation of other requests, a necessity which may arise from the manner in which the previous requests had been disposed of or treated by the justice presiding at the trial, by his refusal to acquiesce in some and his treatment of others, and the expression of original views of the facts, circumstances, and law of the case; yet it is impossible for counsel to anticipate what disposition of their requests will be made, or what views may be expressed with regard to them or of the case itself. In any, and indeed in all, of these emergencies, the necessity for further requests may exist, and it is not only a right but the duty of counsel to make such requests in the discharge of his professional obligations, not only to his client but to the court, as the emergency demands. It is not to be denied that requests to charge very often assist in the administration of justice, either by preventing the enforcement of a rule not applicable to the case, or by preventing the omission of one which is controlling." *Pfeffle v. Second Ave. R. Co.*, 34 Hun (N.Y.) 499.

1. *Yeldell v. Shinholster*, 15 Ga. 189; *Brick v. Bosworth*, 162 Mass. 334; *Leydecker v. Brintnall*, 158 Mass. 298; *Crippen v. Hope*, 38 Mich. 344; *People v. Garbutt*, 17 Mich. 25; *Carey v. Chicago, etc., R. Co.*, 61 Wis. 71; *Allen v. Perry*, 56 Wis. 178.

2. *Crippen v. Hope*, 38 Mich. 344; *People v. Garbutt*, 17 Mich. 25; *Brick v. Bosworth*, 162 Mass. 338.

A party may well assume that, with-

out special request therefor, the judge will properly instruct the jury on the leading points of the case; and if at the close of the charge he observes that the judge has omitted to refer to important matters which ought to be explained to the jury, he may bring the errors to the attention of the court and ask for proper instructions. *Brick v. Bosworth*, 162 Mass. 338.

3. *Brick v. Bosworth*, 162 Mass. 338.

4. *Boone v. Miller*, 73 Tex. 557; *State v. Wilkinson*, 76 Me. 317; *Smart v. White*, 73 Me. 332; *Bradstreet v. Rich*, 74 Me. 303; *State v. Fenlason*, 78 Me. 495.

Illustrations.—Thus if the presiding justice, in his charge to the jury, errs in assuming a matter to be uncontroverted which a party intended to controvert, *State v. Fenlason*, 78 Me. 495; or misstates the testimony, *Smart v. White*, 73 Me. 332; or if he has expressed any opinion upon the testimony, or uses an illustration unfavorable to one of the parties, *State v. Wilkinson*, 76 Me. 317: the court's attention should be called to such error before the jury retire, so that proper corrections may be made.

"Good faith requires that a litigant who claims to be prejudiced by a ruling of the court shall at once call attention to the fact by apt language, to the end that if an error has been committed it may be corrected or put in shape for review on the spot; and that is why the rules of practice invoked by the plaintiff exist." *Smith v. Matthews*, 9 Misc. Rep. (Buffalo Super. Ct.) 431.

charging the jury.¹ Under such circumstances the instructions are properly refused.²

Want of Explicitness in General Charge. — A further charge may also become important in order to render more explicit that which has already been stated, but which has fallen short of being a clear exposition of the law on the point to which the court's remarks have been addressed.³

Points Overlooked in Hurry of Trial. — And it may happen in the hurry of the trial that counsel has overlooked some question on which the jury should be instructed. If, under these circumstances, an instruction proper in itself and necessary for the jury to consider in making up their verdict, is submitted at any time before the jury retire, it will be error for the court to refuse it,⁴ unless giving it at that time will unduly prejudice one of the parties.⁵

Improper Argument of Counsel. — And further instructions may be rendered necessary by the course of the argument of counsel.⁶

d. WHEN REQUESTS FOR INSTRUCTIONS CONSIDERED PREMATURE. — In *Michigan* it is held that the defendant cannot insist upon the court's instructing the jury until he has rested his case.⁷ Under the practice in *Tennessee* instructions must be presented after the general charge; if presented before, they may properly be refused.⁸ In *Georgia*, whether the framing of an instruction before the evidence is all in is erroneous, depends on whether the court charged the law of the case properly or not; if it did, the time when the charge was prepared was immaterial.⁹ In *Maryland* it is said to be a perfectly legitimate and usual practice to

1. *Yeldell v. Shinholster*, 15 Ga. 189.

2. **The Proper Course** is to wait until the charge is closed, to call the attention of the court to the point omitted and on which the charge should have been given. If this is done it is the duty of the court to instruct the jury in relation to the same. *Yeldell v. Shinholster*, 15 Ga. 189.

3. *People v. Garbutt*, 17 Mich. 25.

4. *Billings v. McCoy*, 5 Neb. 187; *Wills v. Tanner*, (Ky. 1892) 18 S. W. Rep. 166.

5. *Wills v. Tanner*, (Ky. 1892) 18 S. W. Rep. 166.

6. *People v. Keefer*, 18 Cal. 636; *Carey v. Chicago*, etc., R. Co., 61 Wis. 71; *Kellogg v. Lewis*, 28 Kan. 536; *Foster v. Turner*, 31 Kan. 63; *Wood v. State*, 64 Miss. 761.

But it has been said that instructions given after argument should not go beyond what is fairly authorized by the argument of counsel or by some other good reason. *Foster v. Turner*, 31 Kan. 58.

Illustration. — Thus if the counsel states the law incorrectly in his argument, it is proper to grant a request that the jury should be told that the law is not as stated. *Wood v. State*, 64 Miss. 776.

7. *Morley v. Liverpool*, etc., Ins. Co., 85 Mich. 210; *Clow v. Plummer*, 85 Mich. 550; *Denman v. Johnston*, 85 Mich. 387; *Hinchman v. Weeks*, 85 Mich. 535; *Kelso v. Woodruff*, 88 Mich. 299.

8. *Chesapeake*, etc., R. Co. v. *Foster*, 88 Tenn. 671; *Roller v. Bachman*, 5 Lea (Tenn.) 158; *Chesapeake*, etc., R. Co. v. *Hendricks*, 88 Tenn. 710; *Kansas City*, etc., R. Co. v. *Daughtry*, 88 Tenn. 721. See also *Williams v. Miller*, 2 Lea (Tenn.) 405.

Counsel should first hear the charge and then make such requests as in their opinion are right and proper in extension and modification. *Chesapeake*, etc., R. Co. v. *Hendricks*, 88 Tenn. 710.

9. *Giles v. State*, 66 Ga. 344.

offer a prayer involving the right of the plaintiff to recover on the case made by him, before any proof is offered by the defendant.¹

e. PRESENTING REQUESTS AFTER RETIREMENT OF JURY. — See *infra*, X. *Instructions After Retirement of Jury*.

f. TIME OF PRESENTING REQUESTS FOR WRITTEN CHARGE. — See *infra*, VII. *Written Instructions*.

6. Modification of Erroneous Requested Instructions — *a.* POWER OF COURT TO MODIFY. — As already stated in another section, the court is not bound to give in charge a request which is in any respect erroneous, but may refuse it altogether.² But it is not to be understood that the court cannot modify a request for instructions so as to make it conform to its own views of the law, for this it may do if it thinks proper.³

1. Howard *v.* Carpenter, 22 Md. 249.

2. See *supra*, VI. 4. *Requirements Governing Request*.

3. *California*. — People *v.* Williams, 32 Cal. 280; King *v.* Davis, 34 Cal. 100; People *v.* Hall, 94 Cal. 595; People *v.* Cotta, 49 Cal. 166; People *v.* Davis, 47 Cal. 93; People *v.* Dolan, 96 Cal. 315.

Colorado. — See King *v.* Rea, 13 Colo. 69.

Connecticut. — State *v.* Duffy, 66 Conn. 551; Marlborough *v.* Sisson, 23 Conn. 55.

Florida. — Evans *v.* Givens, 22 Fla. 476.

Georgia. — Lacewell *v.* State, 95 Ga. 346; Ray *v.* State, 15 Ga. 223; Doe *v.* Mattox, 37 Ga. 289.

Illinois. — Bannister *v.* Read, 6 Ill. 92; Doggett *v.* Ream, 5 Ill. App. 174; Cohen *v.* Schick, 6 Ill. App. 280; Meyer *v.* Mead, 83 Ill. 19; Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478; Kimmel *v.* People, 92 Ill. 457; Kreigh *v.* Sherman, 105 Ill. 49; Morgan *v.* Peet, 32 Ill. 281; Needham *v.* People, 98 Ill. 275; School Trustees *v.* McCormick, 41 Ill. 323; Kadgin *v.* Miller, 13 Ill. App. 474; Hovey *v.* Thompson, 37 Ill. 538; Culom *v.* Justice, 161 Ill. 372; Chicago *v.* Moore, 139 Ill. 201; Chicago, etc., R. Co. *v.* Perkins, 125 Ill. 127; Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248; Jansen *v.* Grimshaw, 125 Ill. 468; Howard F. & M. Ins. Co. *v.* Cornick, 24 Ill. 455; Wells *v.* Ipperson, 48 Ill. App. 580; Cary *v.* Norton, 35 Ill. App. 365; Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478.

Indiana. — Howard County *v.* Legg, 93 Ind. 523; Smith *v.* State, 117 Ind. 167; Sherfey *v.* Evansville, etc., R.

Co., 121 Ind. 427; Bishop *v.* Welch, 54 Ind. 527; Logansport *v.* Dykeman, 116 Ind. 15; Louisville, etc., R. Co. *v.* Hubbard, 116 Ind. 193; Lake Erie, etc., R. Co. *v.* Arnold, 8 Ind. App. 304; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 405; Musgrave *v.* State, 133 Ind. 297. See also Taylor *v.* Wootan, 1 Ind. App. 188.

Iowa. — State *v.* Gibbons, 10 Iowa 117; Abbott *v.* Striblen, 6 Iowa 191; Large *v.* Moore, 17 Iowa 258; Paukett *v.* Livermore, 5 Iowa 280; Moore *v.* Chicago, etc., R. Co., 65 Iowa 505.

Kansas. — Evans *v.* Lafeyth, 29 Kan. 736; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47; Reed *v.* Golden, 28 Kan. 632.

Maryland. — See Wellersburg, etc., Plank Road Co. *v.* Hoffman, 9 Md. 559.

Michigan. — American Merchants' Union Express Co. *v.* Phillips, 29 Mich. 515; Weimer *v.* Bunbury, 30 Mich. 201; Evans *v.* Montgomery, 95 Mich. 497.

Minnesota. — Dodge *v.* Rogers, 9 Minn. 223; Blackman *v.* Wheaton, 13 Minn. 326; Bartlett *v.* Hawley, 38 Minn. 308.

Mississippi. — Doss *v.* Jones, 5 How. (Miss.) 158; Shelby *v.* Offutt, 51 Miss. 128; White *v.* State, 52 Miss. 216; Archer *v.* Sinclair, 49 Miss. 343; Brown *v.* State, 72 Miss. 990; Wilson *v.* Kohlheim, 46 Miss. 346; Boles *v.* State, 9 Smed. & M. (Miss.) 284; Cicely *v.* State, 13 Smed. & M. (Miss.) 202.

Missouri. — Newby *v.* Chicago, etc., R. Co., 19 Mo. App. 391; O'Neil *v.* Capelle, 56 Mo. 296.

Nevada. — State *v.* Watkins, 11 Nev. 30; State *v.* Davis, 14 Nev. 407; Gerhauser *v.* North British, etc., Ins. Co.,

b. WHAT MODIFICATIONS PROPER. — Thus the court may make explanatory additions to instructions asked, such as may be necessary to present the case more fully and clearly to the jury, and to obviate the danger of misapprehension.¹ It may state further principles germane to the point of instruction,² and make such modifications as will relieve the request of any possible ambiguity.³ So it may strike out irrelevant⁴ or unnecessary matter,⁵ and may so qualify the requests as to make them conform strictly to the evidence and pleadings, that is, so qualify them that they will be neither too narrow nor too broad.⁶ The

7 Nev. 174; *State v. Smith*, 10 Nev. 123.

New York. — *Knickerbocker v. People*, 57 Barb. (N. Y.) 365; *Stewart v. New York, etc., R. Co.*, (Supreme Ct.) 8 N. Y. Supp. 19.

North Carolina. — *Overcash v. Kitchie*, 89 N. Car. 384; *Alexander v. Richmond, etc., R. Co.*, 112 N. Car. 720; *State v. Horton*, 100 N. Car. 443.

Ohio. — *Avery v. House*, 2 Ohio Cir. Ct. Rep. 246.

Oregon. — *Knapp v. King*, 6 Oregon 243.

Pennsylvania. — *Lloyd v. Carter*, 17 Pa. St. 216; *Columbia Bridge Co. v. Kline, Bright*, (Pa.) 320; *Amer v. Longstreth*, 10 Pa. St. 145; *Hays v. Paul*, 51 Pa. St. 134; *Killion v. Power*, 51 Pa. St. 429; *Yardly v. Cuthbertson*, 108 Pa. St. 395.

Vermont. — *Reed v. Newcomb*, 64 Vt. 49.

Washington. — *State v. Robinson*, 12 Wash. 491.

Modification After Agreement to Allow.

— The court may modify instructions asked even after indicating, according to the requirement of the statute, what instruction would be given and what refused. It would be improper to compel the court to give an erroneous instruction merely because it had acted incautiously in indicating what instructions would be given. *Logansport v. Dykeman*, 116 Ind. 15; *Louisville, etc., R. Co. v. Hubbard*, 116 Ind. 193.

1. *Green v. State*, 28 Miss. 687; *Vick v. Peck*, 4 How. (Miss.) 407; *Evans v. Lafeyth*, 29 Kan. 736; *Knapp v. King*, 6 Oregon 243; *State v. Davis*, 14 Nev. 407; *Cohen v. Schick*, 6 Ill. App. 280; *Meserve v. Delaney*, 105 Ill. 53; *Reinback v. Crabtree*, 77 Ill. 182; *People v. Dolan*, 96 Cal. 315; *Ray v. State*, 15 Ga. 223; *Overcash v. Kitchie*, 89 N. Car. 384; *State v. Duffy*, 66 Conn. 551.

Where instructions asked do not ex-

plain the law as fully as is necessary under the peculiar facts of the case, the court is authorized to explain more fully and distinctly to the jury the rules governing the points of law embraced in the case. *Green v. State*, 28 Miss. 687.

2. *People v. Davis*, 47 Cal. 93; *Meyer v. Mead*, 83 Ill. 19.

3. *State v. Watkins*, 11 Nev. 30; *Keen v. Monroe*, 75 Va. 424.

4. *People v. Cotta*, 49 Cal. 166.

5. *Sherfey v. Evansville, etc., R. Co.*, 121 Ind. 427, in which it was held that it is not error to omit the words, "there is little distinction, except in degree, in a positive intention to do wrong and an indifference whether wrong is done or not," from a requested instruction as to wilful negligence which is complete without them.

6. *Hays v. Paul*, 51 Pa. St. 134; *Killion v. Power*, 51 Pa. St. 429; *O'Neil v. Capelle*, 56 Mo. 296; *Newby v. Chicago, etc., R. Co.*, 19 Mo. App. 391; *Large v. Moore*, 17 Iowa 258; *Pleak v. Chambers*, 7 B. Mon. (Ky.) 569; *Terre Haute, etc., R. Co. v. Voelker*, 31 Ill. App. 314; *Kimmel v. People*, 92 Ill. 457; *Smith v. State*, 117 Ind. 167; *Evans v. Givens*, 22 Fla. 476; *Lacewell v. State*, 95 Ga. 346; *Shelby v. Offutt*, 51 Miss. 128.

Upon the trial of a person under an indictment for perjury, the jury were instructed that intention was the gist of the charge, and although they might believe that the accused had sworn falsely, yet, unless they believed from the evidence that he had so sworn wilfully, corruptly, and falsely, and not by mistake, they must acquit. The court added: "provided any such mistake appears in the evidence." It was held that as the object of the modification was to confine the jury to the evidence it could do no harm, and was

court may modify a request which is abstract, by making it applicable to the case;¹ and may qualify a request given, by the cautionary statement of an abstract principle of law,² or a direction to the jury to consider all the evidence in the case.³ But where an instruction as asked is correct, it is of course erroneous so to modify it as to mislead the jury.⁴ If, however, an instruction as asked is erroneous, the party requesting it cannot complain if the court gives an instruction which is the same in substance,⁵ and an erroneous qualification will not operate to reverse where no injury resulted.⁶

Erroneous Qualification of Erroneous Request. — Whether or not a party can complain of an erroneous qualification by the court of an erroneous instruction asked, does not seem to be well settled. There are rulings both ways on this point.⁷

c. HOW MODIFICATIONS MAY BE MADE. — Whether there are statutory provisions or not on this subject, the practice of modifying instructions asked, by interlineations or erasures, is very generally condemned; the proper method being to keep the original instructions and the alterations separate, so that they may be readily identified.⁸ Yet the court, in many cases, must have

unobjectionable. *Kimmell v. People*, 92 Ill. 457.

1. *Blackman v. Wheaton*, 13 Minn. 326; *Bannister v. Read*, 6 Ill. 92; *School Trustees v. McCormick*, 41 Ill. 323; *Gaudette v. Travis*, 11 Nev. 149.

2. *Yardley v. Cuthbertson*, 108 Pa. St. 395.

3. *Kreigh v. Sherman*, 105 Ill. 49.

4. *Orr v. Jason*, 1 Ill. App. 439; *Earlville v. Carter*, 2 Ill. App. 677; *Mississippi Mills v. Meyer*, 83 Tex. 436; *State v. Green*, 20 Iowa 424.

Adding Qualification Based on Matters Not in Evidence. — Where a charge is asked pertinent to the evidence it is error for the court to annex thereto a material qualification based upon a state of facts purely conjectural, and as to which no evidence had been given to the jury. *Bain v. Wilson*, 10 Ohio St. 14; *Walker v. Stetson*, 14 Ohio St. 89.

5. *Weller v. Hawes*, 49 Iowa 45; *Campbell v. Ormsby*, 65 Iowa 518.

Where the court, in modifying an instruction asked by the defendant, merely employed the language of the defendant, used in another instruction, the latter cannot complain although the instruction so given is erroneous. *Pierce v. Millay*, 62 Ill. 133.

6. *Moyers v. Columbus Banking, etc., Co.*, 64 Miss. 48; *King v. Rea*, 13 Colo. 78; *Watson v. Com.*, 87 Va. 608.

7. *Illinois*. — In *Morgan v. Peet*, 32

Ill. 281, it is said: "If the instruction, in its original form, was not the law, it was the duty of the court either to refuse it altogether, or so to amend it as to make it law, and then give it as amended. * * * An instruction given by the court, on its own motion, is quite as influential with the jury, or more so, than one given at the instance of either party, and in either case it must declare the law on the point made." So, in *O'Neil v. Orr*, 5 Ill. 1, it was held that a party is not precluded from objecting to an erroneous instruction which operates against him, merely because it is given as a qualification of an illegal instruction.

Mississippi. — No qualification of an erroneous instruction can be assigned as error by the party asking the instruction, even though the instruction as modified is erroneous. "One who is entitled to nothing cannot complain that he gets something, but less than he asks." *Louisville, etc., R. Co. v. Suddoth*, 70 Miss. 265.

8. *Campbell v. Fuller*, 25 Kan. 723; *Phillips v. Starr*, 26 Iowa 349; *Ham v. Wisconsin, etc., R. Co.*, 61 Iowa 720; *Exchange Bank v. Cooper*, 40 Mo. 169; *Bishop v. Welch*, 54 Ind. 527. See also *Doe v. Mattox*, 37 Ga. 289.

Statement that Qualifications Have Been Made. — Where instructions asked for were read, and then followed by

some discretion in the matter,¹ and whether or not there are statutes providing that instructions shall not be modified by interlineations or erasures, such a method of modification will not be ground to reverse if no harm resulted therefrom,² especially where no exception is saved.³

d. REVIEW ON APPEAL. — In order to bring before an appellate court a ruling modifying an instruction, it is necessary to show affirmatively in what respect the court modified it.⁴

7. Manner of Complying with Request Properly Framed — *a. RULE THAT INSTRUCTIONS ASKED MAY BE GIVEN IN COURT'S OWN LANGUAGE* — (1) *Statement of Rule.* — In the absence of a statute providing otherwise, it is a rule of almost universal application that the court is not bound to charge the jury in the exact language of the request, but may embody the principles of law covered thereby and essential to a correct determination of the case in language of its own choosing.⁵ The judge, in charging

others from the court, with the words prefixed, "qualification by the court," it was held that all those words should have been omitted; still the insertion of them was not so calculated to influence the verdict as to make it material error. *Manrose v. Parker*, 90 Ill. 581.

1. *Campbell v. Fuller*, 25 Kan. 723.

Thus a modification may be only in change of a word. *Campbell v. Fuller*, 25 Kan. 723.

2. *Daly v. Bernstein*, 6 N. Mex. 380; *Denver, etc., R. Co. v. Harris*, 3 N. Mex. 109 (under statutes forbidding modifications by erasures or interlineations); *Gerhauser v. North British, etc., Ins. Co.*, 7 Nev. 193; *Allison v. Hagan*, 12 Nev. 38; *Union R., etc., Co. v. Kallagher*, 114 Ill. 325 (apparently decided without reference to any statutory provision.)

Illustration. — Where an instruction was modified by rejecting a portion, and such rejection was indicated by passing through the rejected words a stroke of the pen, leaving them still legible, in which state the instruction was handed to the jury, it was held that unless the attention of the court had been called to the fact, and it had refused to allow the instruction to be rewritten, no complaint of the jury having been misled thereby could be entertained. *Gerhauser v. North British, etc., Ins. Co.*, 7 Nev. 174.

Modification by Cutting Off Portion of Sheet on Which Instruction Is Written. — Under the Wisconsin statute (Code, § 2785), providing that alterations or modifications shall not be by erasures

or interlineations, "but shall be well defined, and shall follow some such characterizing words as 'changed thus,' which words shall themselves indicate that the same was refused as demanded," modifications of instructions asked may be made by cutting off a part of the sheet on which the instruction is written. *Ham v. Wisconsin, etc., R. Co.*, 61 Iowa 720.

3. *Allison v. Hagan*, 12 Nev. 38; *Tracey v. State*, 46 Neb. 361 (under a statute forbidding modification by interlineations or erasures).

4. *Howard County v. Legg*, 93 Ind. 530; *Helms v. Wayne Agricultural Co.*, 73 Ind. 325; *Patterson v. Indianapolis, etc., Plank Road Co.*, 56 Ind. 20.

Presumptions on Appeal. — Where an instruction is refused by the court in the form asked, but, as the record shows, was given with an explanation, though it is not shown what the explanation was, it must be presumed that the court eliminated whatever was erroneous, and correctly applied the law to the case. *Clampitt v. Kerr*, 1 Utah 246.

5. *Alabama.* — *Ewing v. Sanford*, 21 Ala. 157; *Long v. Rodgers*, 19 Ala. 321 [*overruling Ivey v. Phifer*, 11 Ala. 535]; *Clealand v. Walker*, 11 Ala. 1059; *Maynard v. Johnson*, 4 Ala. 116; *Rives v. M'Losky*, 5 Stew. & P. (Ala.) 330; *Hinton v. Nelms*, 13 Ala. 222; *Cole v. Spann*, 13 Ala. 537; *Phillips v. Beene*, 16 Ala. 720; *Lyon v. Kent*, 45 Ala. 656; *Warren v. State*, 46 Ala. 549; *Milner v. Wilson*, 45 Ala. 478; *Richardson v.*

the jury, may exercise his discretion as to the form in which he expounds the law and comments on the case. His sole duty is

State, 54 Ala. 158. (These last four decisions were in cases where the requests for instructions were oral.) For the rule under the present statute requiring instructions asked in writing to be given in the terms asked, see next section.

Arkansas. — *Viser v. Bertrand*, 16 Ark. 296; *Sadler v. Sadler*, 16 Ark. 628; *Crisman v. McDonald*, 28 Ark. 8; *Barkman v. State*, 13 Ark. 706; *Metcalf v. Little Rock St. R. Co.*, (Ark. 1890) 13 S. W. Rep. 729; *Davis v. St. Louis, etc., R. Co.*, 53 Ark. 129.

California. — *Boyce v. California Stage Co.*, 25 Cal. 460 [*disapproving* *Russel v. Amador*, 3 Cal. 400; *Conrad v. Lindley*, 2 Cal. 174; *Jamson v. Quivey*, 5 Cal. 490]; *People v. Dodge*, 30 Cal. 448; *People v. Williams*, 17 Cal. 142; *O'Rourke v. Vennekohl*, 104 Cal. 254.

Colorado. — *Martin v. Hazzard Powder Co.*, 2 Colo. 596; *Walling v. Warren*, 2 Colo. 434; *Jenkins v. Tynon*, 1 Colo. App. 133.

Connecticut. — *Livingston's Appeal*, 63 Conn. 68.

Florida. — *Nikels v. Mooring*, 16 Fla. 76.

Georgia. — *Robinson v. State*, 82 Ga. 535; *McConnell v. State*, 67 Ga. 633; *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539; *Durham v. State*, 70 Ga. 264; *Williamson v. Nabers*, 14 Ga. 286; *Long v. State*, 12 Ga. 293; *Freeman v. Coleman*, 88 Ga. 421.

Illinois. — *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329; *Bromley v. Goodwin*, 95 Ill. 118; *Hays v. Borders*, 6 Ill. 46; *Hill v. Parsons*, 110 Ill. 107; *Chicago, etc., R. Co. v. Pillsbury*, 123 Ill. 9; *Alexander v. Mandeville*, 33 Ill. App. 589; *Hanchett v. Kimbark*, 118 Ill. 121; *Chicago v. Moore*, 40 Ill. App. 332; *Bland v. People*, 4 Ill. 364; *People's F. Ins. Co. v. Pulver*, 127 Ill. 246; *Pennsylvania Co. v. Rudel*, 100 Ill. 603; *Fairbury v. Rogers*, 98 Ill. 554; *Chicago, etc., R. Co. v. Dickson*, 88 Ill. 431; *Chicago, etc., R. Co. v. Bingenheimer*, 116 Ill. 226; *Chicago, etc., R. Co. v. Avery*, 109 Ill. 322.

Indiana. — *White v. Gregory*, 126 Ind. 95; *Lafayette, etc., R. Co. v. Murdock*, 68 Ind. 137.

Iowa. — *State v. Gibbons*, 10 Iowa 117; *Bixby v. Carskaddon*, 70 Iowa 726; *Larsh v. Des Moines*, 74 Iowa 512;

Galpin v. Wilson, 40 Iowa 90; *National State Bank v. Delahye*, 82 Iowa 34; *Norris v. Kipp*, 74 Iowa 444 *State v. Stanley*, 33 Iowa 526; *Smit v. Sioux City, etc., R. Co.*, 38 Iowa 173 *Rusch v. Davenport*, 6 Iowa 443; *Abbott v. Striblen*, 6 Iowa 191; *Paukett v. Livermore*, 5 Iowa 277; *Moore v. Chicago, etc., R. Co.*, 65 Iowa 505.

Kansas. — *Rice v. State*, 3 Kan. 152; *Chicago, etc., R. Co. v. Brunson*, 43 Kan. 371; *State v. Tatlow*, 34 Kan. 80; *Fullenwider v. Ewing*, 25 Kan. 69; *State v. Groning*, 33 Kan. 18; *Missouri Pac. R. Co. v. Cassity*, 44 Kan. 207.

Kentucky. — *Clarke v. Baker*, 7 J. J. Marsh. (Ky.) 197; *Jackson v. Com.*, (Ky. 1896) 34 S. W. Rep. 14.

Louisiana. — *State v. Carr*, 25 La. Ann. 407; *State v. Miller*, 41 La. Ann. 677; *State v. Wright*, 41 La. Ann. 605; *State v. Durr*, 39 La. Ann. 751; *State v. St. Geme*, 31 La. Ann. 302; *State v. Porter*, 35 La. Ann. 1159.

Maine. — *State v. Reed*, 62 Me. 129; *State v. Barnes*, 29 Me. 561; *Naples v. Raymond*, 72 Me. 213; *Foye v. Southard*, 64 Me. 389; *Hovey v. Hobson*, 55 Me. 256; *State v. Knight*, 43 Me. 11.

Maryland. — *Mutual Safety Ins. Co. v. Cohen*, 3 Gill (Md.) 459; *Baltimore v. Pendleton*, 15 Md. 12; *New York L. Ins. Co. v. Flack*, 3 Md. 341; *Key v. Dent*, 6 Md. 142; *Hall v. Hall*, 6 Gill & J. (Md.) 386; *Keener v. Harrod*, 2 Md. 63; *Coates v. Sangston*, 5 Md. 121; *Higgins v. Carlton*, 28 Md. 115; *Philadelphia, etc., R. Co. v. Harper*, 29 Md. 336; *Pettigrew v. Barnum*, 11 Md. 434; *Baltimore, etc., R. Co. v. Worthington*, 21 Md. 281; *Davis v. Furlow*, 27 Md. 546; *Snively v. Fahnestock*, 18 Md. 391; *Smith v. Wood*, 31 Md. 300; *Kershner v. Kershner*, 36 Md. 334.

Massachusetts. — *Norwood v. Somerville*, 159 Mass. 105; *Com. v. Mullen*, 150 Mass. 400; *Thurston v. Perry*, 130 Mass. 240; *Howes v. Grush*, 131 Mass. 207; *Randall v. Chase*, 133 Mass. 210; *Com. v. Costley*, 118 Mass. 1; *Com. v. Cobb*, 120 Mass. 356; *McMahon v. O'Connor*, 137 Mass. 216; *Com. v. Farrell*, 160 Mass. 525; *Com. v. Tuttle*, 12 Cush. (Mass.) 502; *Com. v. Moore*, 157 Mass. 324.

Michigan. — *People v. Weaver*, (Mich. 1896) 66 N. W. Rep. 567; *Fisher v. People*, 20 Mich. 135; *Champlain v. Detroit Stamping Co.*, 68 Mich. 238;

to give such instructions to the jury in point of law as clearly arise upon the evidence, and are proper for the consideration of

Babbitt v. Bumpus, 73 Mich. 331; *Moore v. Kalamazoo*, (Mich. 1896) 66 N. W. Rep. 1039; *Crane Lumber Co. v. Otter Creek Lumber Co.*, 79 Mich. 307; *Lewis v. Rice*, 61 Mich. 97; *Fowler v. Hoffman*, 31 Mich. 215; *Fraser v. Jennison*, 42 Mich. 206; *Pound v. Port Huron*, etc., R. Co., 54 Mich. 13; *Kendrick v. Towle*, 60 Mich. 363; *Josselyn v. McAllister*, 22 Mich. 300; *Mynning v. Detroit*, etc., R. Co., 59 Mich. 258; *Ulrich v. People*, 39 Mich. 245; *Campau v. Dubois*, 39 Mich. 274; *Sword v. Keith*, 31 Mich. 247; *People v. Hare*, 57 Mich. 506; *Campbell v. People*, 34 Mich. 351; *King's Estate*, 94 Mich. 411; *People v. Parsons*, 105 Mich. 177.

Minnesota. — *State v. McCartney*, 17 Minn. 76 [*disapproving dictum in Selden v. Bank of Commerce*, 3 Minn. 166]; *Dodge v. Rogers*, 9 Minn. 223; *Chandler v. De Graff*, 25 Minn. 88; *State v. Mims*, 26 Minn. 183. See also *Stearns v. Johnson*, 17 Minn. 142; *Smith v. St. Paul*, etc., R. Co., 51 Minn. 86.

Mississippi. — *Scott v. State*, 56 Miss. 287; *Boles v. State*, 9 Smed. & M. (Miss.) 284; *Green v. State*, 28 Miss. 688; *Mask v. State*, 36 Miss. 77; *Wilson v. Kohlheim*, 46 Miss. 346; *Arch v. Sinclair*, 49 Miss. 343; *Evans v. State*, 44 Miss. 762; *George v. State*, 39 Miss. 570.

Missouri. — *Mitchell v. Plattsburg*, 33 Mo. App. 555; *State v. Jones*, 61 Mo. 232; *State v. Ott*, 49 Mo. 326; *Herman v. Shotwell*, 49 Mo. 423; *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332; *Smith v. Eno*, 15 Mo. App. 576; *Coleman v. Roberts*, 1 Mo. 97; *State v. St. Louis Brokerage Co.*, 85 Mo. 411; *Taylor v. Missouri Pac. R. Co.*, (Mo. 1891) 16 S. W. Rep. 206. *Compare Exchange Bank v. Cooper*, 40 Mo. 169; *Meyer v. Pacific R. Co.*, 40 Mo. 151.

Nebraska. — *Lau v. W. B. Grimes Dry Goods Co.*, 38 Neb. 215.

Nevada. — *State v. Davis*, 14 Nev. 407.

New Hampshire. — *Clark v. Wood*, 34 N. H. 447; *Whitman v. Morey*, 63 N. H. 458; *Walker v. Walker*, 64 N. H. 55; *Welch v. Adams*, 63 N. H. 352; *Walcott v. Keith*, 22 N. H. 196; *Tucker v. Peaslee*, 36 N. H. 167; *Hardy v. Keene*, 54 N. H. 449; *Rublee v. Belmont*, 62 N. H. 365.

New Jersey. — *Fath v. Thompson*, 58

N. J. L. 180; *Gardner v. State*, 55 N. J. L. 17.

New York. — *Sherman v. Wakeman*, 11 Barb. (N. Y.) 262; *Williams v. Birch*, 6 Bosw. (N. Y.) 299; *Fay v. O'Neill*, 36 N. Y. 11; *First Baptist Church v. Brooklyn F. Ins. Co.*, 23 How. Pr. (N. Y. Supreme Ct.) 448; *Carroll v. Tucker*, 6 Misc. Rep. (N. Y. City Ct.) 613, 56 N. Y. St. Rep. 521; *Morehouse v. Yeager*, 71 N. Y. 594; *People v. Williams*, 92 Hun (N. Y.) 354; *Bulkeley v. Keteltas*, 4 Sandf. (N. Y.) 450.

North Carolina. — *Bynum v. Bynum*, 11 Ired. L. (N. Car.) 632; *Newbern v. Dawson*, 10 Ired. L. (N. Car.) 436; *State v. Hinson*, 83 N. Car. 640; *State v. Bowman*, 80 N. Car. 432; *McDonald v. Carson*, 94 N. Car. 507; *Patterson v. McIver*, 90 N. Car. 493; *Burton v. March*, 6 Jones L. (N. Car.) 409; *State v. Brantley*, 63 N. Car. 518; *State v. Scott*, 64 N. Car. 586; *Brink v. Black*, 77 N. Car. 59; *State v. Boon*, 82 N. Car. 637; *Clements v. Rogers*, 95 N. Car. 248; *State v. Jones*, 97 N. Car. 469; *Carlton v. Wilmington*, etc., R. Co., 104 N. Car. 365; *Bethea v. Raleigh*, etc., R. Co., 106 N. Car. 279; *Everett v. Williamson*, 107 N. Car. 204; *Thompson v. Western Union Tel. Co.*, 107 N. Car. 449; *State v. Brabham*, 108 N. Car. 793; *State v. Brewer*, 98 N. Car. 607; *State v. McNeill*, 92 N. Car. 812; *Newby v. Harrell*, 99 N. Car. 149; *Conwell v. Mann*, 100 N. Car. 234; *Hawkins v. House*, 65 N. Car. 614; *Leaving v. Smith*, 115 N. Car. 385; *State v. Hargett*, 65 N. Car. 669; *State v. Mills*, 116 N. Car. 992; *State v. Anderson*, 92 N. Car. 732; *Michael v. Foil*, 100 N. Car. 178; *Rencher v. Wynne*, 86 N. Car. 268; *McFarland v. Southern Imp. Co.*, 107 N. Car. 368; *Marshall v. Flinn*, 4 Jones L. (N. Car.) 199; *Kinney v. Laughenour*, 89 N. Car. 365; *Long v. Pool*, 68 N. Car. 479; *State v. Neville*, 6 Jones L. (N. Car.) 423; *Moore v. Parker*, 91 N. Car. 275; *Wilcoxon v. Logan*, 91 N. Car. 449; *State v. Dunlop*, 65 N. Car. 288; *Cornelius v. Brawley*, 109 N. Car. 542; *Whitford v. Newbern*, 111 N. Car. 272. See also *State v. Mills*, 116 N. Car. 992.

Ohio. — *U. S. Home*, etc., Assoc. v. Kirk, 9 Ohio Wkly. L. Bull. 48; *Bond v. State*, 23 Ohio St. 349; *McHugh v. State*, 42 Ohio St. 154; *Bolen v. State*, 26 Ohio St. 371.

the jury upon the issue before them, in such terms and in such a manner as shall comport with the real merits and justice of the case, and enable the jury to give a proper verdict in point of law. Having done this the court has discharged its entire duty.¹

(2) *Illustrations of Rule.* — The decisions set out in the notes will serve to illustrate the principles enunciated.²

Oregon. — *Conion v. Oregon Short Line R. Co.*, 23 Oregon 499.

Pennsylvania. — *Munderbach v. Lutz*, 14 S. & R. (Pa.) 220; *Geiger v. Welsh*, 1 Rawle (Pa.) 349; *Com. v. McManus*, 143 Pa. St. 64; *Duncan v. Sherman*, 121 Pa. St. 520; *Patterson v. Kountz*, 63 Pa. St. 246; *Lynch v. Welsh*, 3 Pa. St. 297; *McCoy v. Hance*, 28 Pa. St. 149; *Groft v. Weakland*, 34 Pa. St. 304; *Deakers v. Temple*, 41 Pa. St. 234; *Com. v. Cleary*, 135 Pa. St. 64; *Ridgway v. Longaker*, 18 Pa. St. 215; *Arbuckle v. Thompson*, 37 Pa. St. 170; *Lycoming Ins. Co. v. Schreffler*, 42 Pa. St. 188; *Winsor v. Maddock*, 64 Pa. St. 231; *Jacobs v. Curtis*, 11 Leg. Int. (Pa.) 27.

South Carolina. — *State v. Petsch*, 43 S. Car. 132; *Hay v. Carolina Midland R. Co.*, 41 S. Car. 542; *Brodie v. Carolina Midland R. Co.*, 46 S. Car. 203; *State v. Aughtry*, 49 S. Car. 285; *Marshall v. Crawford*, 45 S. Car. 189.

Utah. — *People v. Chadwick*, 7 Utah 142; *Cunningham v. Union Pac. R. Co.*, 4 Utah 206; *People v. Olsen*, 4 Utah 413; *Clampitt v. Kerr*, 1 Utah 247; *Scoville v. Salt Lake City*, 11 Utah 60; *Reddon v. Union Pac. R. Co.*, 5 Utah 344.

Vermont. — *Campbell v. Day*, 16 Vt. 558; *Reed v. Newcomb*, 64 Vt. 49; *State v. Eaton*, 53 Vt. 574. See also *Whittaker v. Perry*, 38 Vt. 107.

Washington. — *State v. Baldwin*, 15 Wash. 15. See also *Seattle v. Buzby*, 2 Wash. Ter. 25.

United States. — *Clymer v. Dawkins*, 3 How. (U. S.) 674; *Kelly v. Jackson*, 6 Pet. (U. S.) 622; *Ohio, etc., R. Co. v. McCarthy*, 96 U. S. 258; *Pitts v. Whitman*, 2 Story (U. S.) 620; *Southern Bell Telephone, etc., Co. v. Watts*, 66 Fed. Rep. 460; *Law v. Cross*, 1 Black (U. S.) 533; *Ayers v. Watson*, 137 U. S. 584; *St. Louis Public Schools v. Risfey*, 10 Wall. (U. S.) 115; *Texas, etc., R. Co. v. Cody*, 166 U. S. 606; *Boston, etc., R. Co. v. McDuffey*, 79 Fed. Rep. 934; *Union Pac. R. Co. v. Novak*, 15 U. S. App. 400.

1. *Pitts v. Whitman*, 2 Story (U. S.) 620; *Continental Imp. Co. v. Stead*, 95 U. S. 165.

2. *Illustrations.* — Where counsel asked an instruction that the jury must believe that the defendant "signed the order, or was present and advised another to sign it," it is sufficient to instruct that they must believe that the defendant "wrote and signed" it. *Jackson v. Com.*, (Ky. 1896) 34 S. W. Rep. 15. So an instruction that certain disputed facts must be proven "affirmatively and directly," is a sufficient compliance with the request that they should be proven "affirmatively and distinctly." *Cornelius v. Brawley*, 109 N. Car. 542.

A request to charge that it would be not only illegal but disgraceful for the jury to be swayed by any outside influence, is sufficiently covered by an instruction that the jury should not decide the case by sympathy with the plaintiff or ill feeling against railroads, but according to the law charged and the evidence heard. *Hay v. Carolina Midland R. Co.*, 41 S. Car. 542.

In an action on a contract of hire a request to charge that if the plaintiff had some other employment at lower wages, and had abandoned it, he could only recover the difference between the amount sued for and the amount he would have earned under the lower contract, is sufficiently covered by an instruction that he is bound to obtain other employment if he can, and that what he would earn at it must be deducted from the amount of his recovery, even if he had relinquished the other employment. *Champlain v. Detroit Stamping Co.*, 68 Mich. 238.

The court substituted, in the defendant's seventh prayer, for the words "they [the jury] must be satisfied and convinced by the evidence," the words "they must find from the evidence;" and in the eighth prayer, for the words "unless they are convinced by the evidence," the words "unless they find from the evidence." It was said: "An instruction to the jury that they must 'find' a fact as to which there is conflicting testimony means, by common acceptance, that they must be satisfied of it to that degree of certainty which

(3) *Requirement that All Proper Points of Request Be Covered.*—It is necessary, however, that the charge as given shall cover all the points of the request essential to a full and clear presentation of the case to the jury.¹ An instruction granted by the court after rejecting the prayer offered by counsel is defective, unless it declares the law upon the points raised by counsel, in terms explicit and intelligible.²

(4) *Requirement that Request Be Not Materially Qualified.*—And care must be taken not so to change the sense of the request or so to qualify it as to weaken its force.³ When a request for instructions, to which a party is entitled, is presented, its substance or meaning must be given unimpaired by any material qualification.⁴

(5) *The Better Course to Follow in Complying with Request.*—While, as already seen, it is not considered error for the court, where requests have been made, to charge in its own language, there is some diversity of opinion as to what is the better course. In some cases it has been said to be the better practice to put aside

the case requires, that is, in a criminal case, as to a fact necessary to constitute the crime beyond a reasonable doubt; in a civil case, by such preponderance of evidence as satisfies the mind. The word 'find' had been several times used in this sense in the judge's charge and in the instructions granted at the defendant's request. The court had used the words 'to find,' 'to be convinced,' 'to reach the conclusion,' in a way that could leave no doubt as to what was intended. That the court adhered to the word already used to express the same meaning is not error." *Southern Bell Telephone, etc., Co. v. Watts*, 25 U. S. App. 214.

1. *California.* — *People v. Dodge*, 30 Cal. 448.

Illinois. — *Alexander v. Mandeville*, 33 Ill. App. 589; *Chicago v. Moore*, 139 Ill. 201, *affirming* 40 Ill. App. 332.

Kansas. — *Missouri Pac. R. Co. v. Cassity*, 44 Kan. 207.

Louisiana. — *State v. Carr*, 25 La. Ann. 407.

Maryland. — *Fells Point Sav. Bank v. Weedon*, 18 Md. 320; *Snively v. Fahenstock*, 18 Md. 391.

Missouri. — *Coleman v. Roberts*, 1 Mo. 97.

North Carolina. — *Rencher v. Wynne*, 86 N. Car. 268; *McDonald v. Carson*, 94 N. Car. 507; *Bynum v. Bynum*, 11 Ired. L. (N. Car.) 632; *Kinney v. Laughenour*, 89 N. Car. 368; *Patterson v. Mc-*

Iver, 90 N. Car. 493; *Brink v. Black*, 77 N. Car. 59; *Newbern v. Dawson*, 10 Ired. L. (N. Car.) 436.

Pennsylvania. — *Kraft v. Smith*, 117 Pa. St. 183; *Huddleston v. West Bellevue*, 111 Pa. St. 110; *West Bellevue v. Huddleston*, 23 W. N. C. (Pa.) 240.

"While the judge is not required to give an instruction in the very words in which it is prayed, even when correct in law, and certainly not when in any particular erroneous, yet it is to be expected that he shall declare the law as applicable to the facts in proof and any reasonable inferences that may be drawn from them, in order to an intelligent and rightful determination of the issues before the jury." *Rencher v. Wynne*, 86 N. Car. 272, *quoted in* *McDonald v. Carson*, 94 N. Car. 507.

Necessity for Exceptions.—The court has the clear right to prepare and give instructions to the jury in lieu of those asked by a party, and if those so given do not contain the substance of those asked by the party, he must except to the ruling of the court if he desires to assign the same for error. *Bromley v. Goodwin*, 95 Ill. 118.

2. *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320.

3. *Brink v. Black*, 77 N. Car. 59; *Patterson v. McIver*, 90 N. Car. 493; *Horton v. Williams*, 21 Minn. 187; *Parrish v. Bradley*, 73 Mich. 613; *Young v. State*, 24 Fla. 147.

4. *Kinney v. Laughenour*, 89 N. Car. 368.

all instructions asked by counsel, and to cover the whole ground of the controversy in a methodical and corrected charge, without regard to the peculiar form or structure of the request;¹ and so far as this view relates to cases in which the requests of counsel are in any manner defective, it is unquestionably correct, for in such case it would not only be the right but the duty of the court to correct the instruction.² There are, however, decisions which take the view that it is always better to instruct in the language of the request, if possible,³ and this view is a reasonable one if the instructions asked are correct and so formulated as to be easily understood by the jury.⁴

(6) *Presumptions on Appeal.*—If the record does not show affirmatively that requests for instructions refused were presented in writing, it will be presumed that they were not, and the action of the trial court in refusing them will be sustained.⁵ If, on the

1. *State v. Collins*, 20 Iowa 85; *Key v. Dent*, 6 Md. 142; *Chicago v. Moore*, 40 Ill. App. 334; *Davis v. St. Louis, etc., R. Co.*, 53 Ark. 129; *Gottstein v. Seattle Lumber, etc., Co.*, 7 Wash. 424; *State v. McCann*, 16 Wash. 249. See also *Wilson Sewing Mach. Co. v. Bull*, 52 Iowa 554.

"One of the evils that has crept into our practice of written instructions arises from the fact that instructions may be so drawn as to embody a correct rule of law, and yet contain by suggestion or innuendo that which amounts to an intimation, if not to an argument, on the facts. The instruction handed up comes to the judge from a partisan hand, and it has been drawn as carefully as the skill of the lawyer can accomplish it, to present a partisan view, or to convey a hint, suggestion, or intimation of advantage to his client. The same legal rule may be stated in a differently arranged combination of words by the judge, and be, as it is very likely to be, coldly impartial and entirely colorless in its statement of the facts on which it is based. The practice of the judge's refusing all instructions asked and giving a written instruction or charge to the jury, covering all the questions in the case, is not only not in violation of the statute or the rights of litigants, but is in our opinion a wise and commendable course, and one most likely to reach just results." *Chicago v. Moore*, 40 Ill. App. 333.

2. *State v. Jones*, 61 Mo. 232; *Com. v. Mullen*, 150 Mass. 400; *Scott v. State*, 56 Miss. 289; *Green v. State*, 28 Miss. 688.

It is the duty of the court, when not entirely satisfied with the instructions asked, to prepare such as will exhibit to the jury, in general and appropriate terms, without comment on the evidence, all the law bearing upon it. *State v. Jones*, 61 Mo. 233.

3. *People v. Williams*, 17 Cal. 142; *Mask v. State*, 36 Miss. 77; *Babbitt v. Bumpus*, 73 Mich. 331; *Cook v. Brown*, 62 Mich. 477; *Mynning v. Detroit, etc., R. Co.*, 59 Mich. 257; *People v. Stewart*, 75 Mich. 21.

4. "A party has the right to have the law of his case go to the jury in its plainest, simplest form; and if it is properly embodied in a request in that form, prepared by counsel, and furnished to the court, it ought to be thus given, and the request should not be ignored by the court. We have had occasion to allude to this subject before, and when the court declines to give such requests it must appear that the substance of them has been as well given by the court in its own language, or the omission will be error." *Babbitt v. Bumpus*, 73 Mich. 331.

Presumptions on Appeal.—If the record shows that the court refused to give a correct and pertinent instruction "in the language and form" requested, it will be presumed on appeal, in the absence of any showing to the contrary, that the charge was substantially given in another form. *Bolen v. State*, 26 Ohio St. 371.

5. *Crosby v. Hutchinson*, 53 Ala. 5 [*overruling Myatts v. Bell*, 41 Ala. 222]; *Hollingsworth v. Chapman*, 54 Ala. 7; *Jacobson v. State*, 55 Ala. 151; *Broadbent v. Tuskaloosa Scientific, etc.,*

other hand, a request for instructions is granted, it will be presumed that it was presented in writing though the record is silent on this point.¹ As to signing and numbering requests, see *infra*, VIII. Marking "Given" or "Refused," Numbering and Signing Instructions.

b. RULE THAT COURT MUST FOLLOW LANGUAGE OF REQUEST. — In some jurisdictions, by virtue of statutes,² and in others where there appear to be no statutory provisions on the subject,³ the rule is that instruction must be given in the language of the request. In one state it is held that the charge must be given or refused in the very terms in which it is asked, and that the error of its refusal would be ground to reverse, though the proposition be embodied in instructions already or thereafter given to the jury.⁴ It is held, however, that the statute does not prohibit the giving of additional explanatory charges in order to relieve the instruction asked from involvement or obscurity, or to

Assoc., 45 Ala. 170; *Milner v. Wilson*, 45 Ala. 478; *Mayberry v. Leech*, 58 Ala. 339; *South, etc., Alabama R. Co. v. Seale*, 59 Ala. 608; *Green v. State*, 66 Ala. 40; *Wheless v. Rhodes*, 70 Ala. 419; *Winslow v. State*, 76 Ala. 42; *Bellinger v. State*, 92 Ala. 86; *Lyon v. Kent*, 45 Ala. 656. See also *Central R. Co. v. Richards*, 62 Ga. 306.

Instruction to Disregard Remark of Counsel. — The refusal to grant an oral request that the jury shall disregard the remark of opposing counsel is not error. *Harding v. Sandy*, 43 Ill. App. 442.

1. *Seals v. Edmondson*, 73 Ala. 295.

These Presumptions Are in Accordance with the General Elementary Rule that all reasonable intendments will be indulged in favor of the correctness of the trial court's rulings. *Hollingsworth v. Chapman*, 54 Ala. 7.

2. *Alabama.* — *Colly v. McCall*, 37 Ala. 20; *Edgar v. State*, 43 Ala. 45; *Bell v. Troy*, 35 Ala. 184; *Lyon v. Kent*, 45 Ala. 656; *Knight v. Clements*, 45 Ala. 89; *Bush v. Glover*, 47 Ala. 167; *Sawyer v. Lorillard*, 48 Ala. 332; *Baker v. State*, 49 Ala. 351; *Cunningham v. State*, 73 Ala. 53; *East Tennessee, etc. R. Co. v. Bayliss*, 77 Ala. 430; *Williams v. State*, 47 Ala. 659; *Eiland v. State*, 52 Ala. 322; *Carson v. State*, 50 Ala. 134. In Alabama the rule only applies where instructions are asked in writing. If asked orally, the court is not bound to charge in the language of the request.

South Dakota. — *Peart v. Chicago, etc., R. Co.*, 8 S. Dak. 431; *Green v. Hughitt School Tp.*, 5 S. Dak. 452. See also *Galloway v. McLean*, 2 Dakota 372.

Wisconsin. — *Rogers v. Brightman*, 10 Wis. 55; *Andrea v. Thatcher*, 24 Wis. 471; *Eldred v. Oconto Co.*, 33 Wis. 134.

3. *Texas.* — *Southern Cotton Press, etc., Co. v. Bradley*, 52 Tex. 602; *Dillingham v. Fields*, 9 Tex. Civ. App. 1; *Trezevant v. Rains*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1092.

Virginia. — See *Richmond, etc., R. Co. v. Norment*, 84 Va. 167; *Baltimore, etc., R. Co. v. Lafferty*, 14 Gratt. (Va.) 478.

West Virginia. — *State v. Evans*, 33 W. Va. 421; *Jordan v. Benwood*, 42 W. Va. 312.

4. *Bush v. Glover*, 47 Ala. 167; *Carson v. State*, 50 Ala. 134; *Knight v. Clements*, 45 Ala. 89; *East Tennessee, etc., R. Co. v. Bayliss*, 77 Ala. 429; *Williams v. State*, 47 Ala. 659. Compare *Frank v. Riggs*, 93 Ala. 252.

"We regard the statute as introductory and affirmatory of the original rule of practice which was announced and observed in this court, and intended to secure to the parties the unqualified right to charges requested, when they affirm correct legal propositions, not abstract, and not misleading, in the terms in which they are expressed." *Eiland v. State*, 52 Ala. 322.

The View Taken is that the right which the statute secures cannot be diminished by the giving of a charge as requested, and then by qualification so limiting, restricting, and modifying as to weaken its force; and that if it needs limitation, restriction, or modification, it should be refused. *Eiland v. State*, 52 Ala. 322.

make plain and interpret the terms employed.¹ Nor does the statute prohibit the giving of a charge asked "in connection with the general charge."²

In Other Jurisdictions the Doctrine of Error Without Injury Applies, and when it is apparent that no injury could result because of the refusal to charge in the exact language of the request,³ or because of the qualification of a request, the judgment will not be reversed.⁴

VII. WRITTEN INSTRUCTIONS — 1. Necessity for Instructing in Writing — *a.* AT COMMON LAW. — At common law it is entirely within the discretion of the trial judge whether instructions to the jury shall be in writing. In the absence of statutes providing otherwise the whole charge may be delivered orally, and the action of the trial judge in so doing will not be reviewable on appeal or error.⁵

b. UNDER STATUTORY REQUIREMENTS — (1) *Statement of Rule.* — But in nearly all jurisdictions there are statutory provisions which have changed the common-law rule. Some of these statutes provide that the instructions shall be in writing when a request for instructions in writing is made by the parties, and under other statutes no request that the instructions shall be

1. *Eiland v. State*, 52 Ala. 322; *Blair v. State*, 52 Ala. 343; *Hogg v. State*, 52 Ala. 2; *Bell v. Troy*, 35 Ala. 184; *Rosenbaum v. State*, 33 Ala. 354; *Turbeville v. State*, 40 Ala. 715; *Morris v. State*, 25 Ala. 57.

2. *Baker v. State*, 49 Ala. 351; *Scott v. State*, 37 Ala. 117.

Sawyer v. Lorillard, 48 Ala. 333. In this case, after the general charge had been given, the court gave an instruction requested, with the statement that it was given "with the qualifications contained in the first charge."

Presumptions on Appeal. — Charges which the record fails to show were moved for in writing will be presumed to have been asked orally, and it is not error to refuse such charges, as asked, without qualification, and then to give them with a qualification by reference to a charge already given and not objected to. *Milner v. Wilson*, 45 Ala. 478.

3. *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4; *Dillingham v. Fields*, 9 Tex. Civ. App. 1; *Galveston, etc., R. Co. v. Smith*, (Tex. Civ. App. 1893) 24 S. W. Rep. 668; *Trezevant v. Rains*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1092; *Richmond, etc., R. Co. v. Norment*, 84 Va. 167; *Green v. Hughitt School Tp.*, 5 S. Dak. 452; *Rogers v. Brightman*, 10 Wis. 55; *Andrea v. Thatcher*, 24 Wis. 471.

4. *Mason v. H. Whitbeck Co.*, 35 Wis. 164; *Eldred v. Oconto Co.*, 33 Wis. 135.

5. *Smith v. Crichton*, 33 Md. 103; *Baer v. Rooks*, 50 Fed. Rep. 898; *Gulf, etc., R. Co. v. Campbell*, 49 Fed. Rep. 354; *Gulf, etc., R. Co. v. Childs*, 49 Fed. Rep. 358.

Where the instruction is definite and contains sound views of the law applicable to the case and intelligible to the jury, it can make no essential difference whether it is communicated to them in writing or orally.

It is true that in the trial of causes and the exposition of the law to the jury, the reduction of the instruction to writing is certainly more formal, less liable to hasty error, and may enable the court the better to mature its views, and more distinctly and formally to express them to the jury, as a general rule; but still the law may be sufficiently expounded to the jury through oral instructions. No doubt the court would not hesitate, where it was requested, and was deemed by the counsel to be material, to embody its views in writing, in advance of any oral communication to the jury. This matter, however, is left to the sound discretion of the court below, and is not the subject of review by this court. *Smith v. Crichton*, 33 Md. 103.

written is necessary. These statutes are not directory but mandatory, and must be strictly complied with. It is almost uniformly held that when the parties are entitled to written instructions, either because the statute leaves the court no discretion in the matter or because a timely request therefor has been made, oral instructions in whole or in part are erroneous, and are sufficient cause for setting aside the judgment and ordering a new trial.¹

1. *Arkansas*. — *National Lumber Co. v. Snell*, 47 Ark. 407; *Mazzia v. State*, 51 Ark. 184; *Anderson v. State*, 34 Ark. 257.

California. — *People v. Beeler*, 6 Cal. 246; *People v. Payne*, 8 Cal. 341; *People v. Demint*, 8 Cal. 423; *People v. Ah Fong*, 12 Cal. 345; *People v. Woppner*, 14 Cal. 437.

Colorado. — *Wettengel v. Denver*, 20 Colo. 552; *Lee v. Stahl*, 9 Colo. 208; *Gile v. People*, 1 Colo. 60; *Montelius v. Atherton*, 6 Colo. 224; *Brown v. Crawford*, 2 Colo. App. 235; *Dorsett v. Crew*, 1 Colo. 18.

Connecticut. — *Allen v. Rundle*, 50 Conn. 33; *Wilson v. Granby*, 47 Conn. 59.

Florida. — *Doggett v. Jordan*, 2 Fla. 541; *Long v. State*, 11 Fla. 295; *Dixon v. State*, 13 Fla. 637; *Luster v. State*, 23 Fla. 339; *Duggan v. State*, 9 Fla. 516.

Georgia. — *Savannah, etc., R. Co. v. Horn*, 69 Ga. 759; *Wheatley v. West*, 61 Ga. 401.

Illinois. — *Brown v. People*, 9 Ill. 439; *Ellis v. People*, 159 Ill. 337; *Arcade Co. v. Allen*, 51 Ill. App. 305; *Abingdon v. Meadows*, 28 Ill. App. 442; *Green v. Lewis*, 13 Ill. 642; *Illinois Cent. R. Co. v. Hammer*, 85 Ill. 526.

Indiana. — *Shafer v. Stinson*, 76 Ind. 374; *Watts v. Coxen*, 52 Ind. 155; *Hardin v. Helton*, 50 Ind. 320; *Feriter v. State*, 33 Ind. 283; *Rising Sun, etc., Turnpike Co. v. Conway*, 7 Ind. 187; *Stephenson v. State*, 110 Ind. 375; *Smurr v. State*, 88 Ind. 504; *Bradway v. Waddell*, 95 Ind. 170; *Bosworth v. Barker*, 65 Ind. 596; *Toledo, etc., R. Co. v. Daniels*, 21 Ind. 256; *Newton v. Newton*, 12 Ind. 527; *Davis v. Foster*, 68 Ind. 238; *Riley v. Watson*, 18 Ind. 291; *Widner v. State*, 28 Ind. 394.

Iowa. — *Pierson v. Baird*, 2 Greene (Iowa) 235; *Head v. Langworthy*, 15 Iowa 235; *Strattan v. Paul*, 10 Iowa 139; *State v. Birmingham*, 74 Iowa 407; *Hall v. Carter*, 74 Iowa 364.

Kansas. — *State v. Potter*, 15 Kan. 302; *State v. Huber*, 8 Kan. 447; *Atchison v. Jansen*, 21 Kan. 560.

Kentucky. — *Louisville, etc., R. Co. v. Banks*, (Ky. 1896) 33 S. W. Rep. 627; *Ferguson v. Fox*, 1 Metc. (Ky.) 86.

Louisiana. — *Kellar v. Belleaudeau*, 5 La. Ann. 609; *State v. Porter*, 35 La. Ann. 535; *State v. Gilmore*, 26 La. Ann. 599.

Missouri. — *Mallison v. State*, 6 Mo. 399; *Cape Girardeau v. Fisher*, 61 Mo. App. 509.

Nebraska. — *Ehrlich v. State*, 44 Neb. 810.

North Carolina. — *Dupree v. Virginia Home Ins. Co.*, 92 N. Car. 417; *Jenkins v. Wilmington, etc., R. Co.*, 110 N. Car. 442; *Drake v. Connelly*, 107 N. Car. 463.

Ohio. — *Hardy v. Turney*, 9 Ohio St. 400; *Monroeville v. Root*, 54 Ohio St. 523.

Tennessee. — *Newman v. State*, 6 Baxt. (Tenn.) 164; *Huddleston v. State*, 1 Baxt. (Tenn.) 109; *Equitable F. Ins. Co. v. C. P. Church*, 91 Tenn. 136.

Texas — Criminal Cases. — *Harkey v. State*, 33 Tex. Crim. Rep. 100; *Jordan v. State*, 5 Tex. App. 422; *Williams v. State*, 5 Tex. App. 615; *Killman v. State*, 2 Tex. App. 222; *Chamberlain v. State*, 2 Tex. App. 451; *Goode v. State*, 2 Tex. App. 520; *Lawrence v. State*, 7 Tex. App. 192; *Trippett v. State*, 5 Tex. App. 595; *West v. State*, 2 Tex. App. 210; *Gibbs v. State*, 1 Tex. App. 13; *Smith v. State*, 1 Tex. App. 408; *Clark v. State*, 31 Tex. 574.

Contra — Texas — Civil Cases. — In Texas the weight of authority is that in civil cases the statute requiring instructions to the jury to be in writing is directory merely, and that a violation thereof cannot be assigned as error, *Galveston, etc., R. Co. v. Dunlavy*, 56 Tex. 256; *Reid v. Reid*, 11 Tex. 586; *Boone v. Thompson*, 17 Tex. 605; *Chapman v. Sneed*, 17 Tex. 428; *Parker v. Chancellor*, 78 Tex. 527; *Toby v. Heidenheimer*, 1 Tex. App. Civ. Cas., § 795; *Gulf, etc., R. Co. v. Holt*, 1 Tex. App. Civ. Cas., § 835; although there is one decision to the contrary, *Levy v. McDowell*, 45 Tex. 220.

In Absence of Request. — Where, however, a request for written instructions is necessary, it is not error to charge orally in the absence of such request.¹

Harmless Error. — It has also been held that a failure to charge in writing although required by statute to do so, even though it be erroneous is no ground for reversal where no prejudice could have resulted to the appellant therefrom;² although there is one

Pennsylvania. — While the Act of March 24, 1877, makes it the duty of a judge to reduce to writing the answers to the several points presented and read them to the jury before they retire to consider their verdict, an omission to do so is not error for which the judgment will be reversed. *Scheuing v. Yard*, 88 Pa. St. 286; *Patterson v. Kountz*, 63 Pa. St. 246. See also *Morberger v. Hackenberg*, 13 S. & R. (Pa.) 26.

North Carolina. — *Recapitulation of Evidence.* — Under the North Carolina statute it is not necessary to put the recapitulation of the evidence in writing. *Jenkins v. Wilmington, etc., R. Co.*, 110 N. Car. 442.

Instance. — Where there was a request for written instructions, it was held error to charge the jury orally that "if the state has failed to make out a case against this defendant beyond a reasonable doubt, or if the defendant by his evidence has raised a reasonable doubt, then your verdict will be as follows" (reading form of verdict for defendant). *Stephenson v. State*, 110 Ind. 358.

Rule Applicable to Further Instructions Given on Return of Jury. — Where a cause is submitted and the court recalls the jury and gives further oral instructions in reference to the law of the case, and verbal explanations of the written instructions that have already been given, it is error, and, upon proper exceptions, sufficient to compel a reversal. *State v. Stoffel*, 48 Kan. 364; *Willis v. State*, 89 Ga. 188.

Comments on Request to Charge must be in writing if requested. *City Bank v. Kent*, 57 Ga. 285.

Withdrawal of Request. — Where the plaintiff requested the court to put charges in writing, and afterwards, when too late for the defendant to make such a request, withdrew it, it was held no error, especially where the record did not show that any oral instructions were given or that the defendant was injured. *Mutual Ben. L. Ins. Co. v. Miller*, 39 Ind. 475.

Certificate that Instructions Were in Writing—What Sufficient. — The judge's certificate, in the bill of exceptions, that the reporter stated that he had taken down the charge in writing and had lost it, is not a sufficient certificate that the charge was so taken down. *Penberthy v. Lee*, 51 Wis. 261.

Lack of Time to Put Whole Charge in Writing—Effect. — The fact that "it was impracticable to put the whole charge in writing in the time within which it was necessary to conclude the trial," does not cure a failure to observe the requirement of the statute. If there was not time to do so the court should, in its discretion, have made a mistrial. *Jenkins v. Wilmington, etc., R. Co.*, 110 N. Car. 442.

1. *Anderson v. State*, 34 Ark. 257; *Bradford v. People*, 22 Colo. 157; *Sutherland v. Hankins*, 56 Ind. 343; *Davis v. Wilson*, 11 Kan. 74; *State v. Chevallier*, 36 La. Ann. 85; *Blackburn v. State*, 23 Ohio St. 146; *Marshall v. Stine*, 112 N. Car. 697; *Monroeville v. Root*, 54 Ohio St. 523; *Dobson v. State*, 5 Lea (Tenn.) 277.

What Record Must Show on Appeal. — To render the refusal of a request available error the record must affirmatively show that the court was requested to give such instructions before the argument, and that its refusal to do so was a subject of an exception. *Monroeville v. Root*, 54 Ohio St. 523.

2. *Greathouse v. Summerfield*, 25 Ill. App. 296; *Walsh v. St. Louis Drayage Co.*, 40 Mo. App. 339; *Com. v. Barry*, 11 Allen (Mass.) 263.

It is not the province of the defendant to assert or maintain a rule of law where the omission to observe it has been the cause of no injustice to him. *Com. v. Barry*, 11 Allen (Mass.) 263.

In *Hogel v. Lindell*, 10 Mo. 484, it was said that "if oral instructions should be given and it could not be ascertained what they were, under the late law it would be a cause for reversing the judgment. But if they are preserved in the bill of exceptions, and

decision to the contrary.¹ It would seem, though, that an error of this sort should not be allowed to deprive the appellee of the fruits of his verdict.

(2) *What Are Instructions Within the Rule.*—The statutory requirement that instructions shall be in writing applies to special instructions asked by the parties as well as to instructions in chief.² About this principle there is no dispute, but during the course of a trial oral communications not infrequently pass between the court and jury, and it is not always easy to decide whether these communications are instructions within the meaning of the statutes just mentioned.³ The charge or instruction required by law to be reduced to writing is only that which the court may have to say to the jury in regard to the principles of law applicable to the case and the evidence.⁴ Instructions proper are directions in regard to the law of the case.⁵ It follows then that every statement or remark made by the court during the

it appears that they were favorable to the party complaining, or did not at all affect his rights as a suitor, it would be difficult to find a ground on which to place such a construction of the statute as would overturn the judgment. The instructions may have been given without the solicitation of the party obtaining the verdict, and even against his consent, and yet to deprive him of his ascertained rights, and to subject him to the payment of costs, merely because the judge has wilfully violated a statute in a way that did not at all conduce to the attainment of his verdict, would seem to be the greatest injustice."

1. In *Indiana* it has been held that the judgment should be reversed, although the instruction was favorable to the appellant. *Widner v. State*, 28 Ind. 394. See also *Shafer v. Stinson*, 76 Ind. 374.

2. *Stratton v. Paul*, 10 Iowa 139.

3. *Millard v. Lyons*, 25 Wis. 516.

4. *Hasbrouck v. Milwaukee*, 21 Wis. 217; *Millard v. Lyons*, 25 Wis. 517; *Seymour v. Colburn*, 43 Wis. 67; *Illinois Cent. R. Co. v. Wheeler*, 149 Ill. 525; *Burns v. People*, 45 Ill. App. 70; *McCallister v. Mount*, 73 Ind. 559; *Lawler v. McPheeters*, 73 Ind. 577; *Lehman v. Hawks*, 121 Ind. 541; *State v. Potter*, 15 Kan. 302.

5. *Lawler v. McPheeters*, 73 Ind. 579; *Dodd v. Moore*, 91 Ind. 522; *Stanley v. Sutherland*, 54 Ind. 339.

Where an exception is taken to a charge and the court says in reply: "I have not attempted to state what the facts are, but simply what is claimed," such a statement is not part of the

charge and need not be in writing. *Malachi v. State*, 89 Ala. 134.

Remarks Held to Be Instructions.—The admission by the court to the jury that "the defendant's attorney had let down the fence and that all is now before the jury," is an oral instruction and erroneous. *Coppage v. Com.*, 3 Bush (Ky.) 532.

A statement to the jury that "this idea of an accident, which has been urged by the defense, amounts to nothing and is not tenable; there is no evidence to show it was an accident; on the contrary, it shows there was a scuffle, and that the defendant persisted in holding on to the pistol," is an instruction within the meaning of the statute requiring instructions to be in writing, and is also vicious as being upon the weight of evidence. *People v. Bonds*, 1 Nev. 33.

Harmless Error.—Where a stipulation in another case was introduced in evidence during the progress of a trial, and the court said, in the presence of the jury: "I shall hold that by that stipulation defendants acknowledged that there was twelve hundred dollars and interest due the said railroad company that has not been paid," it was held that as the remark was not addressed to the jury, and as there was no conflict in the evidence as to the fact that the amount named was in fact due the railroad company, and the question of indebtedness was fairly submitted to the jury, no prejudice could have resulted from the remark. *Cedar Rapids, etc., R. Co. v. Cowan*, 77 Iowa 535.

time consumed in delivering its charge to the jury is not necessarily a part of its instructions,¹ and that the mere fact that an oral communication has passed from the court to the jury is no proof that the statute has been disregarded.²

Particular Oral Communications. — In view of these principles it has been uniformly held that the court may properly make oral statements to the jury in reference to the form of the verdict,³ or state that certain instructions were given at the request of one of the parties.⁴ And directions to counsel confining their arguments to such points of law as the court supposed controlled the case, and stating what those points were;⁵ or remarks in relation to the jury agreeing on a verdict,⁶ or in relation to the admissibility of evidence,⁷ or the purpose for which evidence is introduced;⁸ or directing the jury not to consider evidence;⁹ or limiting the effect of evidence;¹⁰ or withdrawing, or directing the jury not to

1. *McCallister v. Mount*, 73 Ind. 559.

2. *State v. Potter*, 15 Kan. 302.

A remark of the court, not designed as an instruction to the jury, nor addressed to them, nor of a nature to be considered while they were deliberating upon their verdict, will not be presumed to have influenced their verdict. *Cormac v. Western White Bronze Co.*, 77 Iowa 32.

3. *State v. Potter*, 15 Kan. 302; *People v. Bonney*, 19 Cal. 427; *Illinois Cent. R. Co. v. Wheeler*, 149 Ill. 525; *Lehman v. Hawks*, 121 Ind. 541; *Bradway v. Waddell*, 95 Ind. 170; *McCallister v. Mount*, 73 Ind. 559; *State v. Glass*, 50 Wis. 219.

Thus an oral statement to the jury that they should find one of three written verdicts submitted to them by the court with the defendant's consent, and that they should sign the verdict as found, was held no part of the charge which the statute required to be in writing. *State v. Glass*, 50 Wis. 219.

So where the jury returned with an informal verdict, and the court orally directed them to retire and bring in a verdict covering the issues in the case, it was held that such direction was not an instruction. *Lehman v. Hawks*, 121 Ind. 541.

4. *Scott v. Chicago, etc., R. Co.*, 68 Iowa 360; *Sample v. State*, 104 Ind. 289.

Where it has been demanded that the instructions to the jury shall be in writing, it is not error to state orally to the jury that "the plaintiff has requested me to give you some instructions which are in writing, and I will read them first, and I read them as the law."

Such a statement is not the annunciation of any principle of law, nor is it a direction to guide the jury in arriving at a verdict. It is no more than a declaration that the court had not instructed, but was about to instruct, as to the law of the case. *Dodd v. Moore*, 91 Ind. 522.

5. *O'Hara v. King*, 52 Ill. 304.

6. *State v. McLafferty*, 47 Kan. 140.

As, for instance, an admonition as to the importance of finding a verdict. *Strepey v. Stark*, 7 Colo. 614. Or an oral statement that as the trial had occasioned great expense, and a large venire had been exhausted, and much time taken up, and it was doubtful whether another jury could be procured, the court would give an instruction upon the point upon which the jury had been in doubt the night before, and it might aid them in finding a verdict. *State v. Jones*, 7 Nev. 408.

7. *Meinaka v. State*, 55 Ala. 47; *Fruchey v. Eagleson*, 15 Ind. App. 88.

8. *Green v. Com.*, (Ky. 1895) 33 S. W. Rep. 100.

9. *State v. Good*, 132 Mo. 114; *Bradway v. Waddell*, 95 Ind. 170.

Such remarks are customarily made by courts in the trial of causes and are not regarded as instructions. *State v. Good*, 132 Mo. 114.

10. *State v. Becton*, 7 Baxt. (Tenn.) 139; *Stanley v. Sutherland*, 54 Ind. 339.

Remarks made at the time the evidence was given, stating for what purpose it was admitted and to enable the jury to give it the intended application, are not instructions. *Farmer v. Thrift*, 94 Iowa 374.

consider, an erroneous instruction given;¹ or directing the jury to answer interrogatories,² or to further consider their verdict;³ or admonishing jurors in regard to their duty as such;⁴ or repeating admissions made by parties;⁵ or explaining what facts will or will not disqualify jurors;⁶ or directing a verdict;⁷ or refusing instructions — are not instructions.⁸ So the court may comment orally on the manner in which the trial has been conducted, or the behavior of the jury, or counsel, or parties,⁹ and may direct them to refrain from talking among themselves or with others,¹⁰ or may state that he cannot instruct them as to matters of fact.¹¹ So also apologies made by the court for impatience shown because of the length of the trial are not considered instructions.¹²

In Conclusion it may be stated that nothing short of a positive direction as to the law applicable to the case will be considered an instruction within the meaning of the statutes.

(3) *What Is a Sufficient Compliance with the Rule* — (a) Generally. — A requirement that instructions shall be in writing is

1. *Edwards v. Smith*, 63 Mo. 119; *Wall v. State*, 18 Tex. 682.

Ohio, etc., *R. Co. v. Stansberry*, 132 Ind. 533. In this case the defendant requested the court to reduce its instructions to writing, which was done, but during the reading of the same to the jury, and after reading one of its instructions, the court stopped and said: "That is not correct; I'll read that again," and thereupon reread the instruction.

2. *Trentman v. Wiley*, 85 Ind. 33; *Judge v. Jordan*, 81 Iowa 519.

3. *Judge v. Jordan*, 81 Iowa 519; *Johnson v. Rider*, 84 Iowa 50. In this case the jury having returned a verdict, the judge stated to them that it was not in accordance with the charge, and directed them to retire and return a verdict in accordance with the charge.

4. *Sargent v. State*, 35 Tex. Crim. Rep. 325; *Duggan v. State*, 9 Fla. 516; *Moore v. Platteville*, 78 Wis. 644. In this case the court, before reading the charge, directed the jury to pay particular and careful attention to each word and sentence thereof, so that they might be advised as to the law of the case. *Compare Equitable F. Ins. Co. v. C. P. Church*, 91 Tenn. 135, where it was held that oral statements by the judge before delivering his written charge, as to the duty of the jury to try the cause on the sworn testimony, constituted an instruction within the meaning of a statute (Code 1884, § 3672), requiring

the judge, on the request of either party, to reduce every word in his charge to writing.

5. *Hinckley v. Horazdowsky*, (Ill. 1890) 23 N. E. Rep. 338.

6. *Oberbeck v. Mayer*, 59 Mo. App. 289.

7. *Grant v. Connecticut Mut. L. Ins. Co.*, 29 Wis. 125; *Stone v. Chicago*, etc., *R. Co.*, 47 Iowa 82; *Leggett*, etc., *Tobacco Co. v. Collier*, 89 Iowa 144; *Young v. Burlington Wire Mattress Co.*, 79 Iowa 415; *Milne v. Walker*, 59 Iowa 186.

Contra. — *Greenwich Ins. Co. v. Raab*, 11 Ill. App. 636.

8. *Sullivan v. Collins*, 18 Iowa 228, in which case, the jury having sent questions to the judge, he told them orally that their questions had nothing to do with the case and that it was their duty to determine it under the evidence and instructions given. To the same effect see *Seymour v. Colburn*, 43 Wis. 71, where the court, in answer to an irrelevant question, told the jury that it was irrelevant; and *People v. Jackson*, 57 Cal. 316, where the court, in answer to a request from the jury to know what was the least punishment for the offense charged, directed them orally that they had nothing to do with that matter.

9. *State v. Potter*, 15 Kan. 302.

10. *McCallister v. Mount*, 73 Ind. 559.

11. *State v. Waterman*, 1 Nev. 543.

12. *Hasbrouck v. Milwaukee*, 21 Wis.

sufficiently complied with when such instructions are written in pencil,¹ or printed,² or when written in English and orally translated into the language understood by the jury.³

(b) **Subsequent Reduction of Oral Charge to Writing.** — There is some conflict of opinion as to whether an oral charge, subsequently reduced to writing, satisfies a requirement that an instruction shall be in writing. In *Arkansas*⁴ and *Ohio*⁵ this practice is permissible. In *Indiana*,⁶ *Florida*,⁷ *Kentucky*,⁸ and *Iowa*⁹ it is not, and it makes no difference whether the writing contains merely the substance of the charge,¹⁰ or is a verbatim copy of it.¹¹

Having Charge Taken Down by Stenographer. — In *California* and *Wisconsin*, by express provision of statute,¹² the court may charge orally when the charge is taken down by the stenographer.¹³ It is, however, erroneous to deliver an oral charge in the absence of the stenographer.¹⁴ In *Idaho* the practice is the same, although

1. *Harvey v. Tama County*, 53 Iowa 228.

2. *State v. Fooks*, 65 Iowa 196; *State v. Kelly*, 73 Mo. 608. In this case it was said that an objection that part of the instructions were in print was too frivolous for comment.

3. *Territory v. Romine*, 2 N. Mex. 114.

4. *National Lumber Co. v. Snell*, 47 Ark. 407; *Barkman v. State*, 13 Ark. 705 (under Mans. Dig., § 5131, providing that instructions shall be reduced to writing on request of either party).

5. *Powers v. Hazleton, etc.*, R. Co., 33 Ohio St. 429.

6. *Rising-Sun, etc., Turnpike Co. v. Conway*, 7 Ind. 187; *Toledo, etc., R. Co. v. Daniels*, 21 Ind. 256; *Widner v. State*, 28 Ind. 394.

7. *Dixon v. State*, 13 Fla. 650. It was held, however, in *Southern Express Co. v. Van Meter*, 17 Fla. 794, that where a judge, having refused to give instructions asked for by the defendant and having given oral instructions, subsequently, and before the jury retired, gave the written instructions offered by the plaintiff, saying to the jury that the written instructions thus given were substantially the same as the oral instructions he had given, and that he adopted them as instructions of the court, this was a sufficient compliance with the statute (Laws 1877, c. 2096) requiring charges to be wholly in writing.

8. *Payne v. Com.*, 1 Metc. (Ky.) 370.

9. *State v. Harding*, 81 Iowa 599. In this case it was held that the fact that the court detained the jury until the further instructions asked were written

out and sent in to them, and that they then voted upon and adhered to their former verdict, did not cure the defect.

10. *Rising-Sun, etc., Turnpike Co. v. Conway*, 7 Ind. 187.

11. *Widner v. State*, 28 Ind. 394.

12. Penal Code Cal., § 1093; Wis. Laws 1871, c. 89. (This statute effectually amends Laws 1868, c. 106, notwithstanding a clerical error in the latter act by which the amended act is described as of the year 1869.) *Pemberthy v. Lee*, 51 Wis. 261.

13. *People v. Curtis*, 76 Cal. 57; *Pemberthy v. Lee*, 51 Wis. 261.

14. *People v. Carrillo*, 70 Cal. 643; *People v. Hersey*, 53 Cal. 575; *People v. Leary*, 105 Cal. 500.

In delivering an oral charge in the absence of the stenographer, the court, by its own act, makes it impossible that the defendant shall be secured in his rights, and this is necessarily an error of the court. *People v. Leary*, 105 Cal. 500.

The object of the statute in requiring the instructions of the court, if not in writing, to be taken down by the stenographer, is to insure to the defendant the means of getting a correct statement of the charge really given, and this object would be completely frustrated if the judge, who has orally charged the jury in the absence of the stenographer, could cure the error by putting into the bill of exceptions a correct charge. *People v. Leary*, 105 Cal. 500.

Failure of Stenographer to Take Down Whole Charge. — If the stenographer is present but fails to take down the whole

there is no express statutory authority therefor,¹ and possibly it would be permissible in *Nebraska*.² In *Indiana*,³ *Colorado*,⁴ *Kansas*,⁵ and *Georgia*,⁶ the giving of oral instructions and having them taken down by a stenographer will not be sufficient.

(c) **Oral Explanations, Modifications, or Additions.**—Where a statute requires the court to instruct in writing on request or without request, it is error to accompany the written instructions given, by oral explanations, modifications, additions, or illustrations. The court has no power to affect or change the law as stated in written instructions, by any statement not in writing,⁷ but, of

charge the court may nevertheless put into the bill of exceptions what was actually said; and if the bill of exceptions shows that the language not taken down by the reporter did not affect nor in any way qualify the charge which was taken down, there is no such error as will warrant a reversal. *People v. Cox*, 76 Cal. 281. See also *People v. Leary*, 105 Cal. 500.

1. *State v. Preston*, (Idaho 1894) 38 Pac. Rep. 694 (under a statute [Rev. Stat. 1887, § 7855], providing that the judge shall reduce all instructions to writing before giving them to the jury).

2. See *Yates v. Kinney*, 23 Neb. 648, in which the court said that the Act of 1875, relating to instructions to juries, requires all instructions to be in writing and filed with the clerk before being given to the jury, unless the writing is waived, etc. Even if delivered orally, the statutes seem to require them to be reduced to writing and filed with the clerk before the case is finally submitted, in order that exceptions may be taken by either party, if desired, and that the jury may have the benefit of such instructions in considering their verdict.

3. *Shafer v. Stinson*, 76 Ind. 374, (under a statute requiring instructions to be reduced to writing before being given).

4. *Crawford v. Brown*, 21 Colo. 272, affirming 2 Colo. App. 235 (under a statute [Code, § 187, subd. 6], providing that "before the argument is begun, the court shall give such instructions * * * as may be necessary, which instructions shall be in writing and signed by the judge").

5. *State v. Bennington*, 44 Kan. 583; *Wheat v. Brown*, 3 Kan. App. 431; *Rich v. Lappin*, 43 Kan. 666 (under Code Civ. Pro., § 285, providing as follows: "When the evidence is concluded and either party desires special instruc-

tions to be given to the jury, such instructions shall be reduced to writing, numbered, and signed by the party or his attorney asking the same, and delivered to the court. The court shall give general instructions to the jury which shall be in writing, and be numbered and signed by the judge, if required by either party. * * * All instructions given by the court must be signed by the judge and filed, together with those asked for by the parties, as a part of the record").

6. *Bowden v. Achor*, 95 Ga. 243 (under Georgia Code (1895), § 4318, providing that charges to the jury shall be in writing; "that is to say, shall write out their charges and read the same to the jury when the counsel for either party shall require them to do so").

7. *Arkansas*.—*Mazzia v. State*, 51 Ark. 177.

California.—*People v. Payne*, 8 Cal. 341.

Colorado.—*Dorsett v. Crew*, 1 Colo. 18.

Georgia.—*City Bank v. Kent*, 57 Ga. 283; *Fry v. Shehee*, 55 Ga. 208. Compare *Miller v. Mitchell*, 38 Ga. 312.

Illinois.—*Ellis v. People*, 159 Ill. 337; *Ray v. Wooters*, 19 Ill. 82; *McEwen v. Morey*, 60 Ill. 32; *Burns v. People*, 45 Ill. App. 70.

Indiana.—*Laselle v. Wells*, 17 Ind. 33; *Meredith v. Crawford*, 34 Ind. 401; *McClay v. State*, 1 Ind. 385; *Hauss v. Niblack*, 80 Ind. 416; *Provines v. Heaston*, 67 Ind. 482; *Bosworth v. Barker*, 65 Ind. 595; *Bradway v. Waddell*, 95 Ind. 170; *Kenworthy v. Williams*, 5 Ind. 375; *Townsend v. Doe*, 8 Blackf. (Ind.) 328; *Lung v. Deal*, 16 Ind. 349; *Stephenson v. State*, 110 Ind. 358; *Ohio*, etc., *R. Co. v. Rowland*, 57 Ind. 285.

Iowa.—*State v. Harding*, 81 Iowa 599; *Parris v. State*, 2 Greene (Iowa) 449; *Head v. Langworthy*, 15 Iowa 235.

course, this may be done by consent of counsel. It surely is no hardship to require the court to do exactly what the law commands and the parties request. A line or two more costs but little labor, and prevents confusion, wrong, and error.¹ To take advantage of such error, however, an exception must be saved at the time it is committed.²

(d) **Reading from Books and Papers as Part of the Charge.** (See also *infra*, IX. 2. *Reading Decisions, Text-books, or Statutes.*)—There is considerable conflict of opinion as to whether this practice violates a statutory requirement that instructions shall be in writing, and decisions, even in the same states, are not always harmonious. This conflict is due, in a measure at least, to the difference in the provisions and wording of the various statutes. In *Arkansas*,³ *Louisiana*,⁴ *Kansas*,⁵ and *Nevada*⁶ it has been held no violation of the statutes to read the law applicable to the case from the

Kentucky. — *Payne v. Com.*, 1 Metc. (Ky.) 377.

Michigan. — *O'Donnell v. Segar*, 25 Mich. 369.

Nebraska. — *Hartwig v. Gordon*, 37 Neb. 657.

North Carolina. — *Currie v. Clark*, 90 N. Car. 360.

Ohio. — *Householder v. Granby*, 40 Ohio St. 430.

Texas. — *McMahon v. State*, 1 Tex. App. 102.

"The propositions embodied in the writing must stand in their assumed form, not added to or diminished by any contemporary and extraneous words falling from the lips of the judge. The jury must gather the meaning of the instruction solely from the written words in which it is conveyed, as must the revising court in passing upon its correctness in law." *Currie v. Clark*, 90 N. Car. 355.

Instances.—An oral substitution of the word "fairly" for the word "strictly." *Provines v. Heaston*, 67 Ind. 482.

An additional oral instruction upon the subject of nominal damages. *Bradway v. Waddell*, 95 Ind. 170.

An additional oral instruction as to fixing the punishment after a written charge in which nothing was said about punishment. *Ellis v. People*, 159 Ill. 337.

An oral recapitulation of the substance of a testimony. *McClay v. State*, 1 Ind. 385.

Immateriality of Explanation or Modification.—There is some conflict of authority as to whether error in giving

oral explanations, additions, or modifications of a written charge will operate to reverse where such explanations, additions, and modifications are immaterial. According to one decision it makes no difference that an oral modification made was immaterial. *Ray v. Wooters*, 19 Ill. 82.

But another decision holds that where it appears from the record that an oral explanation could not and did not modify the charge, it will not be treated as error. It is further said in this case, however, that the record must affirmatively show that the oral explanation did not modify the charge or the cause will be reversed. *O'Donnell v. Segar*, 25 Mich. 369. To the same effect is *Currie v. Clark*, 90 N. Car. 361.

A decision similar to this is *Fry v. Shehee*, 55 Ga. 208, in which the court said that in all cases where an oral addition to a written charge was given a new trial would be granted, unless it plainly appeared from the record that such new trial would not change the verdict. *Continental Nat. Bank v. Folsom*, 67 Ga. 624.

Subsequent Reduction to Writing.—An error in giving an oral explanation or modification is not cured by subsequently reducing it to writing. *Payne v. Com.*, 1 Metc. (Ky.) 377.

1. *Bradway v. Waddell*, 95 Ind. 173.

2. *Louisville, etc., R. Co. v. Hall*, 91 Ala. 112. See also *Hartwig v. Gordon*, 37 Neb. 657.

3. *Palmore v. State*, 29 Ark. 248.

4. *State v. Thomas*, 34 La. Ann. 1084.

5. *State v. Mortimer*, 20 Kan. 93.

6. *State v. Stewart*, 9 Nev. 120.

codes and statutes without copying it into the charge, and the same view has been taken by the *Michigan* courts.¹ In *Indiana*,² *Iowa*,³ and *Utah*⁴ the contrary doctrine is maintained. Although there is an earlier decision to the contrary,⁵ it is not now permissible to read from the code in charging in cases of felony in *Tennessee*.⁶ On the other hand, the first decision on this question in *California* denied the propriety of reading from the statutes as a part of the charge,⁷ but the courts of the state now maintain the

1. *Swartout v. Michigan Air Line R. Co.*, 24 Mich. 389, in which the court said: "The spirit of the statute appears to me to have been complied with in this case. The party is as fully protected as if the statute had been copied into the charge. If the jury were to take the charge with them to their rooms, it might be different; but when it is only to be filed, and there is proper reference in it to any statute read, I think it sufficient. Had something besides a general law of the state been thus referred to, perhaps the conclusion should have been different; but it appears to me that in this the judge committed no error."

In *Josselyn v. McAllister*, 22 Mich. 306, the judge, without passing upon the question whether it was objectionable for the judge in charging the jury to read a passage from a text-book without embodying it beforehand in the written charge, held that it was too late to raise the objection after verdict.

2. *Bottorff v. Shelton*, 79 Ind. 98; *Smurr v. State*, 88 Ind. 504; *Bradway v. Waddell*, 95 Ind. 170; *Sellers v. Greencastle*, 134 Ind. 645.

"Where the request to instruct in writing is made, it is not complied with by reading from the statutes of the state or from other law books. This is not reducing the charge to writing as required by the statute. It is proper, of course, for the court to make extracts which are law and applicable to the case from any law book, and to copy the same in its written charge, and to read the charge containing such extracts to the jury. The extracts from books given in this way to the jury become part of the court's written charge; the identity of the charge is secured. But if the court may, in charging the jury, where there is a request to instruct in writing, read from law books, reading a few lines here and a few there, omitting occasionally a word or a sentence not deemed applicable to the case, a party would be put to much and per-

haps fruitless effort in collecting together the court's charge." *Smurr v. State*, 88 Ind. 509.

3. *State v. Birmingham*, 74 Iowa 407, where it was held erroneous to read from the indictment for the purpose of stating the issues to the jury without setting out in the instructions the part of the indictment thus read.

When Error Held Harmless. — While it is error to read a pleading as a part of the charge, such error is not harmful where the charge contains full instructions as to the issues. *Hall v. Carter*, 74 Iowa 364.

4. *Hopt v. People*, 104 U. S. 631, where it was held erroneous to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine, under a statute requiring instructions to be reduced to writing before being given and providing that they should form part of the record and be subjects of appeal. The reasoning of the court in support of this conclusion was as follows: "If the book was not given to the jury when they retired for deliberation, they did not have with them the whole of the instructions of the judge, as the statute contemplated. If they were permitted to take the book with them without the defendant's consent, that would of itself be ground of exception."

5. *Logston v. State*, 3 Heisk. (Tenn.) 414.

6. *Manier v. State*, 6 Baxt. (Tenn.) 595 (under a statute [Act of 1873, c. 57] which provides that every word of the charge in a felony case must be in writing and that the jury must take it with them into the jury-room on retiring).

7. *People v. Sanford*, 43 Cal. 29 (decided under a statute providing that all charges shall be reduced to writing before being given, and that in no case shall any charge be given otherwise than in writing, unless by mutual consent). The court further held in this case that the defendant's consent to such a charge could not be presumed

opposite view.¹ So in *Texas*, a decision by the Supreme Court holding it error to read from the statutes as a part of an instruction required to be in writing² has been disapproved by a decision of the court of appeals which maintains the contrary view.³

2. Time of Presenting and Answering Requests for Written Instructions. — Where the court is not bound to deliver its charge in writing in the absence of a request, a request should be made in time to give the court an opportunity to reduce its instructions to writing. A request should usually be made at or before the close of the evidence and before the commencement of the argument.⁴ If not made until after the argument of the case is concluded, and at a time when the court is about to give oral instructions to the jury, it comes too late and is not available.⁵ But a rule of court requiring a request for written instructions to be made at the commencement of a trial is unreasonable, and will not be enforced.⁶

from his presence and his failure to make objection.

1. *People v. Mortier*, 58 Cal. 262 (by divided court); *People v. Brown*, 59 Cal. 345; *People v. Lewis*, 64 Cal. 401. These cases were decided under a statute (Penal Code, § 1093), providing that if the charge be not given in writing it must be taken down by the phonographic reporter, and Penal Code, § 7, providing that writing includes printing.

2. *Carr v. State*, 41 Tex. 546.

3. *Hobbs v. State*, 7 Tex. App. 117.

4. *Manning v. Gasharie*, 27 Ind. 399; *Welsh v. State*, 126 Ind. 71; *Chance v. Indianapolis, etc.*, *Gravel Road Co.*, 32 Ind. 472; *McJunkins v. State*, 10 Ind. 140; *Ward v. Albemarle, etc.*, R. Co., 112 N. Car. 168.

Time of Answering Request for Written Charge. — Where a charge in writing is requested it has been held that the judge is not bound to give it at once, but may adjourn over to another day to prepare it. *Head v. Bridges*, 67 Ga. 227.

5. *Newton v. Newton*, 12 Ind. 527; *Boggs v. Clifton*, 17 Ind. 217; *Ollam v. Shaw*, 27 Ind. 388; *McCalment v. State*, 77 Ind. 250; *Cortner v. Amick*, 13 Ind. 463; *Atchison, etc., R. Co. v. Franklin*, 23 Kan. 74; *Connor v. Wilkie*, 1 Kan. App. 492; *Union St. R. Co. v. Stone*, 54 Kan. 83.

Where a request for written instructions was delayed until within a few minutes of the close of the evidence, and was made at a time when the granting of such request would necessarily detain the business of the court while the instructions were being pre-

pared and reduced to writing, it was held that such request was not in time and that it was properly refused. *Connor v. Wilkie*, 1 Kan. App. 492.

Reason for Rule. — "While it imposes no hardship upon either the parties or the counsel, a different rule might impose great hardship or great inconvenience upon both the court and parties in other cases waiting for their cases to be heard. If counsel may wait until the close of the argument before making the request it would necessarily cause great delay in the proceedings of the court, and materially increase costs and expenses. Generally, it would require an adjournment of the court to enable the judge to prepare his written instructions." *Atchison, etc., R. Co. v. Franklin*, 23 Kan. 74.

Party Not Bound to Write Out Instructions. — Where a party, after the introduction of the evidence, requested the court to charge the jury in writing, and thereupon the court requested said party to write out any instructions he desired to have given, which he refused to do, and thereupon the court refused to charge the jury in writing, the court committed reversible error. *Jenkins v. Levis*, 23 Kan. 255.

What Record Must Show on Appeal. — An objection that the court erred in refusing to instruct in writing as requested will not avail on appeal where it does not affirmatively appear by the record that the request was made before the commencement of the argument in the cause. *Welsh v. State*, 126 Ind. 71.

6. *Laseille v. Wells*, 17 Ind. 33; *Connor v. Wilkie*, 1 Kan. App. 492.

3. Waiver of Written Instructions — *a.* BY EXPRESS AGREEMENT. — It is perfectly competent for parties to waive written instructions by express agreement to that effect, although the statute requires the court to instruct in writing, and the parties will be estopped from afterwards objecting.¹ If the rule were otherwise it would enable parties to induce such consent, and if the findings should be adverse then assign error and reverse the judgment; the parties having consented must be held to their act.²

1. California. — *People v. Kearney*, 43 Cal. 383.

Colorado. — *Keith v. Wells*, 14 Colo. 321; *Rice v. Goodridge*, 9 Colo. 237; *Edwards v. Smith*, 16 Colo. 529.

Georgia. — *Continental Nat. Bank v. Folsom*, 67 Ga. 626.

Illinois. — *Best v. Wilson*, 48 Ill. App. 352; *Litzelman v. Howell*, 20 Ill. App. 588; *Bates v. Ball*, 72 Ill. 108; *Gaynor v. Pease Furnace Co.*, 51 Ill. App. 292.

Indiana. — *Voght v. State*, 145 Ind. 12.

Iowa. — *State v. Stipult*, 17 Iowa 575.

Missouri. — *State v. De Mosse*, 98 Mo. 340.

Nebraska. — *Fitzgerald v. Fitzgerald*, 16 Neb. 413.

Ohio. — *Ohio, etc., R. Co. v. Sauer*, 4 Ohio Cir. Ct. Rep. 466.

Tennessee. — *State v. Bungardner*, 7 Baxt. (Tenn.) 163; *Hardwick v. State*, 6 Lea (Tenn.) 230.

Texas. — *Clark v. State*, 31 Tex. 574.

Contra. — *State v. Cooper*, 45 Mo. 66, in which the court said: "The provisions of the law are express and positive. They were enacted for wise and beneficial purposes, and neither courts nor parties are to be allowed to treat the law as naught, and construe it into a dead letter, and substitute a different arrangement in its stead. Establish the practice pursued in the court below and it will happen that at the end of a wearisome trial, when the court and bar are anxious to terminate their labors, propositions will be made by the respective counsel to forego the work of drafting written instructions and let the court deliver an oral charge. If the proposition comes from the prosecuting officer the defendant dare not withhold his consent without creating prejudice before an impatient and exhausted jury — the very thing which of all others he is most anxious to avoid. The jury are liable to misapprehend the language of the court; a full, perfect, and satisfactory bill of excep-

tions is unattainable; and thus a man's rights are invaded and frittered away through a violation of law which was made for his protection."

2. Bates v. Ball, 72 Ill. 112.

"When it appears the prisoner, by his counsel, has voluntarily and freely waived a written charge, and this led the judge to give a verbal charge, thereby assenting to what is done and inducing such action, * * * he cannot be heard to assign it for error in this court. It is a long-established principle of our laws that has ripened into a maxim, that 'that to which a person assents is not esteemed in law an injury.'" *State v. Bungardner*, 7 Baxt. (Tenn.) 163.

Instances of Waiver by Consent. — A statement in the record, that "said charge or giving of instructions to the jury in writing was waived by the counsel for the respective parties in open court, before the giving of oral instructions," sufficiently shows a waiver of the right to written instructions. *Fitzgerald v. Fitzgerald*, 16 Neb. 413.

An entry in the minutes of the court in a criminal case, that "the court charge the jury orally, * * * a written charge being expressly waived," is a "mutual consent" to an oral charge. *People v. Kearney*, 43 Cal. 383.

By Whom Waiver Made. — The defendant, either by himself or by his attorney, may consent to a verbal charge. *State v. Bungardner*, 7 Baxt. (Tenn.) 163.

Waiver by Withdrawing Request. — Where a party withdraws a request for written instructions after the judge has announced his readiness to grant the request, the party thereby waives all objections to an oral instruction on the requested point. *State v. Hopkins*, 33 La. Ann. 34; *Continental Nat. Bank v. Folsom*, 67 Ga. 624. But it would seem that if the judge exhibited any unwillingness to comply with the request for

b. BY PRESENTING REQUESTS FOR WRITTEN INSTRUCTIONS TOO LATE. — So the right may be waived by failure to present a request for written instructions in apt time.¹

c. BY FAILURE TO EXCEPT TO ORAL CHARGE. — The right may also be waived by not excepting to the action of the court in charging orally, where a timely request for written instructions has been made,² or where the court is required to deliver all instructions in writing whether requested to do so or not.³ There is some conflict of authority as to whether this last rule is applicable under statutes providing that oral charges shall be given only by "mutual consent" of the parties. In *Mississippi*⁴ and *Texas*⁵ the rule has been held to apply. In *California* and *Nevada* a contrary view is taken,⁶ and it has been held that the consent of a party to an oral instruction cannot be presumed from his presence and failure to make objections when the oral instruc-

written instructions, or if he said or did anything tending to throw upon counsel any blame for any inconvenience to which the jury might be subjected, the withdrawal of a request for written instructions would probably not operate as a waiver of the right thereto. *State v. Hopkins*, 33 La. Ann. 34, *criticising State v. Swayze*, 30 La. Ann. 1323.

1. See *supra*, VII. 2. *Time of Presenting and Answering Requests for Written Instructions.*

2. *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275; *Howard v. State*, 73 Ind. 528; *Louisville, etc., R. Co. v. Hall*, 91 Ala. 113; *Jacobs v. Mitchell*, 2 Colo. App. 456; *Gibson v. State*, 26 Fla. 109; *Bird, etc., Map Co. v. Jones*, 27 Kan. 177. See also *Prater v. Snead*, 12 Kan. 447; *State v. Potter*, 15 Kan. 303.

Compare Shafer v. Stinson, 76 Ind. 374, where the court disregarded a properly made request to instruct in writing, and caused its stenographer to take down its oral instructions; a failure to object to this mode of preserving the evidence of the instructions did not waive the request, nor did such mode satisfy the statute. Under such a request the instructions must be written and given as written.

If a party sits by with the knowledge that the statute requiring instructions to be in writing is not being complied with, and takes no exception to the oral charge, he cannot afterwards be heard to complain. *Head v. Langworthy*, 15 Iowa 235.

3. *Frye v. Ferguson*, 6 S. Dak. 392; *Power v. Larabee*, 2 N. Dak. 141; *Stamm v. Coates*, 4 Dakota 69; *South-*

ern Express Co. v. Van Meter, 17 Fla. 783; *Garton v. Union City Nat. Bank*, 34 Mich. 279.

Rule Applicable to Instructions Given After Retirement of Jury. — Upon the return of the jury to the court-room the trial judge, not noticing the temporary absence of the reporter, gave additional instructions and explanations orally; the appellant's counsel noticed the absence of the reporter, but did not call the attention of the court to it because he intended to take advantage of the error. The error was held to have been waived by the appellant. *Stringham v. Cook*, 75 Wis. 590.

Review of Order Granting New Trial. — If the judge erroneously gives an oral instruction, but grants a new trial for that reason on the motion of the party aggrieved, the Supreme Court will not interfere with its discretion in this regard. *Head v. Langworthy*, 15 Iowa 235.

4. *Keithler v. State*, 10 Smed. & M. (Miss.) 192, construing a former statutory provision.

5. *Goode v. State*, 2 Tex. App. 520; *Franklin v. State*, 2 Tex. App. 8; *Vanwey v. State*, 41 Tex. 639, *construing Rev. Stat. Texas 1895, Penal Code*, art. 720, providing that no verbal charge shall be given in any case whatever except in case of misdemeanor, and then only by consent of the parties.

6. *People v. Chares*, 26 Cal. 78; *People v. Max*, 45 Cal. 254; *People v. Ah Fong*, 12 Cal. 345; *People v. Trim*, 37 Cal. 274; *People v. Woppner*, 14 Cal. 437; *People v. Sanford*, 43 Cal. 29; *People v. Bonds*, 1 Nev. 33.

tion is given.¹ So the courts of *Nebraska* and *Arizona* take directly opposite views as to the applicability of this rule under statutes which are very similar.²

Who May Take Advantage of Error. — A party who has made no request that the instructions be given in writing cannot take advantage of an erroneous refusal of the court to charge in writing, as requested by his adversary.³

4. Loss of Written Instructions. — The loss of written instructions before the decision of a motion for new trial affords no ground for a new trial. The appellate court will not presume that any error was committed in giving or refusing them, but on the contrary will presume that the court decided correctly.⁴

5. Taking Instructions to Jury-room. — See article JURIES.

1. *People v. Chares*, 26 Cal. 78; *People v. Sanford*, 43 Cal. 29; *People v. Prospero*, 44 Cal. 186.

Where the record on appeal discloses that oral instructions were given, but fails to show the consent of the defendant thereto, judgment will be reversed. *People v. Trim*, 37 Cal. 274.

On Return of Jury for Further Instructions. — In criminal cases it is reversible error for the court to charge orally without the defendant's consent, whether in the first instance or after the jury has returned into court for further instructions. *People v. Woppner*, 14 Cal. 437.

2. Nebraska. — Under Consol. Stat. of Neb., 1893, § 1071, providing that in all cases, both civil and criminal, judges shall reduce their instructions or charge to writing unless written instructions are waived by counsel in open court, and it is so entered in the record of the case, it has been held that error in giving oral instructions is waived unless excepted to at the time. *Horbach v. Miller*, 4 Neb. 43; *Republican Valley v. Arnold*, 13 Neb. 485.

In reaching this conclusion the court argued as follows: "It is, however, contended that by statutory provision it shall be error and sufficient cause for the reversal of the judgment if any charge or instruction, or any portion thereof, be given to the jury by the court without first having reduced the same to writing. This is true, and it is equally true that the admission of illegal or incompetent evidence on the trial of a cause, or the refusal to give an instruction, or the giving of an instruction to the jury, may be sufficient cause for the reversal of a judgment, yet under the rule as settled, if the point

is not made in the motion for a new trial it will be considered as waived.

Why should a small portion of a charge, orally given to the jury, be made an exception to this rule? We have heard no good reason why it should be, and we think it would be unjust to the court below to make such an exception to the rule." *Horbach v. Miller*, 4 Neb. 43.

Arizona. — Compiled Laws of Arizona, § 368, provides that the charge shall be in writing, signed by the judge, and filed with the papers in the cause, unless the defendant consents in open court that the charges be given orally; and conviction for felony will be set aside unless the record shows that the charges were in writing and read to the jury, or that the defendant consented in open court that the charge should be given orally. *Territory v. Gertrude*, 1 Arizona 74; *Territory v. Kennedy*, 1 Arizona 505; *Territory v. Duffield*, 1 Arizona 58.

3. Jaqua v. Cordesman, etc., Co., 106 Ind. 141.

4. Addems v. Suver, 89 Ill. 482, in which it was said: "We are unable to comprehend how that should render a new trial necessary. We presume no one could conceive the idea that the loss of the summons, the declaration, the pleas, a deposition, or the minutes of evidence taken by either party on the trial, could form ground for a new trial. It would be ground for granting leave to restore any of them except the minutes of evidence. If appellant desired to embody the instructions in a record for this court he should have taken the necessary steps to have them restored. It was not the duty of the court to do so, but of counsel on either side to proceed for the purpose."

6. Presumptions on Appeal or Error. — Unless the record shows to the contrary it will be presumed on appeal that instructions were in writing,¹ or that a written charge was waived,² as the presumption of law is in favor of the regularity of the action of the trial court.³ So if the record does not show to the contrary, it will be presumed that oral remarks to the jury were not instructions within the rule requiring instructions to be in writing.⁴

VIII. MARKING "GIVEN" OR "REFUSED," NUMBERING AND SIGNING INSTRUCTIONS — 1. Marking Instructions "Given" or "Refused."

— In the absence of a statute requiring it, it is apprehended that it is not necessary to mark instructions "given" or "refused,"⁵ but in a number of jurisdictions there are statutory provisions requiring that each requested instruction be marked "given" or "refused." In construing these statutes it has been held sufficient, where several instructions written on separate sheets are attached, to write "given" or "refused" at the beginning of the first sheet,⁶ or to write "the foregoing are all refused" at the bottom of the last sheet.⁷

Necessity for Exceptions. — The failure of the court to mark "given"

1. *Meshke v. Van Doren*, 16 Wis. 319; *Hardwick v. State*, 6 Lea (Tenn.) 229.

Presumption that Stenographer Took Down Charge. — Unless the record shows affirmatively to the contrary it will be presumed on appeal that the charge delivered by the court was taken down in writing by the stenographer. *People v. Ferris*, 56 Cal. 442; *People v. Bumberger*, 45 Cal. 650; *State v. Preston*, (Idaho 1894) 38 Pac. 694.

Reading from Decisions — Presumption. — Where the record recites that an instruction was given "in which the court read to the jury an extract from the opinion of" the court in a certain case, from a certain law periodical, setting out the extract, it will be presumed that such extract was transcribed in the written instructions given. *Citizens' F. & M. Ins. Co. v. Short*, 62 Ind. 316.

Presumption as to Refusal of Instructions. — Where the record shows the indorsement of the court in writing "refused" on written instructions requested, together with the date and name of the judge, it will be held, nothing to the contrary appearing, that the court conformed to the law in declaring "in writing to the jury his ruling thereon," and presenting and pronouncing the same to the jury as given or refused. *Jones v. State*, 18 Fla. 889.

2. *Hardwick v. State*, 6 Lea (Tenn.) 229.

3. *Hardwick v. State*, 6 Lea (Tenn.) 229.

4. *O'Hara v. King*, 52 Ill. 304.

Presumption as to Correctness of Verbal Charge. — Where a verbal charge was given it will be presumed to be correct; otherwise if given in writing. *Newton v. State*, 3 Tex. App. 245.

5. See *People v. Samsels*, 66 Cal. 99, in which it was held that the charge of the court to the jury, given of its own motion, need not be marked by the judge.

6. *Harvey v. Tama County*, 53 Iowa 228; *McDonald v. Fairbanks*, 161 Ill. 131; *Lawrenceville Cement Co. v. Parker*, 21 Civ. Pro. Rep. (N. Y. Supreme Ct.) 263.

Stating Ground of Refusal Unnecessary. — Where an instruction refused because already given is merely marked "refused," without stating the reason therefor, there is no available error. *People v. Douglass*, 100 Cal. 1. See also *People v. Ramirez*, 56 Cal. 533.

Presumptions on Appeal. — It is not necessary that the record shall affirmatively show that charges given on request, or refused, were indorsed as required by the statute; in the absence of a recital to the contrary, and exception duly reserved on account of it, the court will presume that the charges were properly so indorsed. *Allen v. State*, 74 Ala. 557.

7. *Territory v. Baker*, 4 N. Mex. 117. **Instructions Given by the Court on Its Own Motion.** — An instruction or series of instructions headed "Instructions

or "refused" on the instructions, as required by statute, is a right which the reviewing court will regard as waived unless the failure to do so is excepted to at the time the charge is given,¹ and it makes no difference whether the statute is regarded as directory or mandatory.² So it has been held that a failure to indorse "given" on the instructions requested and given to the jury is not error of which advantage can be taken on motion in arrest of judgment.³ In some jurisdictions the objection must be renewed on a motion for new trial.⁴

Where Instructions Are Shown to Have Been Given. — A failure to comply with a statute requiring instructions to be marked "given" or "refused" will not operate to reverse if the instructions are shown by the record to have been given,⁵ nor is a failure to mark "refused" on instructions which the record shows the court declined giving ground for reversal.⁶ Unless an instruction is marked "given" or "refused" it cannot be assigned that there was error, in giving or refusing such instruction.⁷ Nor can error be assigned to a failure to mark "given" on an instruction where it cannot be

given by the court on its own motion," and so placed in the record as to be clearly separate and distinguishable from the instructions presented by the parties, is a sufficient compliance with the terms of the statute. *Gillen v. Riley*, 27 Neb. 158.

1. *Gibson v. Sullivan*, 18 Neb. 558; *Smith v. State*, 4 Neb. 277; *Tagg v. Miller*, 10 Neb. 442; *Jolly v. State*, 43 Neb. 857; *Chadron v. Glover*, 43 Neb. 734; *Omaha, etc., Land, etc., Co. v. Hansen*, 32 Neb. 449; *Fry v. Tilton*, 11 Neb. 456; *Tyree v. Parham*, 66 Ala. 424; *Barnewall v. Murrell*, 108 Ala. 366; *Allen v. State*, 74 Ala. 557; *Fish v. Chicago, etc., R. Co.*, 81 Iowa 280; *Knight v. Chicago, etc., R. Co.*, 81 Iowa 310.

2. In *Alabama* the statute is regarded as mandatory. See *Tyree v. Parham*, 66 Ala. 424. In other states it is considered directory merely. See cases cited in the preceding note.

3. *Holley v. State*, 75 Ala. 20.

4. *Tagg v. Miller*, 10 Neb. 442.

5. *St. Louis, etc., R. Co. v. Hawkins*, 39 Ill. App. 406; *Cook v. Hunt*, 24 Ill. 550; *Tobin v. People*, 101 Ill. 123; *Frame v. Murphy*, 56 Ill. App. 555; *McKenzie v. Remington*, 79 Ill. 388; *Harrigan v. Turner*, 65 Ill. App. 470.

Cook v. Hunt, 24 Ill. 550, where the court, in arriving at this conclusion, said: "As to those which the court neglected to mark as given or refused, as the statute requires, we have to say, this statute is directory to the court, and

should be obeyed; but if, in the hurry of business, it should not be, a party who is not in fault should not be prejudiced by it if the record shows what was done with the instructions. If the law is correctly laid down in them, we do not think a court would be justified in reversing a judgment because they were not marked 'given.'" So in *Harrigan v. Turner*, 65 Ill. App. 470, it is said that "the failure to mark instructions 'given' or 'refused' is not ground for reversal when it can be ascertained which were given and which refused."

6. *McDonald v. Fairbanks*, 161 Ill. 124; *Washington v. State*, 106 Ala. 58.

7. *Cadwallader v. Blair*, 18 Iowa 420; *Jones v. Buzzard*, 2 Ark. 415; *Little v. State*, 58 Ala. 265; *Thompson v. Chumney*, 8 Tex. 394.

Recital in Transcript. — In *Jones v. Buzzard*, 2 Ark. 415, it is said: "It is true that the clerk has copied into the transcript certain instructions, and has marked them 'filed,' and has written upon the margin opposite to each instruction the word 'given' or 'refused.' These entries are mere clerical memoranda, made without any order or authority of the court, and consequently they cannot be regarded as forming any part of the record in the case." And in *Cadwallader v. Blair*, 18 Iowa 420, it is said that a recital in the clerk's transcript that an instruction was "given" is not sufficient.

determined from the record whether the instruction was applicable to the evidence.¹

2. Numbering Instructions. — In some jurisdictions it is provided by statute that instructions to the jury shall be numbered, but a failure to comply with this requirement is not a ground for reversal unless excepted to at the time the instructions were given. Unless the aggrieved party objects in apt time he cannot be heard afterwards to complain of the omission.² The objection cannot be made for the first time on a motion for new trial.³ So a failure of the court to number its instructions in compliance with a statute requiring it⁴ will not be ground for reversal where no prejudice resulted therefrom.⁵ Where instructions given at a trial are not numbered or so designated that they can be distinguished, a general exception to the giving of them will not be noticed on appeal.⁶

3. Signing Instructions — *a.* **SIGNATURE OF PARTIES OR COUNSEL.** — Whether or not instructions shall be signed by parties or counsel, is largely a matter of statutory regulation. If there is no statutory provision on the subject, the signature of parties or counsel, it is apprehended, will be unnecessary, but when a statute requires such signature, the court will be justified in refusing requests for instructions if the statute is not complied with.⁷

1. *Goodwin v. State*, 106 Ala. 670, 18 So. Rep. 694.

2. *Smith v. State*, 4 Neb. 277; *Gibson v. Sullivan*, 18 Neb. 558; *Jolly v. State*, 43 Neb. 857; *Moffatt v. Tenney*, 17 Colo. 189; *Kansas Pac. R. Co. v. Ward*, 4 Colo. 36; *Gibbs v. Wall*, 10 Colo. 153.

Object of Requirement. — The object in requiring prayers to be numbered and signed is not for the information and guidance of the jury, but for the convenience of the court and the protection of the parties litigant in the matter of preserving their objections and exceptions. *Moffatt v. Tenney*, 17 Colo. 189.

Modifications of Instructions — How Numbered. — Where it is found necessary to modify an instruction it is proper to give the modification another number. *Columbia, etc., R. Co. v. Hawthorne*, 3 Wash. Ter. 353.

Error in Refusing Request Waived by Counsel's Failure to Number Request. — Where counsel are required by statute to number requests for instructions, it has been held that error cannot be assigned to a refusal of requested instructions unless they have been distinctly numbered. *Coryell v. Stone*, 62 Ind. 308.

3. *Moffatt v. Tenney*, 17 Colo. 189.

4. *Comp. Laws N. Mex.*, § 2059.

5. *Miller v. Preston*, 4 N. Mex. 314.

6. *Cunningham v. Seattle Electric R., etc., Co.*, 3 Wash. 471.

7. *Colorado*. — *Schoolfield v. Houle*, 13 Colo. 394.

Indiana. — *Terre Haute, etc., R. Co. v. Graham*, 46 Ind. 240; *Buchart v. Ell*, 9 Ind. App. 355; *Howard County v. Legg*, 110 Ind. 479; *Lake Erie, etc., R. Co. v. Brafford*, 15 Ind. App. 655; *Jeffersonville, etc., R. Co. v. Vancant*, 40 Ind. 233; *Vanderkarr v. State*, 51 Ind. 91; *Louisville, etc., R. Co. v. Goben*, 15 Ind. App. 123; *Sutherland v. Hankins*, 56 Ind. 353; *McCammack v. McCammack*, 86 Ind. 387; *Hindman v. Timme*, 8 Ind. App. 416; *Etter v. Armstrong*, 46 Ind. 197; *State Nat. Bank v. Bennett*, 8 Ind. App. 679; *Stott v. Smith*, 70 Ind. 298; *Lake Erie, etc., R. Co. v. Close*, 5 Ind. App. 444; *Conduitt v. Ryan*, 3 Ind. App. 1; *Jeffersonville, etc., R. Co. v. Vancant*, 40 Ind. 233; *Glover v. State*, 109 Ind. 391; *Chicago, etc., R. Co. v. Hedges*, 105 Ind. 398; *Beatty v. Brummett*, 94 Ind. 76; *Hutchinson v. Lemcke*, 107 Ind. 121; *Craig v. Frazier*, 127 Ind. 286; *Citizens' St. R. Co. v. Hobbs*, 15 Ind. App. 610; *Hunt v. Elliott*, 80 Ind. 245; *Childress v. Callender*, 108 Ind. 394; *Darnell v. Sallee*, 7 Ind. App. 581.

Texas. — *Smith v. Fordyce*, (Tex.

The court may, however, give an unsigned instruction if it sees fit to do so.¹

b. SIGNATURE OF COURT. — In the absence of a statute requiring the charge to be signed by the court, no objection can be taken to the charge for want of its signature.² In some jurisdictions the judge is required by statute to sign the charge, and in *Alabama* and *Florida* the statute is considered mandatory, and it is held that a noncompliance with the requirement is a good ground for reversal if proper exceptions are saved,³ but that a failure to save exceptions constitutes a waiver of the error.⁴ In *Iowa* the statute is considered merely directory, and it is held that a noncompliance therewith is no ground for reversal unless the defendant was prejudiced thereby.⁵ And the same view is taken in *Texas* with regard to the signing of instructions in civil cases,⁶ but in criminal cases of the grade of felony the latter court holds that the statute is mandatory.⁷

1891) 18 S. W. Rep. 663; *Texas*, etc., R. Co. v. Mitchell, (Tex. Civ. App. 1894) 26 S. W. Rep. 154; *Redus v. Burnett*, 59 Tex. 576; *Houston v. Blythe*, 60 Tex. 513.

Preserving Instructions for Review on Appeal. — Instructions asked for by a party, whether given or refused, must be signed either by the party or his attorney, otherwise they will not be noticed or considered on appeal although they may have been copied into the record. *Sutherland v. Hankins*, 56 Ind. 353.

1. *Galveston, etc., R. Co. v. Neel*, (Tex. Civ. App. 1894) 26 S. W. Rep. 788.

2. *Hunter v. Parsons*, 22 Mich. 96.

3. *Fridenberg v. Robinson*, 14 Fla. 130; *Baker v. State*, 17 Fla. 410; *Tyree v. Parham*, 66 Ala. 424.

What Is a Sufficient Compliance. — The following language, written at the foot of an instruction asked; "Refused as it charges on the evidence. E. K. Foster, Judge of the Seventh Judicial Circuit. To which ruling of the court the defendant then and there excepted. E. K. Foster, Judge Seventh Judicial Circuit. [L. S.]:" is a sufficient signing and sealing under Acts of 1877, c. 2096, § 3. *Carter v. State*, 22 Fla. 553.

4. *Jones v. Greeley*, 25 Fla. 629; *Southern Express Co. v. Van Meter*, 17 Fla. 783; *Tyree v. Parham*, 66 Ala. 424.

5. *State v. Stanley*, 48 Iowa 221; *State v. McCombs*, 13 Iowa 426.

6. *Parker v. Chancellor*, 78 Tex. 524; *Dillingham v. Bryant*, (Tex. App. 1889) 14 S. W. Rep. 1017.

7. *Smith v. State*, 1 Tex. App. 416. See also *Hubbard v. State*, 2 Tex. App. 506.

The official signature of the judge to the charge of the court is a full compliance with the statute requiring such charge to be certified by the judge. *Roberts v. State*, 5 Tex. App. 141; *Hubbard v. State*, 2 Tex. App. 506; *Henderson v. State*, 5 Tex. App. 140.

Signing Nunc Pro Tunc. — Where a charge not signed by the judge is not signed by the clerk, and is thereby made a record in the case, and its identity placed beyond doubt, the judge may properly sign it *nunc pro tunc* when his attention is called to the omission by motion for new trial, but it is unnecessary so to sign it. *Parker v. Chancellor*, 78 Tex. 528.

The Rule in Kansas. — In Kansas it is provided by statute that "the judge must charge the jury in writing, and the charge shall be filed among the papers of the cause." Gen. Stat., p. 858, § 236. Under this statute it has been held that in a prosecution for murder, where the court did not sign the instructions, but the same were handed to the clerk, and became a part of the files of the court, and where no one requested that the instructions should be signed, or that the paper containing them should be given to the jury, no material error was committed, the court saying that the statute does not in terms, if it does at all, require that the judge should sign instructions given in criminal cases. *State v. Davis*, 48 Kan. 1.

Assignments of Error. — Unless instructions are signed by the judge and filed as a part of the record, or embodied in a bill of exceptions, the court cannot consider assignments of error to such instructions.¹

IX. METHOD OF PRESENTING INSTRUCTIONS TO JURY — 1. In General. — It has been held sufficient to read a requested instruction to the jury and tell them that the court gives it in charge,² or that it is the law,³ or to express approval of it without using the ordinary phrase, "I so charge you."⁴ So if counsel read a requested charge distinctly, in the presence of the jury, it has been held sufficient for the court without repeating it to tell the jury that such is the law.⁵

2. Reading Decisions, Text-books, or Statutes — Opinions and Decisions. — If there be no statute or rule of court prohibiting it, the court may read legal decisions or extracts therefrom containing propositions of law applicable to the case at bar, as a part or the whole of the charge,⁶ or may read decisions in support of a

1. *Indiana*. — *Heaton v. White*, 85 Ind. 376; *Olds v. Deckman*, 98 Ind. 162; *Landwerlen v. Wheeler*, 106 Ind. 523; *Childress v. Callender*, 108 Ind. 394; *Silver v. Parr*, 115 Ind. 113; *Conduitt v. Ryan*, 3 Ind. App. 1; *Butler v. Roberts*, 118 Ind. 481; *Fromlet v. Poor*, 3 Ind. App. 430; *Supreme Lodge, etc. v. Johnson*, 78 Ind. 110; *Hadley v. Atkinson*, 84 Ind. 64; *Elliott v. Russell*, 92 Ind. 526.

Iowa. — *State v. Gebhardt*, 13 Iowa 473; *State v. Watrous*, 13 Iowa 489.

See also *Barnes v. Jamison*, 24 Tex. 362.

2. *Feagan v. Cureton*, 19 Ga. 404.

3. *Long v. State*, 12 Ga. 293.

4. *State v. Stewart*, 26 S. Car. 125.

5. *Dillon v. McRae*, 40 Ga. 107; *Long v. State*, 12 Ga. 293; *East Tennessee, etc., R. Co. v. Fain*, 12 Lea (Tenn.) 35. *Contra*, *Leaptrot v. Robertson*, 44 Ga. 50, where it was held that when counsel for either party reads written requests to charge in the presence and hearing of the jury, the court should either give or refuse to give such charges. If a request is a legal and pertinent charge which ought to be given, then the court should give it in the language of the request, by reading the same to the jury. To hold up the paper containing the requests to charge, after the same has been read and handed to the court, and say, "Gentlemen, I give you all these in charge as requested," is not a proper mode of instructing the jury.

It is sufficient if the law is given

in charge so plainly that the jury can have no difficulty in understanding it, whether it is repeated in their hearing by the judge himself or read by another and sanctioned and charged by him as read. *Dillon v. McRae*, 40 Ga. 107.

Rule Under the Nebraska Statute. — The statutes of Nebraska (Comp. Stat. Neb., c. 19, § 54) require the court to read over all the instructions which it intends to give, and none others, to the jury. Under this statute it has been held reversible error for the court to refuse or fail to read to the jury instructions which it announces as given and files as such. *McDuffie v. Bently*, 27 Neb. 380. To the same effect is *Veneman v. McCurtain*, 33 Neb. 643, where it was held reversible error to hand instructions to the jury without reading them.

6. *California*. — *Spencer's Estate*, 96 Cal. 448; *Cousins v. Partridge*, 79 Cal. 224.

District of Columbia. — *Johnson v. Baltimore, etc., R. Co.*, 6 Mackey (D. C.) 232.

Illinois. — *Kirby v. Wilson*, 98 Ill. 240.

Indiana. — *Lett v. Horner*, 5 Blackf. (Ind.) 296; *Bronnenburg v. Charman*, 80 Ind. 475.

Michigan. — *People v. Niles*, 44 Mich. 606; *Power v. Harlow*, 57 Mich. 107.

New York. — *People v. Minnaugh*, 131 N. Y. 563; *Cordell v. New York Cent., etc., R. Co.*, 6 Hun (N. Y.) 461; *Panama R. Co. v. Johnson*, 63 Hun (N. Y.) 629, 44 N. Y. St. Rep. 382; *Anderson v. McAleenan*, 15 Daly (N. Y.) 444.

proposition of law which he has announced.¹ It is error, however, to read a part of a decision which, standing alone, announces a different proposition from that contained in the entire opinion.² There should be nothing in the remainder of the opinion qualifying the part read,³ and it is, of course, necessary that the decision read be applicable to the facts of the case.⁴ So if a cause has been reversed on questions of evidence, it has been held error to read to the jury, on the next trial, the opinion of the Supreme Court and to submit the case thereon.⁵

Text-book. — It has also been held that the court may properly read an extract from a text-book as a part of the charge.⁶

Statutes. — The court may also read a statute as a part of the charge, provided it is relevant and applicable.⁷

Pennsylvania. — *Hood v. Hood*, 25 Pa. St. 417.

It is not error for the court to read to the jury an opinion of the Supreme Court without a special statement of the facts on which the opinion was rendered, when he charges the law as applicable to the facts before him. *Riggins v. Brown*, 12 Ga. 271.

Reading Decisions on Former Trial. — In charging the jury it is not error to read to them the language used by the Supreme Court in disposing of the same case on a former trial, if the language read merely lays down a rule of law which is as applicable to one case as to the other. *Power v. Harlow*, 57 Mich. 107; to the same effect see *Kirby v. Wilson*, 98 Ill. 240. It would probably be erroneous, though, if anything read showed the result of the previous trial. *Panama R. Co. v. Johnson*, 63 Hun (N. Y.) 629, 44 N. Y. St. Rep. 382.

Explaining Language of Opinion. — When the trial court in charging adopts the language of the Supreme Court, it is perfectly proper to add such consistent explanations as may be necessary to adapt it to the facts of the case in hand. *Freeman v. Weeks*, 48 Mich. 255.

1. *Henry v. Klopfer*, 147 Pa. St. 178.

2. *Laidlaw v. Sage*, 80 Hun (N. Y.) 550.

Practice Not to Be Commended in Criminal Cases. — It is said that the practice of reading opinions in other cases to the jury as a part of the charge of the court in a criminal case is a dangerous one, and not to be commended. *People v. McNabb*, 79 Cal. 419.

3. *Cordell v. New York Cent., etc., R. Co.*, 6 Hun (N. Y.) 461.

4. *Hutchinson Furnace, etc., Co. v. Lyford*, 123 Ill. 300; *Etchepare v. Aguirre*, 91 Cal. 288.

5. *Dimes Sav. Inst. v. Allentown Bank*, 61 Pa. St. 391. See also *Frank v. Williams*, 36 Fla. 136, where it was held error for the trial judge to read in the hearing of a jury a reported case and state that the facts of the case read from were similar to the one then before the court, and that he adopted the decision in the case read as the law on the subject. In no more effective way could a judge intimate his opinion as to the effect of the evidence before the jury than by saying that it was similar to that of an adjudged case in which the testimony was commented on as being sufficient to sustain a finding thereon.

6. *Bronnenburg v. Charman*, 80 Ind. 475; *People v. Niles*, 44 Mich. 606.

In *Bronnenburg v. Charman*, 80 Ind. 475, it was held that reading to the jury an extract from "Story on Bailments" was not an improper method of stating the law of mandate.

Former Charge. — A judge's written charge may embrace extracts from a former charge of another judge, shown by a transcript made at the time such charge was given. *Ohio, etc., R. Co. v. Sauer*, 4 Ohio Cir. Ct. Rep. 466.

7. *Miller v. Com.*, (Va. 1895) 21 S. E. Rep. 499; *People v. Henderson*, 28 Cal. 465; *People v. Burns*, 63 Cal. 614; *Com. v. Harris*, 168 Pa. St. 619; *Simons v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 619; *State v. Smith*, 49 Conn. 385; *Cochran v. Jones*, 85 Ga. 678; *Fitzpatrick v. People*, 98 Ill. 269; *Needham v. People*, 98 Ill. 275; *Johnson v. Schultz*, 74 Mich. 75. Compare *Lane v. Chicago, etc., R. Co.*, 35 Mo. App. 567.

Where Part of Statute Is Irrelevant. — Where the court, in charging, reads the whole of a section, a part only of which is relevant, the judgment will not be

3. Remarks Tending to Weaken or Strengthen Effect of Instructions. — In presenting requested instructions to the jury the court should refrain from making remarks the tendency of which will be to weaken their force and effect,¹ but, of course, this will not be ground for reversal unless it operates to the prejudice of the party complaining.² On the other hand, nothing should be said which will lead the jury to attach more importance to them than to other instructions given.³ If instructions are taken to the jury-room it is not a proper practice to underscore any of them,⁴ nor should the court make marginal citations thereon to decisions or to other legal authorities.⁵ So in charging the jury, the trial

disturbed if it is not apparent that some substantial right of the accused was affected. *People v. Burns*, 63 Cal. 614; *Needham v. People*, 98 Ill. 275.

1. *Horton v. Williams*, 21 Minn. 187; *Watson v. Union Iron, etc., Co.*, 15 Ill. App. 509; *Stevenson v. Chicago, etc., R. Co.*, 94 Iowa 719; *Wilson v. White*, 71 Ga. 506; *Head v. Bridges*, 67 Ga. 227.

It is erroneous to give a requested instruction, and say, "Yes, if the defendant's papers are all right, and the plaintiff all wrong, then this is so, and I so charge the jury." *Horton v. Williams*, 21 Minn. 187. So where eleven instructions were given for the defendant, most of them stating accurately and tersely the rules of law applicable to the case upon the defendant's theory as to the facts, and the court, after reading these instructions, read one prepared by himself in which he commenced by saying that the plaintiff had asked no instructions, and that such of those asked by the defendant as he had thought to be correct and had read to the jury by no means covered the case which they had to decide, and that he thought he ought not to let the case go in this loose way, it was held that this introductory clause was open to grave criticism. *Watson v. Union Iron, etc., Co.*, 15 Ill. App. 509. On the other hand, it has been held that when the judge correctly states the law to the jury the defendant cannot complain that he also said that he gave the instruction with some hesitation as to its correctness. *Evans v. Foss*, 49 N. H. 490. [This ruling cannot be defended on principle.]

2. *Wilson v. White*, 71 Ga. 506; *Head v. Bridges*, 67 Ga. 227; *Stevenson v. Chicago, etc., R. Co.*, 94 Iowa 719.

Telling Jury at Whose Instance Instruction Given. — It is the better practice not to tell the jury at whose instance the

instruction is given, *Stevenson v. Chicago, etc., R. Co.*, 94 Iowa 719; or at whose instance the charge was reduced to writing, *Head v. Bridges*, 67 Ga. 227; *Wilson v. White*, 71 Ga. 506; but to do so is not ground for reversal.

3. *Smith v. State*, 103 Ala. 40; *Martin v. State*, 104 Ala. 71.

In *Smith v. State*, 103 Ala. 40, it was held proper to refuse an instruction that a requested instruction was entitled to as much importance as any other instruction; and in *Martin v. State*, 104 Ala. 71, it was held proper to refuse a charge that "it is their [the jury's] duty to carefully read and consider these written charges, and * * * apply the law as set forth in the written charges as well as that in the oral charge," on the ground that it would give undue influence to the written charge. On the other hand, in *Dixon v. State*, 46 Neb. 298, it was held that the court might properly instruct that a requested instruction is entitled to as much weight as an instruction given by the court of its own motion.

4. *Wright v. Brosseau*, 73 Ill. 381.

5. *Herzog v. Campbell*, 47 Neb. 370; *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578; *Williams v. St. Louis, etc., R. Co.*, 123 Mo. 573.

Harmless Error. — A marginal citation of authorities on an instruction will not be ground for reversal unless it is shown that the complaining party was prejudiced thereby. *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578.

Prejudice will not be presumed from the mere citation, on an instruction, of a volume and page of the reports. *Herzog v. Campbell*, 47 Neb. 370. And it is not a ground for new trial unless it appears that the jury had the books in the room, or knew what they decided. *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578.

judge may as well dispense with adverse comments to the jury on the justice of the law as expounded by him.¹

4. Manner and Emphasis in Delivering Instructions. — While it is undoubtedly true that the trial judge may, by the manner in which he delivers his charge, and the emphasis he places on certain portions of it, seriously prejudice the rights of one of the parties, it is very generally held that this is an error which cannot be remedied.² The reviewing court can concern itself with the manner of the trial judge in instructing the jury, only so far as it can measure it by the language employed.³ The reason for this is obvious. There is no method by which the manner and emphasis of a trial judge in instructing can be reflected on appeal, or its influence estimated.⁴

5. Necessity of Delivering Instructions in Open Court — *a.* STATEMENT OF RULE. — It is a fundamental principle, to which there are some few exceptions, that when the cause has been submitted to the jury by the charge of the court, all further instructions of whatever nature should be delivered in open court.⁵

1. *Stebbins v. Keene Tp.*, 55 Mich. 552.

2. *Georgia*. — *Anderson v. Tribble*, 66 Ga. 588; *Rountree v. Gurr*, 68 Ga. 292.

Michigan. — *Gibbs v. Johnson*, 63 Mich. 671; *Merchants' Bank v. Ortman*, 48 Mich. 419.

North Carolina. — *Reiger v. Davis*, 67 N. Car. 189; *Ernull v. Whitford*, 3 Jones L. (N. Car.) 474.

Pennsylvania. — *Horton v. Chevington, et al.*, *Coal Co.*, 2 Penny. (Pa.) 49.

Texas. — *Maloney v. Roberts*, 32 Tex. 136.

Wisconsin. — *Page v. Sumpter*, 53 Wis. 656.

See also *Murphy v. Whitlow*, 1 Arizona 340, in which the court refused to pass on this question as not being properly before it, and held that if it could be passed upon at all, this could only be done by making it a ground of motion for a new trial, supported by affidavits in accordance with the statutory requirements on that subject. Compare *Wheeler v. Wallace*, 53 Mich. 357, in which it was said: "It is very unusual to have exception taken on writ of error to the manner and deportment of the trial judge in the conduct of the trial, and under ordinary circumstances a court of review would not scrutinize very closely his methods when no error in his rulings was alleged. Still, it is possible for a judge to deprive a party of a fair trial, even without intending to do so, by the manner in which he conducts the case, and by a plain exhibition

to the jury of his own opinions in respect to the parties, or to their case."

3. *Gibbs v. Johnson*, 63 Mich. 671.

4. *Gibbs v. Johnson*, 63 Mich. 671; *Rountree v. Gurr*, 68 Ga. 292; *Anderson v. Tribble*, 66 Ga. 588, in which the court said: "As to the emphasis of the judge in his charge, we are utterly unable to pass upon that, as there are no means yet provided for conveying to this court the cadences of the judge when he instructs the jury for one side, and again its emphatic swell when he is instructing for the other."

5. *Alabama*. — *Johnson v. State*, 100 Ala. 58.

Illinois. — *Chicago, et al. v. R. Co. v. Robbins*, 159 Ill. 598, reversing 54 Ill. App. 611; *Crabtree v. Hagenbaugh*, 23 Ill. 349; *Fisher v. People*, 23 Ill. 283.

Indiana. — *Low v. Freeman*, 117 Ind. 341; *Fish v. Smith*, 12 Ind. 563; *Hall v. State*, 8 Ind. 439; *Quinn v. State*, 130 Ind. 340; *Smith v. McMillen*, 19 Ind. 391; *Jones v. Johnson*, 61 Ind. 257.

Kentucky. — *Goode v. Campbell*, 14 Bush (Ky.) 75.

Massachusetts. — *Sargent v. Roberts*, 1 Pick. (Mass.) 337; *Moseley v. Washburn*, 165 Mass. 417; *Read v. Cambridge*, 124 Mass. 567; *Merrill v. Nary*, 10 Allen (Mass.) 416.

Michigan. — *Hopkins v. Bishop*, 91 Mich. 328; *Snyder v. Wilson*, 65 Mich. 336; *Fox v. Peninsula White Lead, et al.*, *Works*, 84 Mich. 676.

Minnesota. — *Hoberg v. State*, 3 Minn. 262.

Going in Person to Jury-room.—It is not permissible for the trial judge to go into the jury-room to give further instructions.¹ And it has been held in a recent criminal case that where the judge, at the request of the jury, goes to the jury-room and stands in the doorway, with the door partially open, he is guilty of such misconduct as will necessitate a reversal, and that the prevailing party cannot be permitted to show that the judge said nothing to the jury.²

Missouri.—Chinn *v.* Davis, 21 Mo. App. 363; State *v.* Miller, 100 Mo. 606; State *v.* Alexander, 66 Mo. 148; Chouteau *v.* Jupiter Iron Works, 94 Mo. 388.

New York.—Kehrley *v.* Shafer, 92 Hun (N. Y.) 196; Zust *v.* Linthicum, 58 N. Y. Super. Ct. 478, 19 Civ. Pro. Rep. (N. Y.) 370; Gibbons *v.* Van Alstyne, (Supreme Ct.) 29 N. Y. St. Rep. 463; Thayer *v.* Van Vleet, 5 Johns. (N. Y.) 111; Plunkett *v.* Appleton, 51 How. Pr. (N. Y. Super. Ct.) 469; Taylor *v.* Betsford, 13 Johns. (N. Y.) 487; Neil *v.* Abel, 24 Wend. (N. Y.) 185; Watertown Bank, etc., Co. *v.* Mix, 51 N. Y. 558; Benson *v.* Clark, 1 Cow. (N. Y.) 258; Moody *v.* Pomeroy, 4 Den. (N. Y.) 115; High *v.* Chick, 81 Hun (N. Y.) 100; Seeley *v.* Bisgrove, 83 Hun (N. Y.) 293.

Ohio.—Kirk *v.* State, 14 Ohio 511. Compare dictum in *Milius v. Marsh*, 1 Disney (Ohio) 512.

Rhode Island.—State *v.* Smith, 6 R. I. 33.

Vermont.—State *v.* Patterson, 45 Vt. 316.

The Rule in New Hampshire and South Carolina.—In New Hampshire the rule seems to be settled otherwise. It is there held that the judge may, during a recess of court, at the request of the jury, send them written instructions. *Shapley v. White*, 6 N. H. 172; *School Dist. No. 1 v. Bragdon*, 23 N. H. 517; *Bassett v. Salisbury Mfg. Co.*, 28 N. H. 438. And during the session of court the judge may send written instructions to the jury on their request, after their return. *Allen v. Aldrich*, 29 N. H. 63.

The rule that no communication whatever ought to take place between the judge and the jury after the cause has been committed to them, unless in open court, is not recognized in New Hampshire. *School Dist. No. 1 v. Bragdon*, 23 N. H. 517.

So, in South Carolina it is no ground for new trial that the judge answered an inquiry of the foreman, which he came in to make after the jury had retired for consultation, without communicat-

ing its purport to the parties or their counsel. *Goldsmith v. Solomons*, 2 Strobb. L. (S. Car.) 296. This last decision seems to be based upon the preposterous theory that the intercourse between the jury and the bench is so confidential that often communications from the jury ought not to be disclosed to the bar.

1. *Illinois.*—Crabtree *v.* Hagenbaugh, 23 Ill. 349.

Indiana.—Fish *v.* Smith, 12 Ind. 563. *Louisiana.*—State *v.* Frisby, 19 La. Ann. 143.

Michigan.—Fox *v.* Peninsula White Lead, etc., Works, 84 Mich. 676.

Minnesota.—Hoberg *v.* State, 3 Minn. 262.

New York.—Thayer *v.* Van Vleet, 5 Johns. (N. Y.) 111; Benson *v.* Clark, 1 Cow. (N. Y.) 258; Taylor *v.* Betsford, 13 Johns. (N. Y.) 487; High *v.* Chick, 81 Hun (N. Y.) 100; People *v.* Linzey, 79 Hun (N. Y.) 23.

2. State *v.* Wroth, 15 Wash. 621. The reasoning of the court was as follows: "In the discharge of his official duty, the place for the judge is on the bench. As to him the law has closed the portals of the jury-room, and he may not enter. The appellant was not obliged to follow the judge to the jury-room in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge; and the state cannot be permitted to show what occurred between the judge and the jury at a place where the judge had no right to be, and in regard to which no official record could be made. But learned counsel for the state insist that the judge said nothing to the jury, and hence his conduct could not have been prejudicial to the defendant. But the law does not subject parties litigant to the disadvantage of being required to accept the statement of even the judge as to what occurs between himself and the jury at a place where the judge has no right to be, and where litigants cannot be required to attend. 'It is the

Sending to Jury-room. — So it is improper for the judge to send further instructions into the jury-room, either written or oral.¹

lawful right of a party to have his cause tried in open court, with opportunity to be present and heard in respect to everything transacted. It is his right to be present and attended by counsel whenever it is found necessary or desirable for the court to communicate with the jury, and he is not required to depend upon the memory or sense of fairness of the judge as to what occurs between the judge and jury at any time or place when he has no lawful right to be present."

1. *Alabama.* — *Johnson v. State*, 100 Ala. 58.

Illinois. — *Chicago, etc. R. Co. v. Robbins*, 159 Ill. 598, reversing 54 Ill. App. 611.

Indiana. — *Low v. Freeman*, 117 Ind. 341; *Quinn v. State*, 130 Ind. 340; *Smith v. McMillen*, 19 Ind. 391.

Kentucky. — *Goode v. Campbell*, 14 Bush (Ky.) 75.

Massachusetts. — *Sargent v. Roberts*, 1 Pick. (Mass.) 337; *Merrill v. Nary*, 10 Allen (Mass.) 416.

Michigan. — *Hopkins v. Bishop*, 91 Mich. 328; *Snyder v. Wilson*, 65 Mich. 336.

Missouri. — *State v. Alexander*, 66 Mo. 148; *Chouteau v. Jupiter Iron Works*, 94 Mo. 388.

New York. — *Kehrley v. Shafer*, 92 Hun (N. Y.) 196; *Plunkett v. Appleton*, 51 How. Pr. (N. Y. Super. Ct.) 469; *Neil v. Abel*, 24 Wend. (N. Y.) 185.

Rhode Island. — *State v. Smith*, 6 R. I. 33.

Illustrations. — Where, after the jury had been sent out, the officer in charge informed the justice that they desired to know whether a certain judgment introduced in evidence should be considered by them, to which inquiry the justice answered through the officer that he had been ordered to discharge the judgment, it was held error to send such a message. *Snyder v. Wilson*, 65 Mich. 336.

In a case where the issue was whether there was a sale of a horse or not, one of the jury wrote a note, after they had retired, to this effect: "In this case would the mode of payment affect the validity of the sale?" The court replied, "It would not," without the knowledge or consent of the parties. The judgment was reversed, a statute

providing that when the jury wish further instructions upon a point of law, "the information required shall be given in the presence of, or after notice to, the parties or their counsel." *Goode v. Campbell*, 14 Bush (Ky.) 75.

Withdrawing Instructions Equivalent to Giving Further Instructions. — Where the instructions are in writing and are taken into the jury-room, the court cannot send the bailiff out to withdraw such as may be erroneous; such an act is tantamount to sending another instruction to the jury that previous instructions were erroneous, without giving in their place such as might be correct. *Hall v. State*, 8 Ind. 444.

What Are Not Further Instructions to the Jury. — Where the jury send an officer into court with questions, the court may indorse on a paper containing the questions that he has no further charge to make than is already charged, and return the paper so indorsed to the jury. *Horrman v. Neuman*, 15 Misc. Rep. (N. Y. City Ct.) 449; *Bunn v. Croul*, 10 Johns. (N. Y.) 239.

So also in a larceny case, where the jury, after retiring, ask for further instructions, and the court tells them that he cannot give them further instructions without sending for counsel, but allows a portion of the charge to be re-read, no error is committed. *People v. La Munion*, 64 Mich. 709.

So the judge may, without the consent of the parties, without calling the jury into court, send them word to seal their verdict. *Green v. Bliss*, 12 How. Pr. (N. Y. Supreme Ct.) 428.

Sending Copy of Statutes into Jury-room. — If the judge, in the trial of a civil cause, at the request of the jury and without the knowledge of the parties, allows them to have a copy of the general statutes in the jury-room while deliberating on their verdict, such verdict should be set aside. *Merrill v. Nary*, 10 Allen (Mass.) 416; *State v. Smith*, 6 R. I. 33; *State v. Patterson*, 45 Vt. 316.

In *Burrows v. Unwin*, 3 C. & P. 310, 14 E. C. L. 322, the jury, after retiring, sent a message to the court asking that Selwyn's *Nisi Prius* might be sent to them. In this case the court refused the request, even though counsel for both parties consented.

The Judge Has No More Right to Communicate with the Jury after its retirement than any other person.¹ The jury, after it retires, must remain untrammelled and uninfluenced by any advice which the judge may honestly give in regard to their verdict without the consent of the parties.²

b. WAIVER OF REQUIREMENT — (1) By Express Agreement. — Of course the requirement that all instructions be given in open court may be waived,³ and the judge may go into the jury-room to give further instructions by consent.⁴ There is some conflict of opinion as to what will constitute a waiver. According to some decisions a waiver must be express,⁵ and should affirmatively appear,⁶ and the mere fact that counsel or parties knew that the judge was going into the jury-room and did not object or except does not constitute a waiver.⁷

(2) *By Failure to Make Timely Objections.* — According to other decisions the right to instructions in open court may be waived by not making timely objections.⁸

c. NECESSITY OF SHOWING PREJUDICE IN ORDER TO REVERSE. — On this question also the decisions are conflicting. According to some decisions, where instructions are not delivered in open court it is not incumbent upon the appellant to show error in order to entitle him to a reversal,⁹ and it has been held that it makes no difference what the motive of the judge may be,

1. *Hoberg v. State*, 3 Minn. 262; *Gibbons v. Van Alstyne*, (Supreme Ct.) 29 N. Y. St. Rep. 463; *Valentine v. Kelley*, 54 Hun (N. Y.) 79.

2. *Valentine v. Kelley*, 54 Hun (N. Y.) 79.

3. *McCrary v. Anderson*, 103 Ind. 12; *Joliet v. Looney*, 159 Ill. 471; *Taylor v. Betsford*, 13 Johns. (N. Y.) 487.

4. *McCrary v. Anderson*, 103 Ind. 12; *Smoke v. Jones*, 35 Mich. 409.

5. *Moody v. Pomeroy*, 4 Den. (N. Y.) 115.

6. *Bunn v. Croul*, 10 Johns. (N. Y.) 239.

7. *Taylor v. Betsford*, 13 Johns. (N. Y.) 487; *Read v. Cambridge*, 124 Mass. 567.

8. *Zust v. Linthicum*, 58 N. Y. Super. Ct. 478, 19 Civ. Pro. Rep. (N. Y.) 370; *Thorp v. Riley*, 57 N. Y. Super. Ct. 589; *Mahoney v. Decker*, 18 Hun (N. Y.) 365. See also *Knapp v. Gamsby*, 47 Mich. 375.

9. *People v. Linzey*, 79 Hun (N. Y.) 23; *Kehrley v. Shafer*, 92 Hun (N. Y.) 196; *Gibbons v. Van Alstyne*, (Supreme Ct.) 29 N. Y. St. Rep. 463; *Read v. Cambridge*, 124 Mass. 567.

"It seems to be well settled in this state, that no communication whatever

ought to take place between the judge or justice and the jury after the case has been submitted, unless it is in open court, and where practicable in the presence of the counsel; that where there has been an infraction of this rule the judgment should be reversed, and that the court will not stop to inquire whether the information given by the judge or justice was material, or had any influence upon the verdict of the jury." *Kehrley v. Shafer*, 92 Hun (N. Y.) 196.

Even though the judge said nothing, "but remained in the room listening to the discussion of the jury, and they simply acted under the surveillance of the justice, can it be said that his presence did not affect the decision of the jury? If the justice could stay there with propriety, so could all the other people who attended the trial. The affidavits of jurors cannot be read to impeach their verdict after it has been rendered, so that it may be impossible to show in any given case whether or not an intruder in the jury-room did converse with the jury, or what he said. It is a great deal safer to condemn such an intrusion by the magistrate as tending to affect the ultimate result, and

or how harmless the communication.¹ The principle upon which this rule rests is that such communications are so dangerous and impolitic that they will be conclusively presumed to have influenced the jury improperly. The source of danger is the secret nature of the communication.² According to other decisions, if the error could not have worked to the prejudice of the parties it will not be ground to set aside the verdict.³

6. Necessity of Presence of Counsel—*a.* VIEW THAT COUNSEL MUST BE PRESENT OR ATTEMPT MADE TO NOTIFY THEM.—The rule in the greater number of jurisdictions is that after the retirement of the jury, all further instructions or communications should be made in the presence of counsel,⁴ or if counsel is absent

create a good ground for review." *Gibbons v. Van Alstyne*, (Supreme Ct.) 29 N. Y. St. Rep. 463.

Subsequent Assent by Counsel.—Where the judge, after the jury have retired, goes into their room and instructs them as to matter of law in the absence of parties to the cause or counsel, the verdict will be set aside, and that too although the certificate of the judge states that after the jury were dismissed he submitted the instruction to the counsel of both parties, and that it was correct. *Read v. Cambridge*, 124 Mass. 567.

1. *Hoberg v. State*, 3 Minn. 262.

2. See *Wiggins v. Downer*, 67 How. Pr. (N. Y. Supreme Ct.) 68.

3. *Galloway v. Corbitt*, 52 Mich. 461; *Mosely v. Washburn*, 165 Mass. 417. See also *Hart v. Lindley*, 50 Mich. 20.

Instances.—After the jury retired they sent to the judge, by the officer having them in charge, a note, signed by the foreman, as follows: "Shall the jury compute interest from" a day named? The judge thereupon directed the officer to bring the execution from the jury-room, which he did. The judge then pointed out to the officer on the execution the date which had been pointed out to the jury, and directed him to return the execution to the foreman and to point out to him the date which had been thus indicated. The officer did as he had been directed, and the jury found for the plaintiff with interest computed according to their instructions. The defendant thereupon moved for a new trial. It was held that while the practice adopted by the judge was not to be commended, the irregularity was not such as to require the verdict to be set aside, especially as the instructions had no influence upon the decision of the

jury. *Moseley v. Washburn*, 165 Mass. 417.

In *Galloway v. Corbitt*, 52 Mich. 461, the court, without the consent of counsel, entered the jury-room and advised the jury during their deliberations upon the law and evidence in the case. The court said: "It was highly improper for the justice to enter the jury-room, whether requested to do so by the jury or not, alone, without consent of the parties or attorneys, after the jury had retired to deliberate. But whether it was such an error as calls for a reversal of the judgment upon certiorari, is quite another question. We have here, from the justice's return, a statement of all that occurred, and in passing upon this question we must take his return as true. We cannot say that it was an error that prejudiced the rights of the defendant."

4. *Alabama*.—*Kuhl v. Long*, 102 Ala. 569; *Cooper v. State*, 79 Ala. 54; *Johnson v. State*, 100 Ala. 55; *McNeil v. State*, 47 Ala. 498; *Collins v. State*, 33 Ala. 437; *Feibelman v. Manchester F. Assur. Co.*, 108 Ala. 180.

California.—*Redmand v. Gulnac*, 5 Cal. 148; *People v. Trim*, 37 Cal. 274.

Indiana.—*Fish v. Smith*, 12 Ind. 563; *Hall v. State*, 8 Ind. 444; *Jones v. Johnson*, 61 Ind. 257.

Iowa.—*Davis v. Fish*, 1 Greene (Iowa) 406.

Louisiana.—*State v. Frisby*, 19 La. Ann. 143; *State v. Davenport*, 33 La. Ann. 231.

Massachusetts.—*Kullberg v. O'Donnell*, 158 Mass. 405; *Sargent v. Roberts*, 1 Pick. (Mass.) 337.

Missouri.—*Norton v. Dorsey*, 65 Mo. 376; *Chinn v. Davis*, 21 Mo. App. 363; *State v. Miller*, 100 Mo. 606; *State v. Alexander*, 66 Mo. 148.

New York.—*Watertown Bank, etc.*,

that an attempt be made to notify him that further instructions will be given. If this is done, the court may then proceed to give the further instructions, even though counsel be not present.¹

The Reason for the Rule that courts should not instruct juries in the absence of counsel, if this can be avoided, is that the counsel are deprived of the opportunity to except to such charges,² and in

Co. v. Mix, 51 N. Y. 558; Wheeler v. Sweet, 137 N. Y. 438; Kehrley v. Shafer, 92 Hun (N. Y.) 196; People v. Cassiano, 30 Hun (N. Y.) 388; Plunkett v. Appleton, 51 How. Pr. (N. Y. Super. Ct.) 469. *Contra*, dictum in Cornish v. Graff, 36 Hun (N. Y.) 160.

Ohio. — Moravec v. Buckley, 11 Ohio L. Bul. 225; Campbell v. Beckett, 8 Ohio St. 211; Seagrave v. Hall, 10 Ohio Cir. Ct. Rep. 395.

Tennessee. — Wade v. Ordway, 1 Baxt. (Tenn.) 229.

Trial Before Sheriff's Jury. — If the officer presiding at a trial before a sheriff's jury gives an instruction to the jury after they have retired to deliberate on their verdict, and in the absence of the parties or their counsel, a verdict will be set aside, without inquiring whether the instruction given was prejudicial to either party. Read v. Cambridge, 124 Mass. 567.

1. Alabama. — McNeil v. State, 47 Ala. 498; Collins v. State, 33 Ala. 434.

California. — People v. Trim, 37 Cal. 274.

Louisiana. — State v. Dudoussat, 47 La. Ann. 977; State v. Green, 7 La. Ann. 518.

New York. — Kehrley v. Shafer, 92 Hun (N. Y.) 196; Cornish v. Graff, 36 Hun (N. Y.) 160.

Ohio. — Preston v. Bowers, 13 Ohio St. 1; Seagrave v. Hall, 10 Ohio Cir. Ct. Rep. 395; Crusen v. State, 10 Ohio St. 259; Campbell v. Beckett, 8 Ohio St. 211.

Tennessee. — Dobson v. State, 5 Lea (Tenn.) 277.

What Is Sufficient Notice. — It has been held that it would be sufficient notice to call counsel at the court-house door, or any other place where witnesses and other persons are usually called. McNeil v. State, 47 Ala. 498; Dobson v. State, 5 Lea (Tenn.) 277; Preston v. Bowers, 13 Ohio St. 1.

So it has been held that where the jury retired and the court, being about to take a recess for dinner, announces in open court, and in the hearing of the accused, who is at large on bail, and

his counsel, that in case the jury shall agree on a verdict during the recess the court-house bell will be rung, and that the court will, on that signal, convene and receive the verdict, and on the occurrence of such contingency, and the giving such signal, the court does convene, makes inquiry for counsel and accused, and waits for them over twenty minutes, it is not error to receive the verdict in the presence of the accused and in the absence of his counsel. Crusen v. State, 10 Ohio St. 259.

Whether Error Will Always Operate to Reverse. — While it is improper for the court to instruct the jury in the absence of a party's counsel, thereby depriving him of the opportunity to except or to ask for qualification of the instruction, yet the court holds that where it can clearly be seen that no injury has been done to the party by the instruction given, in a case of such slight departure, no reversal can be had. Wade v. Ordway, 1 Baxt. (Tenn.) 229; Collins v. State, 33 Ala. 435. *Contra*, Feibelman v. Manchester F. Assur. Co., 108 Ala. 180, where it was held that instructions given in the absence of counsel will be conclusively presumed prejudicial, though there is nothing to submit to the jury but the credibility of undisputed evidence.

2. Kuhl v. Long, 102 Ala. 569; Feibelman v. Manchester F. Assur. Co., 108 Ala. 180; Wade v. Ordway, 1 Baxt. (Tenn.) 229; Chouteau v. Jupiter Iron Works, 94 Mo. 388. See also Crabtree v. Hagenbaugh, 23 Ill. 349.

New Hampshire — How Exceptions Taken. — In New Hampshire, when instructions are given in the absence of counsel, they are to be returned with the verdict, and are open to exception to the same extent as if given in open court. School Dist. No. 1 v. Bragdon, 23 N. H. 507; Allen v. Aldrich, 29 N. H. 63; Leighton v. Sargent, 31 N. H. 120; Shapley v. White, 6 N. H. 172. [This is necessarily a very ineffective method of excepting to erroneous instructions; for while it saves errors in giving the instructions for review in the

jurisdictions where it is permissible to ask additional charges where the court gives further instructions, after the retirement of the jury, counsel also loses the opportunity to ask additional charges in explanation or modification, or to except to their refusal.¹

b. VIEW THAT PRESENCE OF COUNSEL IS UNNECESSARY. — In some jurisdictions the trial judge may further instruct the jury in open court though counsel and parties are not present, and is under no obligation to send for them or make any attempt to secure their presence.² It is conceded by some of these decisions that it is the better practice for the court to make an attempt to procure the attendance of absent parties and counsel, but they recognize no obligation on the part of the court to do so,³ taking the view that the giving of notice is merely a matter of grace or favor, and not a legal obligation.⁴

The Principle on Which This Practice Is Based is that such a rule is necessary for the proper dispatch of business,⁵ that the trial is not concluded until after a verdict has been rendered or the jury discharged from the further consideration of the cause,⁶ and that it is the duty of parties and counsel to be present in court when any proceedings are taken in their causes.⁷

appellate court, it cannot prevent error in time to obviate the necessity of a new trial, which might be done if the errors in the instructions were pointed out to the court in time.]

1. *Feibelman v. Manchester F. Assur. Co.*, 108 Ala. 180; *Kuhl v. Long*, 102 Ala. 569; *Wade v. Ordway*, 1 Baxt. (Tenn.) 229.

2. *Arizona*. — *Torque v. Carrillo*, 1 Arizona 336.

Maine. — *State v. Pike*, 65 Me. 111.

Minnesota. — *Hudson v. Minneapolis, etc.*, R. Co., 44 Minn. 52; *Reilly v. Bader*, 46 Minn. 214.

New Hampshire. — *Leighton v. Sargent*, 31 N. H. 120; *Ahearn v. Mann*, 60 N. H. 476.

New Jersey. — *Cooper v. Morris*, 48 N. J. L. 607. *Compare Cook v. Green*, 6 N. J. L. 109.

Rhode Island. — *Alexander v. Gardiner*, 14 R. I. 15.

Wisconsin. — *Chapman v. Chicago, etc.*, R. Co., 26 Wis. 295; *Meier v. Morgan*, 82 Wis. 289.

3. *Torque v. Carrillo*, 1 Arizona 336; *Chapman v. Chicago, etc.*, R. Co., 26 Wis. 295; *Meier v. Morgan*, 82 Wis. 289; *Hudson v. Minneapolis, etc.*, R. Co., 44 Minn. 52.

4. *Chapman v. Chicago, etc.*, R. Co., 26 Wis. 306.

5. *Chapman v. Chicago, etc.*, R. Co., 26 Wis. 306.

6. *Hudson v. Minneapolis, etc.*, R. Co., 44 Minn. 52.

7. *Chapman v. Chicago, etc.*, R. Co., 26 Wis. 306; *Hudson v. Minneapolis, etc.*, R. Co., 44 Minn. 52.

In support of this doctrine a strong argument is given in *Chapman v. Chicago, etc.*, R. Co., 26 Wis. 306. The reasoning of the court is as follows: "Was it the duty of the court to have dispatched a messenger for them [parties and counsel], and to have suspended proceedings until their arrival? It is urged that this was the duty, and that it was irregular and incompetent for the court to proceed without doing so. In support of this view, the generally prevailing custom in our courts, to send for attorneys and counsel under such circumstances, is cited. We know this custom or practice, and are far from wishing to discourage it. We think it a beneficial custom, and one that should be observed in all cases where the business or convenience of the court will allow it. We are sorry it was not observed in this case, though the lateness of the hour, and the fact that it was well known to the defendants and their counsel that the court was to convene at that time, may have been regarded as a good excuse. It is

7. Necessity of Presence of Accused.—It is a rule of universal application, that the accused is entitled to be present when the court gives any further instructions to the jury.¹ If he is not, this is in itself ground of reversal. The reviewing court will not inquire whether the additional instructions given were correct or not. It will be presumed that the accused was injured thereby.²

Waiver of Right.—It makes no difference that counsel was present and failed to make objections. The right of the accused to be present cannot be thus waived,³ although it seems that this right may be waived by the accused himself.⁴

Accused Absconding.—Of course the court may give further instructions in the absence of the accused where he absconds during the trial.⁵

the constant custom of this court, whenever it is known that counsel are within reach. But notwithstanding this custom, and our approval of it, and desire to encourage it, we are by no means prepared to affirm as matter of law that it is the duty of the court at any time to send for absent counsel or suitors, or to await their arrival, before proceeding in causes in which they are interested. On the contrary, we think the duty, the strict obligation of law, is the very opposite. It is the duty of counsel and suitors to be present in court when their causes are moved or any proceedings taken in them; and if they are not it is at their own risk, and not at the risk of the other party, if the court sees fit not to notify them. The rights of the other party will not be affected, nor the proceedings set aside, on account of such mere omission. The giving of the notice is a matter of grace or favor on the part of the court, and not of legal obligation or duty. The court may proceed without it, subject to the power of opening the proceedings where sufficient cause of absence is shown, and it appears that injustice has been done. The idea that the court cannot proceed without causing the notice to be given, or that it is error to do so, and that it must await the motion and presence of counsel or their clients, would be intolerable; for then no business could be done and no proceedings taken except by the favor of counsel or of litigants."

1. *Alabama*. — *Cooper v. State*, 79 Ala. 54; *Johnson v. State*, 100 Ala. 58.

Georgia. — *Wilson v. State*, 87 Ga. 583; *Bonner v. State*, 67 Ga. 510; *Wade v. State*, 12 Ga. 25.

Missouri. — *State v. Alexander*, 66 Mo. 148.

New York. — *Maurer v. People*, 43 N. Y. 1.

Ohio. — *Hulse v. State*, 35 Ohio St. 429; *Kirk v. State*, 14 Ohio 512.

2. *Jones v. State*, 26 Ohio St. 208.

Enforced Absence of Accused.—The rule is especially applicable when the accused is absent because in confinement. *Jones v. State*, 26 Ohio St. 208; *Bonner v. State*, 67 Ga. 510.

Restating Evidence.—It is reversible error for the court, on the trial of a criminal cause, after the jury have retired to their room, to call them back into the court-room, and read over to them the evidence taken down by the court, without the consent of the prisoner's counsel, and in the absence of the prisoner himself. *Wade v. State*, 12 Ga. 25.

Presumption as to Presence of Accused.—Where additional instructions are given it will be presumed, in the absence of anything in the record to the contrary, that the defendant was present. *State v. Miller*, 100 Mo. 606.

3. *Jones v. State*, 26 Ohio St. 208; *Maurer v. People*, 43 N. Y. 1; *Bonner v. State*, 67 Ga. 510.

If the judge, after adjournment of court, sends from his lodging a message to the jury of a character that will probably operate to the prejudice of the accused, the fact that the counsel of the accused consented to it in the latter's absence would not, in a capital case, cure the error. Yet if by no possibility could it work injury to the accused, it ought not to vitiate the verdict. *Rafferty v. People*, 72 Ill. 37.

4. *Benavides v. State*, 31 Tex. Crim. Rep. 173, 37 Am. St. Rep. 799.

5. *Hulse v. State*, 35 Ohio St. 429.

X. INSTRUCTIONS AFTER RETIREMENT OF JURY — 1. On Court's Own Motion. — It is competent for the trial court of its own motion to give the jury further instructions after they have retired, if essential to the furtherance of justice.¹ In this regard it is vested with large discretion, and its action in so doing is not reviewable unless it appears that some legal right of the party has been invaded, under his objection, and that such invasion may have resulted in injury.² The court may recall the jury purposely, to give further instructions,³ or may give them of its own motion

1. See cases cited in subsequent notes of this section.

The Rule in Mississippi differs from that of other states, because of special statutory provisions. In this state the court cannot, after the jury have retired, give them further instructions on its own motion or at the request of the jury. Thus where the jury bring in a verdict properly worded, and in effect acquitting the defendant, it is error for the court, without request of the parties, to charge them as to the law and send them back to find a second verdict. *Duncan v. State*, 49 Miss. 331. If the judge, after the jury retire, in the absence of the parties and without their consent, at the request of the jury, give them a charge on a point of law about which they say they differ, it will be error. The judge has no right to charge the jury except in the mode pointed out by statute, namely, in writing and at the request of one or both parties. *Taylor v. Manley*, 6 Smed. & M. (Miss.) 305. Such irregularity, however, is no ground for reversal, though excepted to at the time, if the instruction given be correct. *Randolph v. Govan*, 14 Smed. & M. (Miss.) 9.

2. *Hayes v. Williams*, 17 Colo. 465.

3. *Alabama*. — *Cooper v. State*, 79 Ala. 54.

Arkansas. — *National Lumber Co. v. Snell*, 47 Ark. 407.

California. — *People v. Perry*, 65 Cal. 568.

Colorado. — *Hayes v. Williams*, 17 Colo. 465.

Dakota. — *People v. Odell*, 1 Dakota 197.

Georgia. — *Wood v. Isom*, 68 Ga. 417; *White v. Fulton*, 68 Ga. 511; *Pritchett v. State*, 92 Ga. 65.

Illinois. — *Joliet v. Looney*, 159 Ill. 471, affirming 56 Ill. App. 502; *Shaw v. Camp*, 160 Ill. 425.

Indiana. — *Breedlove v. Bundy*, 96 Ind. 319; *Hartman v. Flaherty*, 80 Ind. 472; *Hall v. State*, 8 Ind. 439.

Kansas. — *Foster v. Turner*, 31 Kan. 58.

Massachusetts. — *Florence Sewing Mach. Co. v. Grover, etc.*, *Sewing Mach. Co.*, 110 Mass. 70; *Nichols v. Munsel*, 115 Mass. 567.

Minnesota. — *Coit v. Waples*, 1 Minn. 134.

Missouri. — *Scott v. Haynes*, 12 Mo. App. 597.

Nebraska. — *McClary v. Stull*, 44 Neb. 191.

New York. — *Phillips v. New York Cent., etc.*, R. Co., 127 N. Y. 657, 38 N. Y. St. Rep. 675, affirming (Supreme Ct.) 6 N. Y. Supp. 621.

Pennsylvania. — *Cox v. Highley*, 100 Pa. St. 252.

South Carolina. — *State v. Lightsey*, 43 S. Car. 114; *Jones v. Swearingen*, 42 S. Car. 58.

Texas. — *Benavides v. State*, 31 Tex. Crim. Rep. 173.

Washington. — *Dr. Jack v. Territory*, 2 Wash. Ter. 101.

United States. — *Allis v. U. S.*, 155 U. S. 117.

"It is a familiar practice to recall a jury after they have been in deliberation for any length of time, for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment. The time at which such a recall shall be made, if at all, must be left to the sound discretion of the trial court, and there is nothing in the record to show that the court, in the case at bar, abused this discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge as already given." *Allis v. U. S.*, 155 U. S. 123.

It may happen that the judge himself may find on recollection that he has left some part obscure in his charge,

after the jury have returned into court stating that they cannot agree.¹ In such case no request on the part of the jury is necessary,² and further instructions may be given even though the jury when asked if they desired instructions stated that they did not.³ Further instructions may be given at any stage of the jury's deliberations,⁴ or after the jury have returned into court with their verdict, but before the reception of the same.⁵

2. At Request of Jury.—The court may also give the jury further instructions on their own request,⁶ and it is not only the right but the duty of the court to reinstruct on any question of law arising from the facts proven on which they say they are in

especially if prayers for further instructions are presented to him by counsel after his charge has been given, and when the jury are about to retire, and he has been obliged to consider the subject of these prayers hastily. A little reflection may convince him that the matter needs further explanation. The propriety of his recalling the jury and explaining the matter further is hardly open to reasonable doubt, and we think his discretion extends to that matter. *Com. v. Snelling*, 15 Pick. (Mass.) 334.

1. Arkansas.—*McDaniel v. Crosby*, 19 Ark. 533.

Indiana.—*Hogg v. State*, 7 Ind. 551.

Iowa.—*State v. Pitts*, 11 Iowa 343.

Kansas.—*State v. Chandler*, 31 Kan. 201.

Maine.—*Edmunds v. Wiggin*, 24 Me. 509.

Massachusetts.—*Com. v. Snelling*, 15 Pick. (Mass.) 334.

Missouri.—*Dowzelot v. Rawlings*, 58 Mo. 75.

Ohio.—*Salomon v. Reis*, 5 Ohio Cir. Ct. Rep. 375.

Rhode Island.—*Alexander v. Gardiner*, 14 R. I. 15.

Texas.—*Turner v. Lambeth*, 2 Tex. 365.

Wisconsin.—*Hannon v. State*, 70 Wis. 448.

2. Com. v. Snelling, 15 Pick. (Mass.) 334; *State v. Lightsey*, 43 S. Car. 114.

3. Nichols v. Munsel, 115 Mass. 567.

The discretion of the court in giving farther instructions should extend to the time of rendering their verdict. Even after that time there may be a plain and palpable error which the proper administration of justice would correct. But up to the time of rendering the verdict, it is not irregular to send them to their room with such an instruction as is appropriate to the case, when nothing is pointed out to operate

injuriously upon one of the parties. *Florence Sewing Mach. Co. v. Grover*, etc., *Sewing Mach. Co.*, 110 Mass. 70.

4. Allis v. U. S., 155 U. S. 117; *National Lumber Co. v. Snell*, 47 Ark. 407; *McDaniel v. Crosby*, 19 Ark. 533.

5. Dr. Jack v. Territory, 2 Wash. Ter. 101; *Florence Sewing Mach. Co. v. Grover*, etc., *Sewing Mach. Co.*, 110 Mass. 71.

6. Georgia.—*Phelps v. State*, 75 Ga. 571.

Illinois.—*Arnold v. Phillips*, 59 Ill. App. 213; *Lee v. Quirk*, 20 Ill. 392; *Shaw v. Camp*, 160 Ill. 430.

Indiana.—*McClelland v. Louisville*, etc., *R. Co.*, 94 Ind. 276; *Farley v. State*, 57 Ind. 331; *Sage v. Evansville*, etc., *R. Co.*, 134 Ind. 100.

Kansas.—*Foster v. Turner*, 31 Kan. 58.

Kentucky.—*State Bank v. M'Williams*, 2 J. J. Marsh. (Ky.) 263.

Missouri.—*Wilkinson v. St. Louis Sectional Dock Co.*, 102 Mo. 130; *State v. Miller*, 100 Mo. 606.

New Hampshire.—*School Dist. No. 1 v. Bragdon*, 23 N. H. 507; *Allen v. Aldrich*, 29 N. H. 63.

New York.—*Drew v. Andrews*, 8 Hun (N. Y.) 23.

Ohio.—*Hulse v. State*, 35 Ohio St. 421.

Texas.—*Hannahan v. State*, 7 Tex. App. 610; *Wharton v. State*, 45 Tex. 2; *Garza v. State*, 3 Tex. App. 287; *Chamberlain v. State*, 2 Tex. App. 451.

Virginia.—*Williams v. Com.*, 85 Va. 607; *Richlands Iron Co. v. Elkins*, 90 Va. 249.

The giving of an instruction in response to a question by a juror is not a violation of a rule of court that instructions will not be examined unless presented before the final argument, except where the rule will work injustice. *Arnold v. Phillips*, 59 Ill. App. 213.

doubt.¹ The practice is to be commended, since its results tend to a correct and rapid administration of justice.²

3. At Request of Parties. — While, as already shown,³ the court may, after the retirement of the jury, give additional instructions of its own motion or at the request of the jury, it is not as a general rule bound to give further instructions on motion of the parties.⁴ The practice in *Georgia*⁵ and *Tennessee*⁶ forms an exception to this rule. So a party has no right to further instructions after the jury has returned to have instructions repeated.⁷ There is some conflict of opinion as to whether or not a party is entitled to further instructions where the court has given further instructions at the request of the jury. But the weight of authority is to the effect that under such circumstances the party is entitled to additional instructions by way of explanation or modification.⁸ *Massachusetts* seems to be the only state in which the right is flatly denied.⁹

1. O'Shields v. State, 55 Ga. 696; State Bank v. M'Williams, 2 J. J. Marsh. (Ky.) 263.

Reversible Error Not to Instruct. — On a murder trial, the jury having requested a further charge, it was held reversible error for the court to refuse it and to send word that the case was "too plain," unless the case was in fact too plain and the verdict supported by the evidence. King v. State, 86 Ga. 355.

2. State Bank v. M'Williams, 2 J. J. Marsh. (Ky.) 263.

3. See preceding section.

4. Forrest v. Hanson, 1 Cranch (C. C.) 63; U. S. v. White, 5 Cranch (C. C.) 116; Turner v. Foxall, 2 Cranch (C. C.) 324; Lafoon v. Shearin, 95 N. Car. 391; Williams v. Com., 85 Va. 609; Norton v. McNutt, 55 Ark. 59. See also *supra*, VI. 5. *Time of Presenting Requests*.

5. Yeldell v. Shinholster, 15 Ga. 189, where the court held that after the jury had returned and asked for further instructions, and counsel asked for an instruction on a point not fully given in the charge, a refusal of the court to give such instruction was error. See also Gravett v. State, 74 Ga. 197.

6. Buck v. Buck, 4 Baxt. (Tenn.) 392, where it was held not error to recall the jury at the instance of the defendant to give further and fuller instructions. The court will not, however, allow the recall of the jury for a further or additional charge upon the bare request of counsel without grounds. It is said that "under such a rule the ingenious lawyer would always have it in his

power to have emphasized to the jury by the court any proposition he might choose to submit, and have the jury believe the court attached great weight to the matter about which it had been recalled for instructions." Bowling v. Memphis, etc., R. Co., 15 Lea (Tenn.) 122.

7. Prosser v. Henderson, 11 Ala. 484; Harvey v. Graham, 46 N. H. 176. Compare Keeble v. Black, 4 Tex. 69.

8. Harper v. State, 109 Ala. 66; Kuhl v. Long, 102 Ala. 569; Feibelman v. Manchester F. Assur. Co., 108 Ala. 180; Fisher v. People, 23 Ill. 283; Shaw v. Camp, 160 Ill. 430; O'Connor v. Guthrie, 11 Iowa 80; Hudson v. Minneapolis, etc., R. Co., 44 Minn. 55; Chouteau v. Jupiter Iron Works, 94 Mo. 388; Cook v. Green, 6 N. J. L. 109; Wade v. Ordway, 1 Baxt. (Tenn.) 239. See also Page v. Kinsman, 43 N. H. 328.

9. Nelson v. Dodge, 116 Mass. 367; Kellogg v. French, 15 Gray (Mass.) 357. In this case the court said: "When a jury, not having agreed after deliberation, desire further instructions, or a modification or explanation of instructions previously given, the counsel have a right to know what instructions or explanations are given, because they are open to exception in matter of law. But in all other respects it is a transaction between the judge and jury. The situation is a delicate one. The jurors are presumed to have discussed the case, and to have formed or be on the point of forming opinions. Any further discussion, either of the evidence or the law, in

4. What Instructions May Be Given — *a. IN GENERAL.* — The court may recall the jury to give instructions omitted,¹ or to give instructions erroneously refused,² or to correct an erroneous instruction given.³ So it may correct an erroneous instruction where the jury request a repetition of the charge,⁴ and in some jurisdictions may restate the evidence.⁵ It may give any additional instructions at the request of the jury which may be necessary to meet the difficulty in their minds,⁶ and whenever additional instructions are given they may be excepted to for

presence of the jury, might be eminently prejudicial. At all events, it is for the judge himself, at his discretion, to determine whether to permit such discussion or not."

In *Louisiana* it was held that "the refusal of the judge to allow the prisoner's counsel to state new points and propositions in the hearing of the jury, when they came in and asked fresh instructions from the court," was not "such error as would authorize a reversal of the judgment." *State v. Maxent*, 10 La. Ann. 743.

1. *Pritchett v. State*, 92 Ga. 65; *Joliet v. Looney*, 159 Ill. 471; *Benavides v. State*, 31 Tex. Crim. Rep. 173.

Where the court has inadvertently neglected to charge as to the form of the verdict, the jury may properly be recalled and instructed as to that matter. *Pritchett v. State*, 92 Ga. 65.

Upon an application by the jury for further instructions both parties consented that they might take the minutes of all the testimony upon the disputed point. Through an inadvertence the court failed at the time to give them a portion of such testimony, but afterwards recalled them and read the omitted portion. This was held not to be error. *Coit v. Waples*, 1 Minn. 134.

2. *Phillips v. New York Cent., etc., R. Co.*, 127 N. Y. 657, 38 N. Y. St. Rep. 675.

3. *Hartman v. Flaherty*, 80 Ind. 472; *Hall v. State*, 8 Ind. 439; *Phillips v. New York Cent., etc., R. Co.*, 127 N. Y. 657, 38 N. Y. St. Rep. 675; *State v. Lightsey*, 43 S. Car. 115; *Benavides v. State*, 31 Tex. Crim. Rep. 173.

The counsel for the accused, while addressing the jury and endeavoring to show them that his clients should not be convicted of a higher crime than murder in the second degree, was interrupted by the judge with the declaration that the instructions would not warrant a verdict of murder in the second degree; that under the instructions

it was murder in the first degree or nothing. After the jury had retired to consider their verdict, the judge, at their request, had them recalled, and, in open court and in the presence of the accused and their counsel and of the state's attorney, gave them correct instructions in relation to murder in the second degree, and the accused were found guilty of that offense. It was held that no error had been committed. The accused could not have been prejudiced, and the Supreme Court is inclined to encourage trial courts to correct errors committed in the progress of the trial rather than to force them to persist in them after they are discovered. *State v. Williams*, 69 Mo. 110.

4. *McClelland v. Louisville, etc., R. Co.*, 94 Ind. 276; *Sage v. Evansville, etc., R. Co.*, 134 Ind. 100.

5. *Byrne v. Smith*, 24 Wis. 68; *Hannon v. State*, 70 Wis. 448; *Alexander v. Gardiner*, 14 R. I. 15; *Nichols v. Munsel*, 115 Mass. 567; *Drew v. Andrews*, 8 Hun (N. Y.) 23; *Edmunds v. Wiggin*, 24 Me. 509; *Allis v. U. S.*, 155 U. S. 117; *Hulse v. State*, 35 Ohio St. 421. But see *Merchants' Ins. Co. v. Frick*, 2 Am. L. Rec. (Ohio) 336.

Where the jurors in a criminal case, after retiring to consider the verdict, returned into court and asked the judge to state his recollection of the evidence of a witness who had given material testimony, it was held proper to comply with such request. *Hulse v. State*, 35 Ohio St. 421.

Examination of Witnesses.—Where the jury, after retiring, returned into court and requested permission to examine a witness as to testimony given by him, it was held proper to allow such examination and to refuse to permit counsel further to examine the witness. *Herring v. State*, 1 Iowa 205.

6. *State v. Chandler*, 31 Kan. 201; *Salomon v. Reis*, 5 Ohio Cir. Ct. Rep. 375.

error, to the same extent as those given before the retirement of the jury.¹

b. REPETITION OF CHARGE. — It is proper for the court, on the request of the jury,² or on its own motion,³ to call them in and read the charge to them a second time, in order to satisfy one or all of them as to the state of the law on the issues before them.⁴

All or Portion of Charge. — As a general rule, it is not necessary to repeat the whole charge when the jury ask to have a portion of the charge restated to them,⁵ and this rule, it seems, applies to a restatement of the evidence in jurisdictions where the practice of summing up obtains,⁶ especially where the jury is admonished that there was other testimony than that restated, and to give such evidence as careful consideration as the evidence which was restated.⁷ It may well be conceived, however, that circumstances might arise under which a repetition of a portion of the charge might unduly influence the jury.⁸ And in any event, it

1. *Nelson v. Dodge*, 116 Mass. 367; *Lund v. Tyngsboro*, 11 Cush. (Mass.) 563; *Feibelman v. Manchester F. Assur. Co.*, 108 Ala. 180; *Kuhl v. Long*, 102 Ala. 563; *O'Connor v. Guthrie*, 11 Iowa 81; *State v. Frisby*, 19 La. Ann. 143; *Cook v. Green*, 6 N. J. L. 109; *Fish v. Smith*, 12 Ind. 563; *Page v. Kinsman*, 43 N. H. 328; *Wade v. Ordway*, 1 Baxt. (Tenn.) 229.

2. *Woodruff v. King*, 47 Wis. 261.

3. *Gaff v. Greer*, 88 Ind. 122; *Salomon v. Reis*, 5 Ohio Cir. Ct. Rep. 375.

4. Where the judge, in his charge, states his opinion as to the credibility of the witness, and on the return of the jury for further instructions repeats the opinion, there is no error. *State v. Summers*, 4 La. Ann. 27.

5. *Hatcher v. State*, 18 Ga. 460; *Wilson v. State*, 68 Ga. 827; *Swaggerty v. Caton*, 1 Heisk. (Tenn.) 202; *Allis v. U. S.*, 155 U. S. 124. Compare *Cockrill v. Hall*, 76 Cal. 192. In this case, after retiring for deliberation, the jury returned into court and asked instructions upon a particular point. The court directed them to follow the instructions already given. The plaintiff thereupon requested the court to read the particular instruction covering the matter. The court refused so to do, but expressed a willingness to read the entire instructions if the jury so desired. The foreman of the jury thereupon stated that they had no such desire. It was held that the failure to read the particular instruction was not error.

"We do not understand that when in-

structions are asked upon particular questions, it is the duty of the court to repeat its entire charge as previously given. Such a practice might lead to confusion, and would certainly protract proceedings needlessly. All that is necessary is that the charge should fully present both aspects of the case, and 'should call' the attention of the jury to that view of the facts consistent with innocence, as well as the one suggesting guilt.'" *Gravett v. State*, 74 Ga. 197.

6. *Allis v. U. S.*, 155 U. S. 117; *Byrne v. Smith*, 24 Wis. 68, in which it was held that under a statute (Wis. Rev. Stat., c. 118, § 31) authorizing the judge to "state anew the evidence, or any part of it," to a jury disagreeing, no exception lies to his refusal to restate that in favor of one party after restating that of the other.

7. *Allis v. U. S.*, 155 U. S. 124.

8. *Swaggerty v. Caton*, 1 Heisk. (Tenn.) 202, where it was held that when a jury merely disagree as to the result, after weighing the testimony and considering the charge, it is error in the court to repeat or recharge disjointed portions of his charge. In support of this conclusion the court said: "In such instance the jury very well may, and we think always will, conclude that the court means to have them understand that the matter or question thus disjointedly charged upon is controlling in the case." See also *Granberry v. Frierson*, 2 Baxt. (Tenn.) 326, in which it was held reversible error to

would not only be proper but highly commendable for the court to admonish the jury not to overlook those parts of the charge not restated.

c. **QUESTIONS NOT PRESENTED BY JURY.** — Unless there is a statute providing otherwise, as in *Texas*,¹ the court is not confined strictly to the point presented by the jury.² It is not restricted to categorical answers, but may and should give such further instructions as may be necessary to keep the issues before their minds.³

Cannot Change Tenor of Charge. — It is not proper, however, for the court to give another full, complete, and different charge on nearly all or even some of the material questions involved in the issue of the case. It is not right to change the tenor of the charge already given.⁴ Nor can it give such instructions to the jury after they have returned a valid verdict as shall result in a change or modification of the verdict.⁵

XI. REPETITION OF INSTRUCTIONS — POINTS ALREADY COVERED —

1. Propriety of Refusing to Repeat Instructions Already Given —

a. **STATEMENT OF RULE.** — Instructions on points which have been sufficiently covered by other instructions may properly be refused, although they are correctly drawn and applicable to the evidence. This is so whether the instruction requested is covered by the general charge or by special instructions granted at the request of either party, or whether the mode of expression is the same or different.⁶ The duty of the court is fully discharged if

recall the jury and repeat a portion of the charge, the jury not asking and the losing party objecting. The court considered that this case was strictly within the rule laid down in *Swaggerty v. Caton*, 1 Heisk. (Tenn.) 199.

1. The Rule in Texas. — Pasch. Dig., art. 3079, provides that the jury, after retiring, may ask further instructions of the judge touching matters of law, which shall be given them in writing, but no charge shall be given except upon the particular point upon which it was asked. The Texas courts have enforced this statute to the letter. In consideration it has been held that the judge must confine himself strictly to the point presented. *Garza v. State*, 3 Tex. App. 293; *Chamberlain v. State*, 2 Tex. App. 451; *Hannahan v. State*, 7 Tex. App. 610; *Wharton v. State*, 45 Tex. 2, furnishes a good illustration of this principle. The jury returned into court and asked: "Can we judge a witness just by what he says on the stand, and not by what we know of him privately?" To this question the court did not reply, but proceeded to give them rules governing juries in

weighing testimony. The reviewing court held that this was erroneous; that the court could not do more than answer the question and inform them that they should decide the case upon the evidence adduced at the trial.

2. *Edmunds v. Wiggin*, 24 Me. 509; *Paine v. Hutchins*, 49 Vt. 314; *McClelland v. Louisville*, etc., R. Co., 94 Ind. 276.

3. *Paine v. Hutchins*, 49 Vt. 314; *Edmunds v. Wiggin*, 24 Me. 509.

In *Edmunds v. Wiggin*, 24 Me. 509, the court said: "That the words 'if proposed to him,' contained in Rev. Stat., c. 115, § 67, were not designed to limit the power of the judge to the explanation of such questions of law only as should be voluntarily proposed by the jury, will be obvious, when it is considered that a discretion is therein confided to him to restate any particular testimony, and to send them out, before they have agreed, more than once."

4. *Foster v. Turner*, 31 Kan. 58.

5. *State v. Johnson*, 30 La. Ann. 921.

6. *Alabama.* — *Smith v. State*, 92 Ala. 30; *Louisville*, etc., R. Co. v. *Hurt*, 101 Ala. 34; *Allen v. State*, 111 Ala. 80;

the instructions embrace all the points of the law arising in the case, in the court's own language. Indeed the practice of taking

Murphy v. State, 108 Ala. 10; *Miller v. State*, 110 Ala. 69.

Arkansas. — *Haney v. Caldwell*, 43 Ark. 193; *Sadler v. Sadler*, 16 Ark. 628; *Hanger v. Evins*, 38 Ark. 334; *Casey v. State*, 37 Ark. 67; *Ford v. State*, 34 Ark. 649; *Pleasant v. State*, 15 Ark. 625; *Stanton v. State*, 13 Ark. 317; *Johnson v. Brock*, 23 Ark. 283; *Crampton v. State*, 37 Ark. 108; *Crisman v. McDonald*, 28 Ark. 8; *Reed v. State*, 54 Ark. 621; *Lewis v. State*, 62 Ark. 494; *Ringlehaupt v. Young*, 55 Ark. 128; *Sweeney v. State*, 35 Ark. 585.

California. — *People v. Williams*, 32 Cal. 280; *People v. Ramirez*, 56 Cal. 533; *Haas v. Whittier*, 97 Cal. 411; *People v. Hawes*, 98 Cal. 648; *Hayward v. Rogers*, 62 Cal. 372; *Fairchild v. California Stage Co.*, 13 Cal. 599; *People v. Kelly*, 28 Cal. 423; *Conroy v. Duane*, 45 Cal. 598; *People v. Varnum*, 53 Cal. 630; *Siemers v. Eisen*, 54 Cal. 418; *Witherby v. Thomas*, 55 Cal. 9; *People v. De Cleer*, 60 Cal. 382; *People v. Fine*, 77 Cal. 147; *People v. O'Brien*, 78 Cal. 41; *Fox v. Stockton Combined Harvester, etc., Works*, 83 Cal. 333; *Richards v. Travelers' Ins. Co.*, 89 Cal. 170; *People v. Samonset*, 97 Cal. 448; *People v. Cochran*, 61 Cal. 548; *Stevens v. San Francisco, etc., R. Co.*, 100 Cal. 554; *De Noon v. Morrison*, 83 Cal. 163; *People v. Swalm*, 80 Cal. 46; *People v. McCoy*, 71 Cal. 395; *People v. Turley*, 50 Cal. 469; *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517; *People v. Davis*, 47 Cal. 93; *People v. King*, 27 Cal. 507; *People v. Clementshaw*, 59 Cal. 385; *People v. Cadd*, 60 Cal. 640; *Bartlett v. San Francisco*, 63 Cal. 156; *People v. Gray*, 66 Cal. 271; *Dufour v. Central Pac. R. Co.*, 67 Cal. 319; *Bullard v. Stone*, 67 Cal. 477; *People v. Robertson*, 67 Cal. 649; *People v. Treadwell*, 69 Cal. 226; *People v. Pacheco*, 70 Cal. 473; *People v. Bush*, 71 Cal. 602; *People v. Giancoli*, 74 Cal. 642; *People v. Madden*, 76 Cal. 521; *People v. Doane*, 77 Cal. 560; *People v. Adams*, 85 Cal. 231; *People v. McNamara*, 94 Cal. 509; *People v. Douglass*, 100 Cal. 1; *People v. Roney*, 100 Cal. 375; *Sharp v. Blankenship*, 79 Cal. 411; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Hope*, 62 Cal. 291; *Higgins v. Williams*, 114 Cal. 176; *People v. Rogers*, 71 Cal. 565; *People v. Ah Jake*, 91 Cal. 98; *People v. Lynch*, 101 Cal. 229; *People v.*

Schmitt, 106 Cal. 48; *Kahn v. Brilliant*, (Cal. 1893) 35 Pac. Rep. 309; *People v. Cowgill*, 93 Cal. 596.

Colorado. — *Kansas Pac. R. Co. v. Ward*, 4 Colo. 31; *Dozenback v. Raymer*, 13 Colo. 451; *Smith v. Havens*, 6 Colo. 297; *McKee v. Bassick Min. Co.*, 8 Colo. 392; *Craig v. Thompson*, 10 Colo. 517; *Boulder v. Fowler*, 11 Colo. 396; *Farmer v. Phelps*, 18 Colo. 126; *Gaynor v. Clements*, 16 Colo. 209; *Patrick Red Sandstone Co. v. Skoman*, 1 Colo. App. 323; *Van Houton v. People*, 22 Colo. 53; *Chestnut v. People*, 21 Colo. 512; *A. Westman Mercantile Co. v. Park*, 2 Colo. App. 545.

Connecticut. — *Hartford v. Champion*, 58 Conn. 276; *Charter v. Lane*, 62 Conn. 124; *Kellogg v. New Britain*, 62 Conn. 232.

District of Columbia. — *U. S. v. McBride*, 18 D. C. 371; *Gleeson v. Virginia Midland R. Co.*, 1 App. Cas. (D. C.) 185; *Johnson v. Baltimore, etc., R. Co.*, 6 Mackey (D. C.) 232; *Presbrey v. Thomas*, 1 App. Cas. (D. C.) 171.

Florida. — *Southern Express Co. v. Van Meter*, 17 Fla. 783; *Coleman v. State*, 26 Fla. 61; *Wooten v. State*, 24 Fla. 355; *Reddick v. State*, 25 Fla. 112, 433; *Pinson v. State*, 28 Fla. 735; *Killins v. State*, 28 Fla. 313; *Robinson v. Barnett*, 19 Fla. 670; *Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.*, 27 Fla. 1, 157; *Bryant v. State*, 34 Fla. 291; *Driggers v. State*, 38 Fla. 7.

Georgia. — *Rounsaville v. Watters*, 94 Ga. 707; *Holdridge v. Cubbedge*, 71 Ga. 254; *Bernhard v. State*, 76 Ga. 613; *Everett v. State*, 62 Ga. 65; *Hoffman v. Oates*, 77 Ga. 701; *James v. Kiser*, 65 Ga. 515; *Murphy v. Peabody*, 63 Ga. 522; *Williams v. State*, 69 Ga. 13; *Central R. Co. v. Gleason*, 72 Ga. 742; *Georgia R. Co. v. Thomas*, 73 Ga. 350; *Beck v. State*, 76 Ga. 453; *Richmond, etc., R. Co. v. Howard*, 79 Ga. 44; *Young v. State*, 95 Ga. 456; *Cheshire v. Tappan*, 94 Ga. 704; *Savannah St. R. Co. v. Ficklin*, 94 Ga. 146; *Kehoe v. Hanley*, 95 Ga. 321; *May v. State*, 94 Ga. 76; *Rodgers v. Black*, 99 Ga. 139; *Petersburg Sav., etc., Co. v. Manhattan F. Ins. Co.*, 66 Ga. 446; *Carter v. Dixon*, 69 Ga. 82; *McLain v. State*, 71 Ga. 280; *Central R. Co. v. DeBray*, 71 Ga. 407; *Henderson v. Francis*, 75 Ga. 178; *Simmons v. State*, 79 Ga. 697; *Thompson v. Thompson*, 77 Ga. 692; *Papot v.*

the instructions requested and formulating a general charge to the jury, embracing all the matters of law arising upon the plead-

Southwestern R. Co., 74 Ga. 297; Merchants', etc., Ins. Co. v. Vining, 67 Ga. 661; Varnedoe v. State, 75 Ga. 181; Etheridge v. Hobbs, 77 Ga. 531; Corry v. Tompkins, 17 Ga. 351.

Illinois. — Price v. Hudson, 125 Ill. 284; Mason v. Jones, 36 Ill. 212; Fairbank Canning Co. v. Innes, 125 Ill. 410; Sterling v. Merrill, 124 Ill. 522; Brace v. Black, 125 Ill. 33; Hessing v. McCloskey, 37 Ill. 341; Bowen v. Schuler, 41 Ill. 192; Halty v. Markel, 44 Ill. 225; McKichan v. McBean, 45 Ill. 228; Underwood v. White, 45 Ill. 437; Ware v. Gilmore, 49 Ill. 278; Freeman v. Tinsley, 50 Ill. 497; Calhoun v. O'Neal, 53 Ill. 354; Aurora v. Gillett, 56 Ill. 132; May v. Tallman, 20 Ill. 443; Toledo, etc., R. Co. v. Maine, 67 Ill. 298; Earl v. People, 73 Ill. 329; Lonergan v. Courtney, 75 Ill. 580; Chicago v. Hesing, 83 Ill. 204; Frank v. Welch, 89 Ill. 38; Chicago, etc., R. Co. v. Utley, 38 Ill. 410; McCartney v. McMullen, 38 Ill. 237; Emery v. Hoyt, 46 Ill. 258; Chicago v. Smith, 48 Ill. 107; Weyrich v. Foster, 48 Ill. 115; Cossitt v. Hobbs, 56 Ill. 231; Henneberry v. Morse, 56 Ill. 394; Sangamo Ins. Co. v. McKeen, 60 Ill. 167; Chicago, etc., R. Co. v. Murray, 62 Ill. 326; Kuhnen v. Blitz, 56 Ill. 171; Chicago, etc., R. Co. v. Gregory, 58 Ill. 272; Bowen v. Rutherford, 60 Ill. 41; Bourne v. Stout, 62 Ill. 261; Cass v. Campbell, 63 Ill. 259; Davis v. Wilson, 65 Ill. 525; Ames v. Snider, 69 Ill. 376; Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302; Curtiss v. Martin, 20 Ill. 557; Chicago, etc., R. Co. v. Button, 68 Ill. 409; Scott v. Delany, 87 Ill. 146; Chicago, etc., R. Co. v. McGaha, 19 Ill. App. 342; Wrigley v. Cornelius, 162 Ill. 92; Chicago, etc., R. Co. v. Krueger, 124 Ill. 457; Gilmore v. People, 124 Ill. 380; Sheehan v. People, 131 Ill. 22; Hannibal, etc., R. Co. v. Martin, 111 Ill. 219; Chicago, etc., R. Co. v. Kuster, 22 Ill. App. 188; Lyons v. People, 137 Ill. 602; Spahn v. People, 137 Ill. 538; McNulta v. Lockridge, 32 Ill. App. 86; Chicago City R. Co. v. Brady, 35 Ill. App. 460; Davis v. People, 114 Ill. 86; Campbell v. Magruder, 39 Ill. App. 604; Razor v. Razor, 42 Ill. App. 504; Painter v. People, 147 Ill. 444; Mitchell v. Hindman, 150 Ill. 538; Hoehn v. Chicago, etc., R. Co., 152 Ill. 223; St. Louis, etc., R. Co. v. Barrett,

152 Ill. 168; Baird v. School Trustees, 106 Ill. 657; Keeler v. Stuppe, 86 Ill. 309; Chicago v. Stearns, 105 Ill. 554; Thompson v. Duff, 119 Ill. 226; Friedberg v. People, 102 Ill. 160; Bloomington v. Perdue, 99 Ill. 329; Abney v. Austin, 6 Ill. App. 49; Richmond v. Robert, 98 Ill. 472; Alliance Ins. Co. v. McKnight, 97 Ill. 80; Boylston v. Bain, 90 Ill. 283; Baker v. Robinson, 49 Ill. 299; Chapman v. Cawrey, 50 Ill. 518; Concordia Cemetery Assoc. v. Minnesota, etc., R. Co., 121 Ill. 199; Chicago, etc., R. Co. v. Holland, 122 Ill. 461; Hutchinson Furnace, etc., Co. v. Lyford, 123 Ill. 300; Chicago, etc., R. Co. v. Warner, 123 Ill. 38; Hoggins v. Coad, 58 Ill. App. 58; Chicago, etc., R. Co. v. Wolf, 137 Ill. 360; Campbell v. Campbell, 138 Ill. 612; Cooper v. Cooper, 132 Ill. 80; Nelson v. Smith, 26 Ill. App. 57; Peoria Grape Sugar Co. v. Frazer, 26 Ill. App. 60; Loomis v. Downs, 26 Ill. App. 257; Pyle v. Pyle, 158 Ill. 289; Fisher v. Cook, 125 Ill. 280; Roth v. Smith, 54 Ill. 431; Keeler v. Stuppe, 86 Ill. 309; Field v. Chicago, etc., R. Co., 68 Ill. 367; Kennedy v. People, 40 Ill. 488; Field v. Crawford, 146 Ill. 136; Graybeal v. Gardner, 146 Ill. 337; Kendall v. Young, 141 Ill. 188; West Chicago St. R. Co. v. Nash, 166 Ill. 528; Chicago, etc., R. Co. v. Ryan, 165 Ill. 88.

Indiana. — Bissot v. State, 53 Ind. 408; Benson v. State, 119 Ind. 488; Grubb v. State, 117 Ind. 277; Sherman v. Hogland, 73 Ind. 472; Blizzard v. Applegate, 77 Ind. 516; Jennings v. Howard, 80 Ind. 214; Pittsburgh, etc., R. Co. v. Martin, 82 Ind. 476; Evansville v. Wilter, 86 Ind. 414; Terry v. Shively, 93 Ind. 413; Louisville, etc., R. Co. v. White, 94 Ind. 257; Everson v. Seller, 105 Ind. 266; Atkinson v. Dailey, 107 Ind. 117; National Ben. Assoc. v. Grauman, 107 Ind. 288; Bronnenberg v. Coburn, 110 Ind. 169; Hudson v. Houser, 123 Ind. 309; Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426; Rains v. State, 137 Ind. 83; Story v. Story, 1 Ind. App. 284; Westbrook v. Aultman, 3 Ind. App. 83; Ohio, etc., R. Co. v. Wrape, 4 Ind. App. 100; Lake Erie, etc., R. Co. v. Ziebarth, 6 Ind. App. 228; Keesling v. Doyle, 8 Ind. App. 43; Haymond v. Saucer, 84 Ind. 3; Martinsville v. Shirley, 84 Ind. 546; McDermott v. State, 89 Ind. 187;

ings and the evidence, has been specially commended. In this way the law is sufficiently declared and clearly presented to the jury

Koerner v. State, 98 Ind. 7; Davidson v. State, 99 Ind. 366; Barnett v. State, 100 Ind. 171; Walker v. State, 102 Ind. 502; Garfield v. State, 74 Ind. 60; Goodwin v. State, 96 Ind. 550; Turner v. State, 102 Ind. 425; Kennedy v. State, 107 Ind. 144; Starret v. Burkhalter, 86 Ind. 439; Nicles v. Calvert, 96 Ind. 316; Fowler v. Wallace, 131 Ind. 347; Ohio, etc., R. Co. v. Stansberry, 132 Ind. 533; Smith v. State, 142 Ind. 288; Elwood Planing Mill Co. v. Jackson, 11 Ind. App. 181; Chicago, etc., R. Co. v. Boggs, 101 Ind. 522; Langsdale v. Bonton, 12 Ind. 467; McDonald v. McDonald, 142 Ind. 55; Evansville, etc., R. Co. v. Malott, 13 Ind. App. 289; Smith v. State, 117 Ind. 167; Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 475; Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 80; Louisville, etc., R. Co. v. Falvey, 104 Ind. 409; Louisville, etc., R. Co. v. Jones, 108 Ind. 551; Williamson v. Yingling, 93 Ind. 42; Cline v. Lindsey, 110 Ind. 337; Stephenson v. State, 110 Ind. 358; Louisville, etc., R. Co. v. Wright, 115 Ind. 378; Delhaney v. State, 115 Ind. 499; Logan v. Logan, 77 Ind. 558; Conradt v. Clauve, 93 Ind. 476; Staser v. Hogan, 120 Ind. 207; Ohio, etc., R. Co. v. Dickerson, 59 Ind. 317; Richie v. State, 58 Ind. 355; Lewellen v. Garrett, 58 Ind. 442; Gebhart v. Burkett, 57 Ind. 378; Gramm v. Boener, 56 Ind. 497; House v. McKinney, 54 Ind. 240; Graham v. Nowlin, 54 Ind. 389; Indianapolis, etc., R. Co. v. Stout, 53 Ind. 143; Thompson v. Grimes, 5 Ind. 385; Morgan v. Stevenson, 6 Ind. 169; Fitzgerald v. Jerolaman, 10 Ind. 338; Musselman v. Pratt, 44 Ind. 126; Epps v. State, 102 Ind. 539; Indiana Mfg. Co. v. Millican, 87 Ind. 87; Freeze v. DePuy, 57 Ind. 188; Coryell v. Stone, 62 Ind. 307; Indianapolis v. Murphy, 91 Ind. 382; Bowen v. Pollard, 71 Ind. 177; National Ben. Assoc. v. Grauman, 107 Ind. 288; Freeman v. Hutchinson, 15 Ind. App. 639; Miller v. Miller, (Ind. App. 1897) 47 N. E. Rep. 338.

Iowa. — Raver v. Webster, 3 Iowa 509; State v. Hockenberry, 11 Iowa 269; State v. Sheeley, 15 Iowa 404; State v. Schlagel, 19 Iowa 169; State v. Stanley, 33 Iowa 526; State v. Heather-ton, 60 Iowa 175; Crosby v. Hungerford, 59 Iowa 712; Iowa College v. Hill, 12 Iowa 462; State v. Castello, 62 Iowa 404; Albrosky v. Iowa City, 76 Iowa

301; State v. Winter, 72 Iowa 627; Seekel v. Norman, 71 Iowa 264; State v. Rainsbarger, 74 Iowa 196; State v. McClintic, 73 Iowa 663; Harper v. Madren, 21 Iowa 407; Clinton Nat. Bank v. Torry, 30 Iowa 85; Todd v. Branner, 30 Iowa 439; Hopper v. Moore, 42 Iowa 563; Price v. Alexander, 2 Greene (Iowa) 427; Rusch v. Davenport, 6 Iowa 443; Mills v. Mabon, 9 Iowa 484; Payne v. Billingham, 10 Iowa 360; Rindscoff v. Barrett, 14 Iowa 101; Russ v. Steamboat War Eagle, 14 Iowa 363; State v. Rorabacher, 19 Iowa 154; Robinson v. Illinois Cent. R. Co., 30 Iowa 401; Wilhelm v. Fimple, 31 Iowa 131; Maxwell v. Gibbs, 32 Iowa 32; State v. Morphy, 33 Iowa 270; Kline v. Kansas City, etc., R. Co., 50 Iowa 656; Thomas v. Brooklyn, 58 Iowa 438; Thompson v. Keokuk, 61 Iowa 187; Votaw v. Diehl, 62 Iowa 676; Gee v. Moss, 68 Iowa 318; Wilson Sewing Mach. Co. v. Bull, 52 Iowa 554; Parsons v. Hedges, 15 Iowa 119; State v. Donneker, 40 Iowa 340; Allen v. Burlington, etc., R. Co., 57 Iowa 623; Van Winter v. Henry County, 61 Iowa 684; Poole v. Hintrager, 60 Iowa 180; Van Horn v. Overman, 75 Iowa 421; State v. Pugsley, 75 Iowa 742; Larkin v. Burlington, etc., R. Co., 85 Iowa 492; Clark v. Raymond, 85 Iowa 737; Rieve v. Elting, 89 Iowa 82; Cox v. Chicago, etc., R. Co., 95 Iowa 54; State v. Hopkins, 94 Iowa 86; State v. Tippet, 94 Iowa 646; Norris v. Kipp, 74 Iowa 444; Bener v. Edgington, 76 Iowa 105; Minthon v. Lewis, 78 Iowa 620; State v. Cody, 94 Iowa 169; Winter v. Central Iowa R. Co., 80 Iowa 443; Blair v. Madison County, 81 Iowa 313; Allen v. Kirk, 81 Iowa 658; Shannon v. Tama City, 74 Iowa 22; Hablichtel v. Yambert, 75 Iowa 539.

Kansas. — Rice v. State, 3 Kan. 152; Gillett v. Corum, 7 Kan. 156; Abeles v. Cohen, 8 Kan. 180; Kansas Ins. Co. v. Berry, 8 Kan. 159; Wilson v. Fuller, 9 Kan. 186; Topeka v. Tuttle, 5 Kan. 311; Hazard Powder Co. v. Vieregutz, 6 Kan. 471; Lobenstein v. Pritchett, 8 Kan. 213; State v. Bailey, 32 Kan. 83; Deitz v. Regnier, 27 Kan. 94; Missouri Pac. R. Co. v. Johnson, 44 Kan. 660; State v. Peterson, 38 Kan. 204; State v. Mortimer, 20 Kan. 93; Haak v. Struve, 38 Kan. 326; State v. Groning, 33 Kan. 18; Stickel v. Ben-

without the unnecessary repetition and verbose language which so often mar special instructions, whereby jurors are confused and

der, 37 Kan. 457; Warden *v.* Reser, 38 Kan. 86; Inter-State Consol. Rapid Transit R. Co. *v.* Fox, 41 Kan. 715; Morgan *v.* Bell, 41 Kan. 345; Wolf *v.* Foster, 13 Kan. 116; State *v.* Reno, 41 Kan. 674; Chicago, etc., R. Co. *v.* Groves, 56 Kan. 601; Willard *v.* Whinfield, 2 Kan. App. 53; St. Louis, etc., R. Co. *v.* Stevens, 3 Kan. App. 176; St. Louis, etc., R. Co. *v.* Hoover, 3 Kan. App. 577; State *v.* Kearley, 26 Kan. 77; Hendrickson *v.* Harvey, 4 Kan. App. 761.

Kentucky. — Stafford *v.* Hussey, (Ky. 1896) 33 S. W. Rep. 1115; Smith *v.* Com., (Ky. 1887) 4 S. W. Rep. 798; Whitaker *v.* Com., (Ky. 1891) 17 S. W. Rep. 358; Johnson *v.* Com., (Ky. 1891) 15 S. W. Rep. 671; Louisville, etc., R. Co. *v.* Connelly, (Ky. 1888) 7 S. W. Rep. 914; Ruberts *v.* Com., (Ky. 1888) 7 S. W. Rep. 401; Mayes *v.* Farish, 11 B. Mon. (Ky.) 41; Clark *v.* Com., 18 Ky. L. Rep. 758; Dayton *v.* Gardner, (Ky. 1897) 40 S. W. Rep. 779.

Louisiana. — State *v.* Garic, 35 La. Ann. 970; State *v.* Hartleb, 35 La. Ann. 1180; State *v.* Brown, 35 La. Ann. 1058; State *v.* Boasso, 38 La. Ann. 202; State *v.* Wright, 41 La. Ann. 600; State *v.* Cauty, 41 La. Ann. 587; State *v.* Hamilton, 41 La. Ann. 317; State *v.* Spooner, 41 La. Ann. 780; Wimbish *v.* Hamilton, 47 La. Ann. 246; State *v.* Dudoussat, 47 La. Ann. 977; State *v.* Fontenot, 48 La. Ann. 283; State *v.* Martin, 47 La. Ann. 1540.

Maine. — State *v.* Watson, 63 Me. 128; Roberts *v.* Plaisted, 63 Me. 335; Dunn *v.* Moody, 41 Me. 239; State *v.* Williams, 76 Me. 480; State *v.* McDonald, 65 Me. 465; Strickland *v.* Hamlin, 87 Me. 81; Bunker *v.* Gouldsboro, 81 Me. 188; Hearn *v.* Shaw, 72 Me. 187.

Maryland. — Mason *v.* Poulson, 43 Md. 161; U. S. Telegraph Co. *v.* Gildersleeve, 29 Md. 232; Mutual Safety Ins. Co. *v.* Cohen, 3 Gill (Md.) 459; Pettigrew *v.* Barnum, 11 Md. 434; Baltimore, etc., R. Co. *v.* Resley, 14 Md. 424; Keech *v.* Baltimore, etc., R. Co., 17 Md. 32; Cumberland Coal, etc., Co. *v.* Tilghman, 13 Md. 74; Spencer *v.* Trafford, 42 Md. 1; Baltimore, etc., Turnpike Road *v.* State, 71 Md. 573; Lurssen *v.* Lloyd, 76 Md. 360; Lake Roland El. R. Co. *v.* McKewen, 80 Md. 593; Johnson *v.* Turner, (Md. 1891) 22

Atl. Rep. 1103; Cover *v.* Myers, 75 Md. 406; Cover *v.* Bowersox, (Md. 1892) 23 Atl. Rep. 1037; Jackson *v.* Jackson, 82 Md. 17; Deford *v.* State, 30 Md. 179.

Massachusetts. — Breen *v.* Field, 159 Mass. 582; Com. *v.* Cosseboom, 155 Mass. 298; Com. *v.* Ford, 146 Mass. 131; Twomey *v.* Linnehan, 161 Mass. 91; Com. *v.* Farrell, 160 Mass. 525; Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71; Com. *v.* Burns, 167 Mass. 374.

Michigan. — Joslin *v.* LeBaron, 44 Mich. 160; Keables *v.* Christie, 47 Mich. 594; Roux *v.* Blodgett, etc., Lumber Co., 94 Mich. 607; Clark *v.* Rice, 46 Mich. 308; Fraser *v.* Jennison, 42 Mich. 206; Anderson *v.* Walter, 34 Mich. 113; People *v.* Hubbard, 92 Mich. 322; Ferris *v.* McQueen, 94 Mich. 367; Stevens *v.* Pendleton, 94 Mich. 405; Ellis *v.* Whitehead, 95 Mich. 105; St. Clair Mineral Springs Co. *v.* St. Clair, 96 Mich. 463; Westra *v.* Westra, 101 Mich. 526; People *v.* Parsons, 105 Mich. 177; Shearer *v.* Middleton, 88 Mich. 621; Continental Ins. Co. *v.* Horton, 28 Mich. 173; People *v.* Berry, (Mich. 1895) 65 N. W. Rep. 98.

Minnesota. — Wright *v.* Ames, 28 Minn. 362; Ladd *v.* Newell, 34 Minn. 107; O'Leary *v.* Mankato, 21 Minn. 65; Hocum *v.* Weitherick, 22 Minn. 152; State *v.* Mims, 26 Minn. 183; Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526; Kolsti *v.* Minneapolis, etc., R. Co., 32 Minn. 133; Schultz *v.* Bower, 64 Minn. 123.

Mississippi. — Moye *v.* Herndon, 30 Miss. 110; Ellis *v.* Commercial Bank, 7 How. (Miss.) 294; Head *v.* State, 44 Miss. 731; Gamblin *v.* State, 45 Miss. 658; Fortenberry *v.* State, 55 Miss. 403; Parker *v.* State, 55 Miss. 414; White *v.* State, 52 Miss. 217; Russell *v.* State, 53 Miss. 367; Kendrick *v.* State, 55 Miss. 436; Cavanah *v.* State, 56 Miss. 300; Wood *v.* State, 64 Miss. 761; King *v.* State, 58 Miss. 737; Penn *v.* State, 62 Miss. 450; Moyers *v.* Columbus Banking, etc., Co., 64 Miss. 48; Cicely *v.* State, 13 Smed. & M. (Miss.) 202; Germania F. Ins. Co. *v.* Francis, 52 Miss. 457; Richards *v.* Vaccaro, 67 Miss. 516.

Missouri. — Williams *v.* Vanmeter, 8 Mo. 339; Harris *v.* Lee, 80 Mo. 420; Pond *v.* Wyman, 15 Mo. 175; State *v.*

confounded rather than instructed and directed. Of course such action requires great labor, thought, and prudence on the part of

King, 44 Mo. 238; *Rogers v. McCune*, 19 Mo. 557; *State v. Woods*, 97 Mo. 31; *State v. Jackson*, 90 Mo. 156; *State v. Walton*, 74 Mo. 271; *State v. Gann*, 72 Mo. 374; *State v. Emory*, 79 Mo. 461; *State v. Jones*, 78 Mo. 278; *State v. Smith*, 80 Mo. 516; *State v. Thompson*, 83 Mo. 257; *State v. Miller*, 67 Mo. 604; *Blitt v. Heinrich*, 33 Mo. App. 243; *McGonigle v. Daugherty*, 71 Mo. 259; *State v. Jump*, 90 Mo. 171; *Keim v. Union R., etc., Co.*, 90 Mo. 314; *State v. Elliott*, 90 Mo. 350; *Miller v. St. Louis, etc., R. Co.*, 90 Mo. 389; *State v. Partlow*, 90 Mo. 608; *State v. Mason*, 24 Mo. App. 321; *Schroeder v. Mason*, 25 Mo. App. 190; *Jackson v. German Ins. Co.*, 27 Mo. App. 62; *Kling v. Kansas City*, 27 Mo. App. 231; *Teichman Commission Co. v. American Bank*, 27 Mo. App. 676; *Price v. Breckenridge*, 92 Mo. 378; *Kent v. Highleyman*, 28 Mo. App. 614; *Kain v. Kansas City, etc., R. Co.*, 29 Mo. App. 53; *McClure v. Ritchey*, 30 Mo. App. 445; *Ackley v. St. Louis, etc., R. Co.*, 30 Mo. App. 657; *Brown v. Chadwick*, 32 Mo. App. 615; *Mitchell v. Plattsburg*, 33 Mo. App. 555; *Liggett v. Morgan*, 98 Mo. 39; *Tetherow v. St. Joseph, etc., R. Co.*, 98 Mo. 74; *State v. Mathews*, 98 Mo. 119; *Straat v. Hayward*, 37 Mo. App. 585; *Clafin v. Sommers*, 39 Mo. App. 419; *Cox v. Syenite Granite Co.*, 39 Mo. App. 424; *Dunn v. Cass Ave., etc., R. Co.*, 98 Mo. 652; *Brown v. Hannibal, etc., R. Co.*, 99 Mo. 310; *Keystone Implement Co. v. Leonard*, 40 Mo. App. 477; *Wetzell v. Wagoner*, 41 Mo. App. 509; *State v. Moore*, 101 Mo. 316; *Boone v. Wabash, etc., R. Co.*, 20 Mo. App. 232; *Palmer v. Missouri Pac. R. Co.*, 76 Mo. 217; *State v. Weeden*, 133 Mo. 70; *Coe v. Griggs*, 76 Mo. 619; *Utey v. Tolfree*, 77 Mo. 307; *Douglass v. Cissna*, 17 Mo. App. 44; *Walker v. Martin*, 10 Mo. App. 589; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567; *State v. Rider*, 95 Mo. 474; *Sloan v. Frye*, 36 Mo. App. 523; *Marshall v. Bingle*, 36 Mo. App. 122; *State v. Luke*, 104 Mo. 563; *Flynn v. St. Louis, etc., R. Co.*, 43 Mo. App. 424; *State v. Mounce*, 106 Mo. 226; *Fugate v. Millar*, 109 Mo. 281; *Naylor v. Cox*, 114 Mo. 232; *Payne v. Kansas City, etc., R. Co.*, 112 Mo. 6; *Henry v. Grand Ave. R. Co.*, 113 Mo. 525; *Bignall, etc., Mfg. Co. v. Pierce, etc., Mfg. Co.*, 59 Mo. App. 673; *Diel v. Stegner*, 56 Mo. App. 535; *Liggett v. Johnston*, 1 Mo. App. Rep. 346; *State v. Wissmark*, 36 Mo. 592; *State v. Partlow*, 90 Mo. 608; *Hunt v. Weed*, 2 Mo. App. Rep. 1230; *Buck v. People's St. R., etc., Co.*, 108 Mo. 179; *Cooper v. Atchison, etc., R. Co.*, 39 Mo. App. 489; *St. Louis Fourth Nat. Bank v. Altheimer*, 91 Mo. 190; *McClain v. Abshire*, 63 Mo. App. 333; *Connor v. Heman*, 44 Mo. App. 346; *Bluedorn v. Missouri Pac. R. Co. (Mo. 1893)* 24 S. W. Rep. 57; *Nelson Distilling Co. v. Hubbard*, 53 Mo. App. 23; *State v. Tatlow*, 136 Mo. 678; *State v. McLeod*, 136 Mo. 109.

Montana. — *Territory v. Burgess*, 8 Mont. 57; *Territory v. Corbett*, 3 Mont. 50; *Territory v. McAndrews*, 3 Mont. 164.

Nebraska. — *Severance v. Melick*, 15 Neb. 611; *Binfield v. State*, 15 Neb. 484; *Olive v. State*, 11 Neb. 1; *Kerkow v. Bauer*, 15 Neb. 150; *Kopplekom v. Huffman*, 12 Neb. 95; *Lincoln v. Gillilan*, 18 Neb. 114; *Lincoln v. Smith*, 28 Neb. 762; *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 42; *Angle v. Bilby*, 25 Neb. 595; *Bradshaw v. State*, 17 Neb. 147; *Carr v. State*, 23 Neb. 749; *Marion v. State*, 16 Neb. 349; *Curry v. State*, 5 Neb. 412; *Parrish v. State*, 14 Neb. 60; *Miller v. State*, 29 Neb. 437; *Lawhead v. State*, 46 Neb. 607; *Campbell v. Holland*, 22 Neb. 587; *Palin v. State*, 38 Neb. 862; *Hodgman v. Thomas*, 37 Neb. 568; *Young v. Sage*, 42 Neb. 37; *Bushnell v. Chamberlain*, 44 Neb. 751; *Carleton v. State*, 43 Neb. 373; *Lincoln v. Holmes*, 20 Neb. 39; *Uldrich v. Gilmore*, 35 Neb. 288; *Barton v. McKay*, 36 Neb. 632; *Beavers v. Missouri Pac. R. Co.*, 47 Neb. 761; *Woodworth v. Parrott*, 48 Neb. 675; *Omaha Belt R. Co. v. McDermott*, 25 Neb. 714; *Fremont v. Brenner*, 27 Neb. 405; *Bush v. State*, 47 Neb. 642; *Omaha v. Ayer*, 32 Neb. 375; *Bull v. Wagner*, 33 Neb. 246; *Brumback v. German Nat. Bank*, 46 Neb. 540; *Rentner v. Zimbelman*, 50 Neb. 165; *Costello v. Kottas (Neb. 1897)* 71 N. W. Rep. 950; *Jamison v. Kent*, 50 Neb. 247; *Behrends v. Beyschlag*, 50 Neb. 304.

Nevada. — *State v. O'Connor*, 11 Nev. 416; *State v. Waterman*, 1 Nev. 543; *State v. Cardelli*, 19 Nev. 319; *Thompson v. Powning*, 15 Nev. 195; *State v.*

the trial judge in order that the substance of all special instructions shall be given to the jury when the questions therein presented are pertinent to the case, and that no omission shall occur by

McLane, 15 Nev. 345; State *v.* St. Clair, 16 Nev. 207; State *v.* Rover, 13 Nev. 17; State *v.* Millain, 3 Nev. 409; State *v.* Anderson, 4 Nev. 265; State *v.* Ward, 19 Nev. 297.

New Hampshire. — Whitman *v.* Morey, 63 N. H. 458.

New Jersey. — Smith *v.* Irwin, 51 N. J. L. 507; Jackson *v.* State, 49 N. J. L. 252.

New Mexico. — Anderson *v.* Territory, 4 N. Mex. 108; Territory *v.* Baker, 4 N. Mex. 117.

New York. — Sullivan *v.* New York, etc., Cement Co., 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 365; People *v.* O'Connell, 62 How. Pr. (N. Y. Supreme Ct.) 436; Garbaczewski *v.* Third Ave. R. Co., 5 N. Y. App. Div. 186; Holbrook *v.* Utica, etc., R. Co., 12 N. Y. 236; Horowitz *v.* Hamburg American Packet Co., 15 Misc. Rep. (N. Y. City Ct.) 466; Sullivan *v.* New York, etc., Cement Co., 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 365; People *v.* McQuade, (Supreme Ct.) 1 N. Y. Supp. 155; Tucker *v.* Ely, 37 Hun (N. Y.) 565; Esmond *v.* Kingsley, (Supreme Ct.) 3 N. Y. Supp. 696; Chapman *v.* McCormick, 86 N. Y. 479; O'Neil *v.* Dry Dock, etc., R. Co., 129 N. Y. 125; Williams *v.* Birch, 6 Bosw. (N. Y.) 299; Sherman *v.* Wakeman, 11 Barb. (N. Y.) 254; Schooner Samuel T. Keese, 38 N. Y. Super. Ct. 281; O'Toole *v.* Central Park, etc., R. Co. (Supreme Ct.) 12 N. Y. Supp. 347; Rigdon *v.* Allegheny Lumber Co., (Supreme Ct.) 13 N. Y. Supp. 871; Mann *v.* Brooklyn, (Supreme Ct.) 17 N. Y. Supp. 643; Sprague *v.* Gibson, (Supreme Ct.) 17 N. Y. Supp. 685; Vredenburgh *v.* Pall, 7 N. Y. Misc. Rep. (Brooklyn City Ct.) 567; Matter of Rider, 6 Dem. (N. Y.) 473; Hine *v.* Bowe, 114 N. Y. 350; Anderson *v.* John Hancock Mut. L. Ins. Co., (Brooklyn City Ct.) 7 N. Y. Supp. 601; Thorp *v.* Carvalho, 14 Misc. Rep. (N. Y. C. Pl.) 554; Bowen *v.* Sweeney, 89 Hun (N. Y.) 359, 25 Civ. Pro. Rep. (N. Y.) 128; Coates *v.* Harvey, (Buffalo Super. Ct.) 2 N. Y. Supp. 5; Matter of Bull, 14 Daly (N. Y.) 510; Abenheim *v.* Samuel, (Supreme Ct.) 1 N. Y. Supp. 868; Link *v.* Sheldon, 136 N. Y. 1; Whitlatch *v.* Fidelity, etc., Co., 21 N. Y. App. Div. 124; McSwegan *v.* Pennsylvania R. Co., 43 N. Y. Supp. 1159, 13 N. Y. App.

Div. 625; Gillespie *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 501.

North Carolina. — Redmond *v.* Stepp, 100 N. Car. 212; Ramsey *v.* Wallace, 100 N. Car. 75; State *v.* Neville, 6 Jones L. (N. Car.) 423; Cuthbertson *v.* North Carolina Home Ins. Co., 96 N. Car. 480; Alexander *v.* Richmond, etc., R. Co., 112 N. Car. 720; Michael *v.* Foil, 100 N. Car. 178.

North Dakota. — State *v.* Pancoast, (N. Dak. 1896) 67 N. W. Rep. 1052; Daeley *v.* Minneapolis, etc., Elevator Co., 4 N. Dak. 269; State *v.* McGahey, 3 N. Dak. 293.

Ohio. — Stewart *v.* State, 1 Ohio St. 67; Bond *v.* State, 23 Ohio St. 349; Lloyd *v.* Moore, 38 Ohio St. 97; Lakeside, etc., R. Co. *v.* Kelly, 3 Ohio Dec. 319; Berdan *v.* J. M. Bour Co., 2 Ohio Dec. 295.

Oklahoma. — Gatliff *v.* Territory, 2 Okla. 523.

Oregon. — State *v.* Brown, 7 Oregon 186; State *v.* Anderson, 10 Oregon 448; LaGrande Nat. Bank *v.* Blum, 27 Oregon 215; Roth *v.* Northern Pac. Lumbering Co., 18 Oregon 205.

Pennsylvania. — Munderbach *v.* Lutz, 14 S. & R. (Pa.) 220; Geiger *v.* Welsh, 1 Rawle (Pa.) 349; Kroegher *v.* McConway, etc., Co., 149 Pa. St. 444; Gallagher *v.* Philadelphia, 4 Pa. Super. Ct. Rep. 60.

Rhode Island. — Hampson *v.* Taylor, 15 R. I. 83.

South Carolina. — Emory *v.* Hazard Powder Co., 22 S. Car. 483; Simkins *v.* Columbia, etc., R. Co., 20 S. Car. 270; State *v.* Robinson, 35 S. Car. 340; Hay *v.* Carolina Midland R. Co., 41 S. Car. 542; State *v.* Petsch, 43 S. Car. 132; Mitchell *v.* Charleston Light, etc., Co., 45 S. Car. 146; State *v.* Aughtry, 49 S. Car. 285.

South Dakota. — Griswold *v.* Sundback, 4 S. Dak. 441; State *v.* Phelps, 5 S. Dak. 480.

Tennessee. — Rea *v.* State, 8 Lea (Tenn.) 356; Blair *v.* Childs, 10 Heisk. (Tenn.) 201; East Tennessee, etc., R. Co. *v.* Smith, 9 Lea (Tenn.) 685; East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea (Tenn.) 46; East Tennessee, etc., R. Co. *v.* Humphreys, 12 Lea (Tenn.) 200; Knights of Pythias *v.* Rosenfeld, 92 Tenn. 508; Southern R. Co. *v.* Pugh, 97 Tenn. 624.

which either of the parties may be prejudiced. But if the trial judge is willing to undertake the additional labor, the jury, as a

Texas. — *Powell v. Messer*, 18 Tex. 401; *Taylor, etc., R. Co. v. Taylor*, 79 Tex. 104; *Robertson v. State*, 1 Tex. App. 312; *Hays v. Hays*, 66 Tex. 606; *Traylor v. Townsend*, 61 Tex. 144; *Gray v. Burk*, 19 Tex. 228; *Smith v. Eckford*, (Tex. 1891) 18 S. W. Rep. 210; *East Texas F. Ins. Co. v. Dyches*, 56 Tex. 565; *Tucker v. Hamlin*, 60 Tex. 171; *Schooler v. Hutchins*, 66 Tex. 324; *International, etc., R. Co. v. Eckford*, 71 Tex. 274; *Texas Mexican R. Co. v. Douglas*, 73 Tex. 325; *Rousel v. Stanger*, 73 Tex. 670; *Texas Trunk R. Co. v. Johnson*, 75 Tex. 158; *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220; *Texas Pac. R. Co. v. Overheiser*, 76 Tex. 437; *Gulf, etc., R. Co. v. Hudson*, 77 Tex. 494; *Gulf, etc., R. Co. v. Locker*, 78 Tex. 279; *Wilson v. Lucas*, 78 Tex. 292; *Goodbar v. City Nat. Bank*, 78 Tex. 461; *International, etc., R. Co. v. Kernan*, 78 Tex. 294; *Callahan v. Hendrix*, 79 Tex. 494; *Bonner v. Glenn*, 79 Tex. 531; *Tennent, etc., Shoe Co. v. Partridge*, 82 Tex. 329; *Smith v. Traders' Nat. Bank*, 82 Tex. 368; *Texas, etc., R. Co. v. Brick*, 83 Tex. 598; *Hernsheim v. Babcock*, (Tex. 1887) 2 S. W. Rep. 880; *Rio Grande Bridge, etc., Co. v. Varela*, (Tex. Civ. App. 1893) 22 S. W. Rep. 99; *Galveston, etc., R. Co. v. Tuckett*, (Tex. Civ. App. 1894) 25 S. W. Rep. 150; *Wilson v. Adams*, 15 Tex. 323; *Hicks v. Bailey*, 16 Tex. 229; *Tucker v. Hamlin*, 60 Tex. 171; *Henderson v. State*, 12 Tex. 525; *Floyd v. Rice*, 28 Tex. 341; *Vaughan v. Warnell*, 28 Tex. 119; *Clark v. Wilcox*, 31 Tex. 322; *Fort v. Barnett*, 23 Tex. 460; *Oliver v. Chapman*, 15 Tex. 400; *Galbreath v. Atkinson*, 15 Tex. 21; *Wilson v. Lorane*, 15 Tex. 492; *Cordova v. State*, 6 Tex. App. 445; *Phillips v. State*, 6 Tex. App. 44; *Proffit v. State*, 5 Tex. App. 51; *Soye v. McCallister*, 18 Tex. 80; *Grumbles v. Grumbles*, 17 Tex. 472; *Bonner v. Whitcomb*, 80 Tex. 178; *Missouri Pac. R. Co. v. Lehmborg*, 75 Tex. 61; *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4; *Fort Worth, etc., R. Co. v. Thompson*, 2 Tex. Civ. App. 170; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611; *Austin, etc., R. Co. v. Anderson*, 79 Tex. 427; *Newman v. Farquhar*, 60 Tex. 640; *Imperial Roller Milling Co. v. Cleburne First Nat. Bank*, 5 Tex. Civ. App. 686; *Erie Tel., etc., Co. v. Grimes*, 82 Tex. 89; *Gulf, etc., R. Co. v. Duvall*, 12 Tex. Civ. App. 349; *Texas, etc., R. Co. v. Medaris*, 64 Tex. 92; *Texas, etc., R. Co. v. Raney*, (Tex. Civ. App. 1893) 23 S. W. Rep. 340; *Maes v. Texas, etc., R. Co.*, (Tex. Civ. App. 1893) 23 S. W. Rep. 725; *Teague v. Williams*, 6 Tex. Civ. App. 468; *Smith v. State*, 27 Tex. App. 50; *Davis v. Loftin*, 6 Tex. 489; *Case v. Jennings*, 17 Tex. 661; *Thompson v. Shannon*, 9 Tex. 536; *Hagerty v. Scott*, 10 Tex. 525; *Carter v. Eames*, 44 Tex. 544; *Salinas v. Wright*, 11 Tex. 572; *Hollingsworth v. Holshousen*, 17 Tex. 41; *Long v. McCauley*, (Tex. 1887) 3 S. W. Rep. 689; *McVey v. State*, 23 Tex. App. 659; *Gulf, etc., R. Co. v. Pool*, 70 Tex. 713; *Jackson v. State*, 25 Tex. App. 314; *Martin v. State*, 25 Tex. App. 557; *Rolins v. O'Farrell*, 77 Tex. 90; *Gulf, etc., R. Co. v. Hudson*, 77 Tex. 494; *Duncan v. State*, 30 Tex. App. 1; *Bayne v. State*, 29 Tex. App. 132; *Le Page v. Slade*, 79 Tex. 473; *Muely v. State*, 31 Tex. Crim. Rep. 155; *Fordyce v. Yarbrough*, 1 Tex. Civ. App. 260; *Galveston, etc., R. Co. v. Tuckett*, (Tex. Civ. App. 1894) 25 S. W. Rep. 150; *Kraus v. Haas*, 6 Tex. App. 665; *Crawford v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 927; *Countee v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 127; *Todd v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 697; *Missouri, etc., R. Co. v. Jamison*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1090; *Bewley v. Massie*, (Tex. Civ. App. 1895) 31 S. W. Rep. 1086; *Producers' Marble Co. v. Bergen*, (Tex. Civ. App. 1894) 31 S. W. Rep. 89; *Yoakum v. Kelly*, (Tex. Civ. App. 1895) 30 S. W. Rep. 836; *Franklin v. State*, 34 Tex. Crim. Rep. 625; *Larkin v. Watt*, (Tex. Civ. App. 1895) 32 S. W. Rep. 552; *Hibernia Ins. Co. v. Malevinsky*, 6 Tex. Civ. App. 81; *Sabine, etc., R. Co. v. Brouard*, 69 Tex. 617; *McCulloch v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 780; *Steel v. State*, (Tex. Crim. App. 1895) 30 S. W. Rep. 1064; *Pless v. State*, 23 Tex. App. 73; *Rummel v. State*, 22 Tex. App. 558; *Carr v. State*, 24 Tex. App. 562; *Burks v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 173; *Bonnors v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 669; *Chaddick v. Haley*, 81 Tex. 617; *Kuechler v. Wilson*, 82 Tex. 638; *Texas, etc., R. Co. v. Bailey*, 83

rule, will be better instructed in their duty than by hearing read the special instructions asked for on the part of the plaintiff and

Tex. 19; Musselman *v.* Strohl, 83 Tex. 473; Stanton *v.* State, (Tex. Crim. App. 1893) 24 S. W. Rep. 33; Lambeth *v.* State, (Tex. Crim. App. 1894) 24 S. W. Rep. 906; Schubert *v.* State, (Tex. Crim. App. 1894) 24 S. W. Rep. 906; Gonzales *v.* State, (Tex. Crim. App. 1894) 25 S. W. Rep. 777; Williams *v.* State, (Tex. Crim. App. 1894) 25 S. W. Rep. 788; Clark *v.* State, (Tex. Crim. App. 1894) 26 S. W. Rep. 68; Thompson *v.* State, 33 Tex. Crim. Rep. 217; Morrow *v.* State, (Tex. Crim. App. 1894) 26 S. W. Rep. 395; De Los Santos *v.* State, (Tex. Crim. App. 1894) 26 S. W. Rep. 831; Ayers *v.* Harris, 77 Tex. 108; Bankers', etc., Mut. Ben. Assoc. *v.* Stapp, 77 Tex. 517; Gulf, etc., R. Co. *v.* Gasscamp, 69 Tex. 545; Brunswick *v.* White, 70 Tex. 504; Woodring *v.* State, 34 Tex. Crim. Rep. 419; Partin *v.* State, (Tex. Crim. App. 1895) 30 S. W. Rep. 1067; Stephens *v.* Anderson, (Tex. Civ. App. 1896) 36 S. W. Rep. 1000; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24; Jennings *v.* Willer, (Tex. Civ. App. 1895) 32 S. W. Rep. 375; Missouri, etc., R. Co. *v.* Kirkland, 11 Tex. Civ. App. 528; San Antonio, etc., R. Co. *v.* Harding, 11 Tex. Civ. App. 497; Campbell *v.* Nicolini, (Tex. Civ. App. 1896) 35 S. W. Rep. 74; Breneman *v.* Kilgore, (Tex. Civ. App. 1896) 35 S. W. Rep. 202; Texas, etc., R. Co. *v.* Reed, (Tex. Civ. App. 1895) 32 S. W. Rep. 118; Spiars *v.* Dallas Cotton Mills, (Tex. Civ. App. 1895) 32 S. W. Rep. 777; Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 349; Texas, etc., R. Co. *v.* Padgett, (Tex. Civ. App. 1896) 36 S. W. Rep. 300; Graves *v.* State, (Tex. Crim. App. 1897) 42 S. W. Rep. 300; Central Texas, etc., R. Co. *v.* Bush, 12 Tex. Civ. App. 291.

Utah. — Scoville *v.* Salt Lake City, 11 Utah 60; Cunningham *v.* Union Pac. R. Co., 4 Utah 206; People *v.* Chadwick, 7 Utah 134; People *v.* Thiede, 11 Utah 247; People *v.* Hampton, 4 Utah 258.

Virginia. — Harman *v.* Cundiff, 82 Va. 239; Central Lunatic Asylum *v.* Flanagan, 80 Va. 110; Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. (Va.) 455; Virginia Midland R. Co. *v.* White, 84 Va. 498; Simmons *v.* McConnell, 86 Va. 497; Kerr *v.* Lunsford, 31 W. Va. 659; Atkinson *v.* Smith, (Va. 1896) 24 S. E. Rep. 901; Ferguson *v.* Wills, 88 Va. 136; Richmond, etc., R. Co. *v.* Burnett, 88 Va. 538.

Washington. — Brewster *v.* Baxter, 2 Wash. Ter. 135; State *v.* Friedrich, 4 Wash. 204; Curry *v.* Catlin, 12 Wash. 322; Carstens *v.* Stetson, etc., Mill Co., 14 Wash. 643; State *v.* Cushing, 14 Wash. 527; State *v.* Rutten, 13 Wash. 203; Brown *v.* Porter, 7 Wash. 327; State *v.* Cushing, (Wash. 1897) 50 Pac. Rep. 512.

West Virginia. — Davidson *v.* Pittsburgh, etc., R. Co., 41 W. Va. 407; State *v.* Bingham, 42 W. Va. 234.

Wisconsin. — Messman *v.* Ihlenfeldt, 89 Wis. 585; Schaefer *v.* Osterbrink, 67 Wis. 495; Brickley *v.* Walker, 68 Wis. 563; Holmes *v.* Fond du Lac, 42 Wis. 282; Osen *v.* Sherman, 27 Wis. 501; Karasich *v.* Hasbrouck, 28 Wis. 569; Nauman *v.* Zoerhlaut, 21 Wis. 466; Kenworthy *v.* Ironton, 41 Wis. 647; Spain *v.* Howe, 25 Wis. 625; Lathers *v.* Wyman, 76 Wis. 616; Franklin *v.* State, 92 Wis. 269; Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375; Seefeld *v.* Thacker, 93 Wis. 518.

United States. — Kelly *v.* Jackson, 6 Pet. (U. S.) 622; Marchand *v.* Griffon, 140 U. S. 516; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291; Texas, etc., R. Co. *v.* Elliott, 71 Fed. Rep. 378; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408; Tome *v.* Dubois, 6 Wall. (U. S.) 548; Laber *v.* Cooper, 7 Wall. (U. S.) 565; Mills *v.* Smith, 8 Wall. (U. S.) 27; St. Louis Public Schools *v.* Risley, 10 Wall. (U. S.) 91; Chicago, etc., R. Co. *v.* Whitton, 13 Wall. (U. S.) 270; New York, etc., R. Co. *v.* Winter, 143 U. S. 60; Washington, etc., R. Co. *v.* McDade, 135 U. S. 554; Ormsby *v.* Webb, 134 U. S. 47; Anthony *v.* Louisville, etc., R. Co., 132 U. S. 172; Aetna L. Ins. Co. *v.* Ward, 140 U. S. 76; Northwestern L. Ins. Co. *v.* Muskegon Bank, 122 U. S. 501; Patrick *v.* Graham, 132 U. S. 627; Law *v.* Cross, 1 Black (U. S.) 533; Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529; Kelly *v.* Jackson, 6 Pet. (U. S.) 622; Winans *v.* New York, etc., R. Co., 21 How. (U. S.) 88; Beaver *v.* Taylor, 1 Wall. (U. S.) 637; Findlay *v.* Pertz, 43 U. S. App. 388; Armstrong *v.* Morrill, 14 Wall. (U. S.) 120; Baltimore, etc., R. Co. *v.* Friel, 39 U. S. App. 451; Tweed's Case, 16 Wall. (U. S.) 504; Mobile, etc., R. Co. *v.* Wilson, 76 Fed. Rep. 127; Klein *v.* Russell, 19 Wall. (U. S.) 433; Burton *v.* Driggs, 20

the defendant.¹ The court should simplify its directions to the jury and make every effort to render them as free from complexity as possible.²

b. REASON FOR RULE. — The reason for this is obvious. Repetition tends to encumber the record,³ and to confuse and embarrass the minds of the jury,⁴ and it is also liable to give undue prominence to the proposition repeated.⁵

c. APPLICATIONS OF RULE. — The decisions set out in the notes will serve to show the application of the rule stated.⁶

Wall. (U. S.) 125; Woodruff *v.* Hough, 91 U. S. 596; Ohio, etc., R. Co. *v.* McCarthy, 96 U. S. 258; Ruch *v.* Rock Island, 97 U. S. 693; Smith *v.* Field, 105 U. S. 52; Ayers *v.* Watson, 137 U. S. 584; Rio Grande Western R. Co. *v.* Leak, 163 U. S. 280; Alabama G. S. R. Co. *v.* O'Brien, 69 Fed. Rep. 223; Chicopee Bank *v.* Philadelphia Bank, 8 Wall. (U. S.) 641; Union Pac. R. Co. *v.* Jarvi, 53 Fed. Rep. 65; Coffin *v.* U. S., 162 U. S. 664; Brown *v.* U. S., 150 U. S. 93; Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190; Hartford L. Annuity Ins. Co. *v.* Unsell, 144 U. S. 439; Great Northern R. Co. *v.* McLaughlin, 70 Fed. Rep. 669; Missouri, etc., R. Co. *v.* Fuller, 72 Fed. Rep. 467; Texas, etc., R. Co. *v.* Thompson, 30 U. S. App. 549; Atlas Nat. Bank *v.* Holm, 34 U. S. App. 472; Gowean *v.* Bush, 40 U. S. App. 349; Missouri, etc., R. Co. *v.* Fuller, 36 U. S. App. 456; Boston, etc., R. Co. *v.* McDuffey, 79 Fed. Rep. 934; St. Louis, etc., R. Co. *v.* Spencer, 36 U. S. App. 229.

1. Deitz *v.* Regnier, 27 Kan. 95.

2. State *v.* King, 44 Mo. 238; Deford *v.* State, 30 Md. 179.

The court should not multiply instructions with changed phraseology on the same proposition of law. One clear, pointed statement to the jury of each proposition advanced is sufficient. Olive *v.* State, 11 Neb. 30.

3. Haney *v.* Caldwell, 43 Ark. 184.

4. Haney *v.* Caldwell, 43 Ark. 184; Crampton *v.* State, 37 Ark. 108; Pettigrew *v.* Barnum, 11 Md. 434; Baltimore, etc., R. Co. *v.* Resley, 14 Md. 424.

5. Lincoln *v.* Holmes, 20 Neb. 39; Campbell *v.* Holland, 22 Neb. 587; Traylor *v.* Townsend, 61 Tex. 144; Powell *v.* Messer, 18 Tex. 401; Hays *v.* Hays, 66 Tex. 606.

6. On a trial of the right of property taken under execution there is no error in refusing to charge that the claimant must make out his title by "abundant

proof," especially after the court has already charged that the burden of proof is upon the claimant. Swinney *v.* Booth, 28 Tex. 113.

The refusal of an instruction calling attention to the effect of impeaching evidence upon the credibility of any particular witness is not erroneous where a general instruction on that subject has already been given. State *v.* Curran, 51 Iowa 112.

An instruction to the effect that the defendant had a right to use such force in expelling the plaintiff from his premises as an ordinarily prudent and cautious man would have done under the circumstances, may properly be refused when by another instruction the jury have been told that the defendant had a right to use such force as was reasonably necessary; as the instruction given contained, in substance, all that was embraced in the one refused. Jones *v.* Jones, 71 Ill. 562.

An instruction that only compensatory damages are recoverable is properly refused where the jury have already been told that compensation for actual injuries is the measure of damages. Best Brewing Co. *v.* Dunlevy, 157 Ill. 141.

Where the jury has once been instructed upon the effect of false testimony given knowingly and wilfully, the court may properly refuse an instruction as to the effect of particular testimony claimed to be contradictory and false. Bernstein *v.* Smith, 10 Kan. 60.

In an action for rent the court may properly refuse to instruct that if the husband of the lessor was acting for his wife such part of the rent could not be recovered, where the court had stated to the jury in another instruction that she would be bound by such arrangement if it was authorized by her. Trulock *v.* Donahue, 85 Iowa 748.

An instruction having been given that the burden of proof is on the plain-

d. LIMITATIONS AND QUALIFICATIONS OF RULE. — The rule as stated is subject to some limitations and qualifications.

Application of Principle to Facts. — Thus it is erroneous to refuse an instruction applying a principle of law to the facts in the case, even though the same principle be stated abstractly in other instructions. It is better practice to charge the law as applied to the respective theories contended for than to announce principles in the abstract.¹

tiff to show the negligent construction of an embankment, a further instruction that "if upon the whole evidence your minds are evenly balanced, and you are unable to say that the preponderance of evidence is in favor of the plaintiff, then you will find for the defendant," is properly refused. *Gulf, etc., R. Co. v. Locker*, 78 Tex. 279.

Where, in an action for obtaining money by false pretenses, the court instructs the jury that such false pretenses must have been made with the intent to defraud, it may properly omit to charge as to intent in subsequent instructions. *State v. Chase*, 89 Iowa 38.

In an action for use and occupation of the plaintiff's lands, a requested charge as to the defendant's liability in case the lands are occupied by stock, only part of which belonged to the defendant, is properly refused where the court had already charged that the plaintiff could not recover unless the defendant had the exclusive use and occupation of the plaintiff's land. *Lazarus v. Phelps*, 156 U. S. 202.

A charge that expert evidence should be received with much caution and scrutiny is properly refused where the court instructed that such evidence is not conclusive, and was only intended to supplement the general knowledge and experience of the jury, and that they should exercise their own judgment upon the facts, independently of such evidence. *McLean v. Crow*, 88 Cal. 644.

In an action for malicious prosecution, an instruction that the plaintiff cannot recover unless the defendant instituted the suit without grounds, and solely with an intent to injure the plaintiff, is properly refused where a charge had been given that the plaintiff must show that the prosecution was begun by the defendants through malice and also without probable cause. *Keesling v. Doyle*, 8 Ind. App. 43.

Where the court has charged that the plaintiff cannot recover exemplary

damages, it may properly refuse a charge that the jury can give no exemplary damages in an action for libel unless they find actual malice on the part of the defendant, and that actual malice is a wilful intent to injure the plaintiff. *Van Ingen v. Mail, etc., Pub. Co.*, 14 Misc. Rep. (N. Y. C. Pl.) 326.

In an action to recover for the death of a person struck by a railroad train, an instruction that the defendant is not liable unless it was done at a public crossing renders it unnecessary farther to instruct on behalf of the company as to the rule of liability for injuries to trespassers. *Baltimore, etc., R. Co. v. Stanley*, 158 Ill. 396.

In an action for the death of a person killed at a railroad crossing, after charging that the deceased was bound to use all precautions which the surrounding circumstances would permit, the court may properly refuse a subsequent request to charge that it was the duty of the deceased to wait until there were no obstructions to interfere with his view before trying to cross the track. *Puff v. Lehigh Valley R. Co.*, 71 Hun (N. Y.) 577.

An instruction applying the law to a theory of facts constituting a perfect defense for the accused, but which only authorizes an acquittal if the jury believes these facts in connection with other facts stated, is not a substitute for an instruction which only requires the jury, in order to acquit, to believe facts necessary to the defense set up. *Gerdine v. State*, 64 Miss. 798.

A charge giving a rule for computing damages, followed by a detailed illustration for the application of the rule, is not subject to the objection of unnecessary repetition. *McAuley v. Harris*, 71 Tex. 631.

1. *Gerdine v. State*, 64 Miss. 798; *Lamar v. State*, 64 Miss. 428; *Aldridge v. State*, 59 Miss. 250; *Muldrow v. Illinois Cent. R. Co.*, 39 Iowa 615; *Parkhill v. Brighton*, 61 Iowa 103; *Thompson v. Thompson*, 77 Ga. 692;

Clear Language. — So it is erroneous to refuse a request where the charge given does not state the requested point in clear and unmistakable language, and where the language of the request will be more readily understood by the jury.¹

Criminal Trials. — So in many jurisdictions it is said to be better practice in criminal trials to give every instruction asked by the defendant, unless it is manifestly not the law of the case, although the requested instruction has already been given in the main charge.²

2. Repetition Usually Not a Ground for Reversal. — It must be understood, however, that the repetition of instructions is no ground for reversal unless it appears that such repetition gave undue prominence to some phase of the case, and unless the jury were misled thereby, or unless the instruction requested is erroneous and objectionable in form.³

3. Stating Grounds of Refusal to Jury. — Whether the court, in refusing instructions already given, should state the grounds of refusal to the jury, must depend on the manner in which the request

Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; *Devitt v. Pacific R. Co.*, 50 Mo. 302.

1. *Muldowney v. Illinois Cent. R. Co.*, 32 Iowa 180.

Charge Liable to Be Misunderstood. — If the general charge, though correct in point of law, is liable to be misunderstood by persons not possessed of legal training, it is error to refuse a special charge clearly presenting the law. *Willis v. McNeill*, 57 Tex. 465; *Parkhill v. Brighton*, 61 Iowa 103; *Manuel v. Chicago, etc., R. Co.*, 56 Iowa 655; *Haines v. Illinois Cent. R. Co.*, 41 Iowa 227.

It is error for the court to refuse special charges containing a more specific definition and a fuller and more particular explanation than are contained in the general charge. *Martin Brown Co. v. Wainscott*, 66 Tex. 131.

Disconnected General Charge. — It is also error to refuse to give instructions that correctly state the law applicable to the facts, unless such requests are covered by the general charge in a manner not so disconnected as to impair their force. *Mynning v. Detroit, etc., R. Co.*, 59 Mich. 257.

2. *Banks v. State*, 7 Tex. App. 591; *People v. Strong*, 30 Cal. 151; *People v. Murray*, 41 Cal. 66; *People v. King*, 27 Cal. 515; *People v. Ramirez*, 13 Cal. 173. This last decision is based on the ground that by such refusal a pretext is afforded for an appeal which might not otherwise be taken.

3. *Lawder v. Henderson*, 36 Kan. 754; *Seebrock v. Fedawa*, 30 Neb. 424; *Ratto v. Bluestein*, 84 Tex. 57; *International, etc., R. Co. v. Leak*, 64 Tex. 654; *Keeble v. Black*, 4 Tex. 69; *McBride v. Banguss*, 65 Tex. 174; *Moffatt v. Tenney*, 17 Colo. 189.

In a damage suit against a railroad company, the court in its charge repeated several times that a great degree of care was required of the conductor in expelling an insane woman from a car. The court held that the repetition of the statement could do no harm unless it induced the jury to believe that the court thought there was evidence showing a want of requisite care, and that the repetition was not of a character thus to mislead the jury, and occurred only when it was necessary to qualify the principles applicable to the different phases of the case. *International, etc., R. Co. v. Leak*, 64 Tex. 654.

Unnecessary Instructions Do Not Necessarily Make a Charge Erroneous. — If no instructions are given that are erroneous or misleading the court must be held to have discharged its duty, and the judgment, if well founded in other respects, should not be disturbed, even though some unnecessary instructions have been given. To hold the trial courts to a stricter rule than this would practically result in overthrowing the judgment in nearly every contested case. *Moffatt v. Tenney*, 17 Colo. 189.

is preferred, that is, whether the jury are thereby made acquainted with the contents of the instruction refused. If the instructions are never seen or heard read by the jury, it is obvious that no prejudice can result from a failure of the court to explain that they are refused only because they have already been given.¹ A different question, however, presents itself when the jury know the contents of the instructions refused. In this case the court should distinctly and explicitly explain to the jury the grounds of its refusal, for otherwise the jury might be misled into believing that the instructions were refused on the merits.² There is, however, one decision which denies this doctrine,³ but it is against the weight of authority, and, it is believed, is wrong on principle.

4. Presumptions on Appeal. — If the instructions of the court, or a part of them, are omitted from the record, it will be presumed, on appeal, that instructions refused were properly covered by other instructions given.⁴ It is necessary that the instructions

1. *State v. O'Connor*, 11 Nev. 416; *People v. Saunders*, 25 Mich. 119, in which the court said that the jury is not misled by the refusal of instructions, since the requests are not read in their presence, but are submitted to the court in writing, and marked "refused" if they are rejected.

It is said, however, in *State v. O'Connor*, 11 Nev. 416; *State v. Ferguson*, 9 Nev. 118, that it would be well that the reason for refusing the instruction should be noted thereon.

"For a defendant might appeal without making any bill of exceptions, and in that case the charge of the judge would form no part of the record, whereas the instructions refused by him would come before us for review, and if we found that an instruction manifestly correct and applicable to the case had been refused, and had no means of knowing that an equivalent instruction had been given, we might be compelled to reverse the judgment for a reason that in fact did not exist." *State v. O'Connor*, 11 Nev. 427.

2. *People v. Hurley*, 8 Cal. 390; *People v. Ramirez*, 13 Cal. 172; *People v. Hobson*, 17 Cal. 424; *People v. Williams*, 17 Cal. 148 (the practice in California is now otherwise by rule of court, and it is not proper to read refused instructions in the presence of the jury); *Waldie v. Doll*, 29 Cal. 556; *People v. Sears*, 18 Cal. 635; *Davis v. Richmond*, etc., R. Co., 30 S. Car. 613, 9 S. E. Rep. 105 (this case is not reported in full in the official reports); *State v. O'Connor*, 11 Nev. 426.

Qualification of Rule. — Although the

Supreme Court will reverse a judgment in a criminal case where the court below refused an instruction asked by the defendant on the ground that the instruction had already been given in substance, without informing the jury that the refusal was for this cause, yet the rule is subject to the qualification that the language of the instruction asked be clear and explicit and leave no reason for doubt or misconstruction; in short, be free from objection. *People v. Hobson*, 17 Cal. 424.

3. *Hopcraft v. Lachman*, 68 Hun (N. Y.) 433, in which the court said: "If a party is not satisfied with a point clearly and squarely covered by the charge, he must take the effect upon the jury of a direct refusal to repeat the charge if he makes a request."

4. *Georgia*. — *Pace v. Payne*, 73 Ga. 675.

Indiana. — *Bash v. Young*, 2 Ind. App. 297; *Myers v. Murphy*, 60 Ind. 282; *Delaney v. State*, 115 Ind. 499; *Garrett v. State*, 109 Ind. 527; *Indianapolis v. Murphy*, 91 Ind. 382; *Ricketts v. Coles*, 97 Ind. 602; *Ehlert v. State*, 93 Ind. 76; *Terry v. Shively*, 93 Ind. 413; *Pittsburgh, etc., R. Co. v. Noel*, 77 Ind. 110; *Puett v. Beard*, 86 Ind. 104; *Standard Oil Co. v. Bretz*, 98 Ind. 231; *Taber v. Ferguson*, 109 Ind. 227; *Audleur v. Kuffel*, 71 Ind. 543; *Bowen v. Pollard*, 71 Ind. 177; *Newcomer v. Hutchings*, 96 Ind. 119; *Kennedy v. Anderson*, 98 Ind. 151; *Lockwood v. Beard*, 4 Ind. App. 505; *Sexson v. Hoover*, 1 Ind. App. 65.

Kansas. — *Pacific R. Co. v. Nash*, 7 Kan. 280; *Marshall v. Shibley*, 11 Kan.

given be set out in the record so that it may appear that the jury were not directed as to the law on the point stated.¹

XII. DECLARATIONS OF LAW IN CAUSES TRIED WITHOUT A JURY —

1. In Chancery Cases. — In chancery cases, where no issues of fact are referred to a jury, instructions, or declarations of law, as they might more properly be termed, should not be given.² If asked they should be refused,³ and if given they will be disregarded by the reviewing court.⁴

2. In Actions at Law. — In some jurisdictions it is considered just as essential in actions at law, triable without a jury, that instructions should be given in order to enable the appellate court to review the action of the trial court, as in like cases tried with the aid of a jury.⁵ These decisions proceed on the view that unless this is done the reviewing court cannot tell on what

114; *Washington L. Ins. Co. v. Haney*, 10 Kan. 525.

Nebraska. — *Malcom v. Hanson*, 32 Neb. 50.

Ohio. — *Bolen v. State*, 26 Ohio St. 371; *Woodward v. Stein*, 3 Am. L. Rec. (Ohio) 352.

Texas. — *Texas, etc., R. Co. v. Lowry*, 61 Tex. 149.

All the Presumptions Are in Favor of the Decision of the Court Below, and where a party claims on appeal or error that any of those decisions are erroneous, he must so save and present the erroneous decision, in the record, as to exclude every reasonable presumption in favor of such decision. *Myers v. Murphy*, 60 Ind. 286.

1. *Malcom v. Hanson*, 32 Neb. 50.

"In the absence of the instructions actually given by the court, we cannot possibly say that the court below erred in its refusal to give the jury the instructions asked for by the appellant. For even if it were conceded that the instructions asked for and refused were right and proper, and stated the law correctly, yet we do not know, and cannot know, from the record, that the court below did not give those instructions for the reason that their legal substance had been already given to the jury, by the court, in its own language." *Myers v. Murphy*, 60 Ind. 286.

Limitation of Rule. — While, generally, if the entire charge be not brought up in the record it will be presumed to have been correct, if, where a request containing a legal proposition pertinent to the case was refused, the court charged to the contrary, the presump-

tion in favor of the general charge was overcome. *Pace v. Payne*, 73 Ga. 670.

2. *Gill v. Clark*, 54 Mo. 415; *Freeman v. Wilkerson*, 50 Mo. 554.

Reason for Rule. — An appeal in chancery cases brings up the whole record, and the cause is tried anew on the bill, answer, and proofs.

3. *Freeman v. Wilkerson*, 50 Mo. 554; *Moore v. Wingate*, 53 Mo. 398.

4. *Gill v. Clark*, 54 Mo. 415; *Wendover v. Baker*, 121 Mo. 273; *Durfee v. Moran*, 57 Mo. 377; *Smith v. St. Louis Beef Canning Co.*, 14 Mo. App. 526.

5. *Mead v. Spalding*, 94 Mo. 43; *Krider v. Milner*, 99 Mo. 145; *Davis v. Scripps*, 2 Mo. 187; *Suddarth v. Robertson*, 118 Mo. 286; *Rogers v. Johnson*, 125 Mo. 202; *Harbison v. School Dist. No. 1*, 89 Mo. 184; *Wrought Iron Bridge Co. v. Highway Com'rs*, 101 Ill. 518; *Christy v. Stafford*, 123 Ill. 464. See also *Cook v. Gill*, 83 Md. 177; *Lyon v. George*, 44 Md. 295; *U. S. Mutual Acc. Assoc. v. Robinson*, 74 Fed. Rep. 11. *Contra*, *Lamb v. Harbaugh*, 105 Cal. 681, in which it is held that under the Code of Civil Procedure there is no authority for the practice of presenting to the court propositions of law which the court is requested to declare as legal principles applicable to the facts of the case, and to render its decision in accordance therewith, and that the refusal of the court to do so cannot be assigned as error. In arriving at this conclusion the court decided that anything to the contrary appearing in certain California cases enumerated (*Touchard v. Crow*, 20 Cal. 150; *Page's Estate*, 57 Cal. 238; *Wilson v. Wilson*, 64 Cal. 92) was merely *obiter dictum*.

theory of law the trial court based its judgment,¹ and it is obvious that instructions can only be important as showing the theory of the trial court of the law applicable to the cases.² The rules governing these declarations of law differ from ordinary instructions to juries in no essential particular.³

XIII. INSTRUCTIONS TO JURIES TRYING ISSUES DIRECTED OUT OF CHANCERY. — See article ISSUES TO JURY.

XIV. INSTRUCTIONS IN CASES WHERE SPECIAL VERDICT IS DIRECTED. — Where the jury are directed to find a special verdict it is not proper to give general instructions as to the law of the case.⁴ The jury should be left entirely free to find the facts

1. *Rogers v. Johnson*, 125 Mo. 202; *Krider v. Milner*, 99 Mo. 149; *Mead v. Spalding*, 94 Mo. 47; *Suddarth v. Robertson*, 118 Mo. 286; *Davis v. Scripps*, 2 Mo. 187.

2. *Weber v. American Cent. Ins. Co.*, 35 Mo. App. 521; *Cooper v. Ord*, 60 Mo. 420; *Methudy v. Ross*, 10 Mo. App. 106; *Gaty v. Clark*, 28 Mo. App. 340.

3. *Lyon v. George*, 44 Md. 295.

On Weight of Evidence. — An instruction which comments on the weight of the evidence is bad even where the whole cause is tried by the judge without a jury. *King v. Allemania F. Ins. Co.*, 37 Mo. App. 102; *Lyon v. George*, 44 Md. 295.

Evidence to Support. — If a requested instruction is supported by the evidence it is error to refuse it. *Gage v. Averill*, 57 Mo. App. 111. Otherwise where there is no evidence to support it. *Cook v. Gill*, 83 Md. 177; *U. S. Mutual Acc. Assoc. v. Robinson*, 74 Fed. Rep. 10.

Technical Objections and Ambiguities. — The judgments of the trial court will not be reversed because instructions are subject to mere verbal criticisms or technical objections. *Liberty v. Burns*, 114 Mo. 426. Nor will a judgment be reversed because ambiguous declarations of law were given. It is the duty of the parties to ask such declarations as will enable the appellate court to determine upon what theory of the law the trial court's findings of fact were made. *Gaff v. Stern*, 12 Mo. App. 115; *Methudy v. Ross*, 10 Mo. App. 106.

Ignoring Testimony. — An instruction which entirely ignores the testimony of one of the parties is properly refused. *Stocker v. Green*, 94 Mo. 280.

Harmless Error. — Although a declaration of law given for the prevailing party is erroneous, yet if the judgment on the uncontroverted evidence is for

the right party, it will not be reversed. *Fairbanks v. Long*, 91 Mo. 628.

Like Errors in Instructions of Both Parties. — A party cannot be heard to complain of an error in a declaration of law given for the other side when one given for him is similarly erroneous. *Fairbanks v. Long*, 91 Mo. 628.

Presumptions on Appeal. — The court will only consider declarations of law given and refused to determine the theory on which the court tried the case. Every presumption will be made in favor of the action of the trial court giving and refusing declarations of law. *Stone v. Pennock*, 31 Mo. App. 544.

If no declaration of law is asked or given the presumption is that the court sitting as a jury correctly assumes the law, and that its findings of fact are in accordance therewith. *De Laureal v. Kemper*, 9 Mo. App. 77.

Necessity for Requests. — Unless requested the court is not bound to give declarations of law. *De Laureal v. Kemper*, 9 Mo. App. 77. But when a proper request is made it is error to refuse it. *Hisey v. Goodwin*, 90 Mo. 366.

Thus it is proper to refuse a declaration of law that, under the evidence, the right of stoppage *in transitu* of the goods in controversy existed at the time of the institution of this suit, and the plaintiffs are entitled to recover. *Klein v. Fischer*, 30 Mo. App. 568.

4. *Toler v. Keiher*, 81 Ind. 383; *Woollen v. Wire*, 110 Ind. 251; *Sprinkle v. Taylor*, 1 Ind. App. 74; *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566; *Johnson v. Culver*, 116 Ind. 278; *Swales v. Grubbs*, 126 Ind. 106; *Louisville, etc., R. Co. v. Balch*, 105 Ind. 93; *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 28; *Stayner v. Joyce*, 120 Ind. 99; *Indianapolis, etc., R. Co. v. Bush*, 101 Ind. 582; *Lake Erie, etc., R. Co. v. Gould*,

material to the issues without instructions as to whether the law will declare one way or the other upon any fact or state of facts which may be found.¹ But a statement of the matters put in issue by the pleadings, and of the rules for weighing and reconciling testimony, with whatever else may be necessary to enable the jury clearly to comprehend the subjects to be covered by a verdict as to them, is proper.² If, however, general instructions as to the law of the case are given, available error can be predicated thereof.³

XV. INSTRUCTING JURORS TO APPLY PERSONAL KNOWLEDGE TO FACTS. — It was undoubtedly the ancient doctrine that jurors were to render their verdict as well upon the facts within their personal knowledge as upon those derived from the testimony of the witnesses duly sworn and testifying in the case, and accordingly they were usually taken from the vicinage.⁴ At the present time it is considered that the purposes of justice are better subserved by the selection of jurors who have no personal knowledge of anything connected with the case, and with this change as to the proper qualifications of a juror, it has now come to be well settled that a juror cannot give a verdict upon facts in his own private knowledge;⁵ and it will, therefore, usually be deemed erroneous for a court to instruct the jury that in making up their verdict they may take into consideration matters within their own personal knowledge.⁶

(Ind. App. 1897) 47 N. E. Rep. 941. Compare dictum in *Burns v. North Chicago Rolling Mill Co.*, 60 Wis. 544, in which it was stated that "when the jury are called upon to render a special verdict, the trial court may, in its discretion, limit its instructions to such matters as are necessarily involved in the questions of fact submitted to them," and that instructions as to such matters should be given in connection with the questions and not as general instructions in the case.

Refusal Proper. — Where the jury are directed to find a special verdict, they find the facts entirely independent of their legal bearings. It is not a case, therefore, for general instructions as to the law of the case, and there is no error in refusing such instructions. *Indianapolis, etc., R. Co. v. Bush*, 101 Ind. 582.

1. *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 28.

2. *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 28; *Johnson v. Culver*, 116 Ind. 278; *Woollen v. Wire*, 110 Ind. 253.

"A demand for a special verdict does not relieve the court of the duty of instructing the jury as to the nature of

the action and the issues, and as to the form of their special verdict and their general duty in relation thereto." *Toler v. Keiher*, 81 Ind. 388.

3. *Indianapolis, etc., R. Co. v. Bush*, 101 Ind. 582; *Woollen v. Wire*, 110 Ind. 253; *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566.

4. 3 Black. Com. 374; 5 Bac. Abr. 351; *Orcutt v. Nelson*, 1 Gray (Mass.) 536; *Chattanooga, etc., R. Co. v. Owen*, 90 Ga. 265.

5. *Orcutt v. Nelson*, 1 Gray (Mass.) 536.

Matters Proved by Way of Illustration. — It is not a misdirection if the judge refers the jury to their own knowledge of any particular facts which have been proved as matter of illustration only, and not as matter of evidence. *Rex v. Sutton*, 4 M. & S. 532.

6. *Chattanooga, etc., R. Co. v. Owen*, 90 Ga. 265; *Pettyjohn v. Liebscher*, 92 Ga. 149; *Gibson v. Carreker*, 91 Ga. 617; *Douglass v. Trask*, 77 Me. 35; *Burrows v. Delta Transp. Co.*, 106 Mich. 582; *Waite v. Teeters*, 36 Kan. 604.

"Controversies are now determined, not wholly or in part by what the juries know of the facts, but solely by what

Personal Knowledge of Character of Witnesses. — According to the better view it is held erroneous to instruct the jury that they can act upon their own private and personal knowledge of the character of the witnesses who testify in the cause on trial, and that they can consider such character if they know it.¹

View by Jury. — In cases of view by jury the general rule has been much relaxed. See article VIEW BY JURY.

XVI. URGING OR COERCING JURY TO AGREE. — The Trial Judge is Vested with Large Discretion in the conduct of judicial proceedings,² and he may properly admonish the jury as to the desirability and importance of agreeing on a verdict, and may urge them to make every effort to do so consistent with their consciences.³

the evidence establishes." *Chattanooga, etc., R. Co. v. Owen*, 90 Ga. 265.

Instances of Instructions Obnoxious to Rule. — An instruction that in ascertaining the value of land the jury may consider their own knowledge as to the value of land in the country, as well as the evidence, is erroneous. *Gibson v. Carreker*, 91 Ga. 617.

So where a question arose in the trial respecting the value of ripe and unharvested corn, which was alleged to have been wrongfully converted at a place remote from a general market, and no testimony was presented to the jury of the value of such corn at the time and place of the conversion, it was held error to direct the jury that they might use their general knowledge in determining its value. *Waite v. Teeters*, 36 Kan. 604.

Instances of Instructions Not Obnoxious to Rule. — It is not error to instruct the jury to take into account their experience among men in determining the credibility of witnesses. *Jenney Electric Co. v. Branham*, 145 Ind. 314. Or that they may call to their aid the knowledge and experience they possess in common with the generality of mankind. *Sanford v. Gates*, 38 Kan. 405; *Rajnowski v. Detroit, etc., R. Co.*, 74 Mich. 15. These charges are not objectionable as allowing the jury to resort to any knowledge peculiar to themselves of any material facts. *Rajnowski v. Detroit, etc., R. Co.*, 74 Mich. 15.

1. *Chattanooga, etc., R. Co. v. Owen*, 90 Ga. 265 (*overruling Anderson v. Tribune*, 66 Ga. 584; *Head v. Bridges*, 67 Ga. 236; *Howard v. State*, 73 Ga. 84); *Pettyjohn v. Liebscher*, 92 Ga. 149; *Wharton v. State*, 45 Tex. 2; *Johnson v. Superior Rapid Transit R. Co.*, 91 Wis. 233. *Contra*, *State v. Jacob*, 30 S. Car. 131.

Reason for Rule. — If the juror knows any particular fact material to the proper decision of the case, he ought to be sworn as a witness in open court and to be publicly examined, so that his evidence, like that of other witnesses, may first be scrutinized as to its competency and bearing upon the issue, and for the further reason that the court and the parties may know upon what evidence the verdict was rendered. *Patterson v. Boston*, 20 Pick. (Mass.) 166.

2. *Hannon v. Halifax*, 89 N. Car. 123. And see article TRIALS.

3. *Georgia*. — *Allen v. Woodson*, 50 Ga. 63.

Indiana. — *Krack v. Wolf*, 39 Ind. 88.

Iowa. — *Niles v. Sprague*, 13 Iowa 198; *Frandsen v. Chicago, etc., R. Co.*, 36 Iowa 378.

Kansas. — *McDonald v. Richolson*, 3 Kan. App. 235.

Kentucky. — *Randolph v. Lampkin*, 90 Ky. 551.

Maine. — *State v. Rollins*, 77 Me. 381.

Massachusetts. — *Com. v. Kelley*, 165 Mass. 175.

Michigan. — *Kelly v. Emery*, 75 Mich. 147; *Pierce v. Rehffuss*, 35 Mich. 53.

Missouri. — *State v. Pierce*, 136 Mo. 34.

North Carolina. — *Warlick v. Plonk*, 103 N. Car. 81.

Oregon. — *State v. Hawkins*, 18 Oregon 476.

Tennessee. — *Taylor v. Jones*, 2 Head (Tenn.) 565; *East Tennessee, etc., R. Co. v. Winters*, 85 Tenn. 240.

Texas. — *Muckleroy v. State*, (Tex. Crim. App. 1897) 42 S. W. Rep. 383.

Vermont. — *State v. Gorham*, 67 Vt. 371.

Wisconsin. — *Giese v. Schultz*, 69 Wis. 526; *Jackson v. State*, 91 Wis. 253.

He may advise jurors to lay aside mere pride of judgment,¹ and not to adhere to an opinion regardless of what the other jurors say, merely through stubbornness;² to examine any existing difference in a spirit of fairness and candor;³ and to reason together and talk over such differences and harmonize them if this be possible.⁴ So also the court may urge as reasons for agreeing on a verdict the time and expense involved in the trial, and the time and expense which a new trial will entail.⁵ But it is not proper to give an instruction censuring jurors for not agreeing with the majority. In this connection it is thought proper to set out in the notes some instructions on this head which have either been approved or held not sufficient cause for reversal.⁶

1. *Fransden v. Chicago, etc., R. Co.*, 36 Iowa 378; *Warlick v. Plonk*, 103 N. Car. 81.

2. *Jackson v. State*, 91 Wis. 253; *Odette v. State*, 90 Wis. 258; *Muckleroy v. State*, (Tex. Crim. App. 1897) 42 S. W. Rep. 383.

3. *Fransden v. Chicago, etc., R. Co.*, 36 Iowa 372.

4. *Jackson v. State*, 91 Wis. 253; *Odette v. State*, 90 Wis. 258.

5. *Allen v. Woodson*, 50 Ga. 63; *State v. Gorham*, 67 Vt. 371; *East Tennessee, etc., R. Co. v. Winters*, 85 Tenn. 240; *Pierce v. Rehfuß*, 35 Mich. 53; *Kelly v. Emery*, 75 Mich. 147; *Stoudt v. Shepherd*, 73 Mich. 588; *Clinton v. Howard*, 42 Conn. 310; *Fransden v. Chicago, etc., R. Co.*, 36 Iowa 372; *Harmon v. State*, 70 Wis. 448.

6. **Instructions Approved on This Head.**—The following charges have been held not objectionable:

That this case had been troublesome and had cost much time and trouble to investigate it, and, therefore, there should be a verdict. *Allen v. Woodson*, 50 Ga. 63.

That the case had been twice tried, and that it was important that the jury should agree, if they should satisfy their minds as to the right of the case between the parties. *Niles v. Sprague*, 13 Iowa 198.

That it was important to the state and to the prisoner that the case should be determined; that it had been quite expensive to the state and that such expense ought not to be thrown away if it could be avoided; that the court had to have these considerations in mind when a jury asked to be discharged, and that the court thought the jury should also have them in mind. *State v. Gorham*, 67 Vt. 371.

That it was the duty of each juror to

lay aside all pride of judgment and carefully review the ground of his opinion; that the case had been long pending and had now been exhaustively tried, and that a new trial would entail a large expense. *Fransden v. Chicago, etc., R. Co.*, 36 Iowa 378.

That it was the duty of the jury to agree; that no juror from mere pride of opinion, hastily expressed, should refuse to agree; nor, on the other hand, should he surrender any conscientious views founded on the evidence, and that it was the duty of each juror to reason with his fellows concerning the facts with an honest desire to arrive at the truth and with a view of arriving at a verdict. *Warlick v. Plonk*, 103 N. Car. 81.

That "it is the duty of each juror, while the jury are deliberating upon their verdict, to give careful consideration to the views his fellow jurymen may have to present upon the testimony in the case. He should not shut his ears and stubbornly stand upon the position he first takes, regardless of what may be said by the other jurymen. It should be the object of all of you to arrive at a common conclusion, and to that end you should deliberate together with calmness. It is your duty to agree upon a verdict if that is possible." *Jackson v. State*, 91 Wis. 253.

That the jury are as capable as any jury will ever be of arriving at a verdict, and that if they follow the rules laid down for their guidance they will have no trouble in agreeing. *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539.

That "you must get together upon a matter of this kind. No juror ought to remain entirely firm in his own conviction one way or another, until he has made up his mind, beyond all question, that he is necessarily right and the

Directing Compromise Verdict. — It is not to be understood from anything heretofore said that the court may direct the jury to bring in a compromise verdict.¹

Stating Time Jury Will Be Kept Out. — There is some contrariety of opinion as to what statement by the trial judge as to the length of time he will keep the jury together for the purpose of obtaining a verdict will operate to reverse. The decisions are collected in the notes.²

others are necessarily wrong." *Cranston v. New York Cent., etc., R. Co.*, 103 N. Y. 614, reversing 39 Hun (N. Y.) 308.

That "the fact that a juror finds his judgment opposed to the judgment of a majority of the panel ought to induce him, as a reasonable man, so far to doubt the correctness of his own views as to weigh carefully the opinions of his associates, and the arguments and reasons upon which they are founded; and if, upon due consideration, he is convinced they are probably right and he is in error, it is his duty to agree with them." *Ahearn v. Mann*, 60 N. H. 472; *Whitman v. Morey*, 63 N. H. 458.

1. *Goodsell v. Seeley*, 46 Mich. 623; *Richardson v. Coleman*, 131 Ind. 210; *Boden v. Irwin*, 92 Pa. St. 345.

While the law contemplates that the jury shall, by their discussions, harmonize their views if possible, it does not contemplate that they shall compromise for the mere purpose of an agreement. *Goodsell v. Seeley*, 46 Mich. 623. In this case it appeared that the jury returned into court and informed the judge that they had not agreed, but "stood eleven to one, and divided on \$200." The trial judge told them: "If that is the only difference, it would be better for the county and the parties on both sides that one or both sides yield so as to come together. It would be unfortunate for all to have a disagreement when the difference is so small."

2. In one decision it was held not a ground for a new trial that the court, on the disagreement of the jury, announced its inflexible determination to keep them until an agreement was reached. *State v. Green*, 7 La. Ann. 518.

In another case it was held not a ground for new trial that the court told the jury that he would keep them together until the end of the term unless they sooner found a verdict. *Hannon v. Grizzard*, 89 N. Car. 115.

See also *Osborne v. Wilkes*, 108 N. Car. 651. In this case the jury came into court on Saturday of the first week of the term and announced that they could not agree as to the facts. The reviewing court held that it was not error for the judge to say that there were two more weeks of the term and he would give them plenty of time to consider, and then to direct the sheriff to provide comfortable accommodation for them.

On the other hand, it has been held reversible error to tell the jury that they will be kept together until after the term of court is over unless they agree. *Taylor v. Jones*, 2 Head (Tenn.) 565. See also *Ingersoll v. Lansing*, 51 Hun (N. Y.) 101, in which the court having adjourned for four days, on the retirement of the jury, without providing for their discharge except in case of agreement, and the judge having immediately departed to another county, it was held that this amounted to the coercion of a verdict, and was ground to set it aside. In *Perkins v. State*, 50 Ala. 154, the judge told the jury that he would keep the court open until they did agree; that they had nothing to do but to find the defendant guilty; that they were bound to find him guilty under the charge of the court, or they would be guilty of moral perjury. This was held to be a most unwarrantable interference and to constitute reversible error.

Directing Juror to Agree with Others — When Not Error. — If the evidence is of such a nature that the court may take the case from the jury and direct a verdict, it may properly, on disagreement of the jury, direct one of the jurors to agree with his fellows. It cannot be error for the court to direct one juror to do what it ought to have directed all of them to do before leaving their box. *W. B. Grimes Dry-Goods Co. v. Malcolm*, 58 Fed. Rep. 670.

Instruction Held Not to Amount to Improper Coercion. — A statement by the

XVII. WITHDRAWING INCOMPETENT EVIDENCE BY INSTRUCTIONS —

1. Efficiency of Remedy. — It is very generally settled that error in admitting illegal evidence may be cured by instructions directing the jury to disregard it,¹ although there are some decisions which flatly deny the doctrine that error may be thus cured. These

court, in its instructions, of the effect of a disagreement at common law and the mitigation of the rule in the United States, coupled with the remark that they would have to remain together and not separate until they agreed upon a verdict and brought it into court, was held not objectionable as indicating a determination to keep them together until they should agree. *State v. Saunders*, 14 Oregon 300.

Coercion Combined with Other Errors. — Where the judge used such strong, emphatic language as to give additional force to the arguments of one side, and afterwards said that it was a plain case, and declared that if the jury did not sooner agree he would keep them until Saturday night, it was held that this was leading the jury to a conclusion in violation of the Act of 1796. *Nash v. Morton*; 3 Jones L. (N. Car.) 3.

1. Colorado. — *King v. Rea*, 13 Colo. 69.

Indiana. — *Zehner v. Kepler*, 16 Ind. 290; *Indianapolis, etc., R. Co. v. Bush*, 101 Ind. 582; *Gebhart v. Burkett*, 57 Ind. 378.

Maryland. — *Haney v. Marshall*, 9 Md. 194.

Massachusetts. — *Hawes v. Gustin*, 2 Allen (Mass.) 402; *Smith v. Whitman*, 6 Allen (Mass.) 562.

Michigan. — *Mitts v. McMorran*, 85 Mich. 94; *Blaisdell v. Scally*, 84 Mich. 149; *Busch v. Fisher*, 89 Mich. 192; *Tolbert v. Burke*, 89 Mich. 132; *Beeman v. Black*, 49 Mich. 598; *Malone v. Gates*, 87 Mich. 332.

Missouri. — *Stavinow v. Home Ins. Co.*, 43 Mo. App. 513; *Knox v. Hunt*, 18 Mo. 174; *Stephens v. Hannibal, etc.*, R. Co., 96 Mo. 207; *Griffith v. Hanks*, 91 Mo. 109; *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62; *Davis v. Peveler*, 65 Mo. 189; *Pavey v. Burch*, 3 Mo. 447; *Fowles v. Bebee*, 59 Mo. App. 403; *Fitzgerald v. State*, 14 Mo. 413.

New Hampshire. — *Hamblett v. Hamblett*, 6 N. H. 333.

New York. — *People v. Parish*, 4 Den. (N. Y.) 153; *McKnight v. Dunlop*, 5 N. Y. 537.

North Carolina. — *Bridgers v. Dill*, 97 N. Car. 222.

Ohio. — *Mimms v. State*, 16 Ohio St. 221.

Pennsylvania. — *Com. v. Shepherd*, 6 Binn. (Pa.) 283; *Unangst v. Kraemer*, 8 W. & S. (Pa.) 391.

Rhode Island. — *State v. Towler*, 13 R. I. 665.

Tennessee. — *Links v. State*, 13 Lea (Tenn.) 708.

Texas. — *Jones v. Reus*, 5 Tex. Civ. App. 628.

Washington. — *Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472.

Wisconsin. — *Conklin v. Parsons*, 2 Pin. (Wis.) 264; *Beck v. Cole*, 16 Wis. 95.

United States. — *Pennsylvania Co. v. Roy*, 102 U. S. 451; *U. S. Bank v. Johnson*, 3 Cranch. (C. C.) 228; *Specht v. Howard*, 16 Wall. (U. S.) 564.

England. — *Tullidge v. Wade*, 3 Wils. 18.

Instances. — While it is erroneous for the court to admit evidence of the unlawful conversion of property as a setoff, in an action of assumpsit, yet if it instructs the jury to reject the setoff and they find accordingly, the error is thereby cured. *Conklin v. Parsons*, 2 Pin. (Wis.) 264. The wife is not a competent witness to prove the nonaccess of her husband; nevertheless, if the court permitted her to be asked a question from which nonaccess may be inferred, as "When did you see your husband last?" and afterwards instructed the jury that they were not to consider any testimony of the wife as to nonaccess, the verdict cannot be disturbed on account of the question. *Com. v. Shepherd*, 6 Binn. (Pa.) 283. Error in the admission of testimony as to the loss, after suit brought, of the use to plaintiff of an article taken from her, was rendered nonprejudicial by the instruction directing the jury to find no damages for such loss. *Blaisdell v. Scally*, 84 Mich. 149. In an action for removing wood from land of which the ownership is disputed by the parties in consequence of a disagreement as to the boundary, rulings relating to the ownership of the land or of the wood, or excluding documentary proof of land contracts under which the defendant

cases proceed upon the theory that the court cannot know to what extent the jury were influenced by the testimony improperly admitted and commented upon.¹ The authorities which hold the affirmative view are not entirely harmonious as to when this remedy will be effectual. According to some decisions the error is not cured unless the court can say affirmatively that the evidence worked no injury to the adverse party;² that it is not enough that the court sitting in review are of the opinion that the result may and probably would have been the same had the

claimed, become immaterial under a charge that the plaintiff cannot recover if the boundary is where the defendant claims it to be. *Beeman v. Black*, 49 Mich. 598.

Trial by Court. — An objection that it is too late to exclude evidence after it has been heard by the triers of the facts is not available where the cause is tried by the court. "It is one of the inconveniences of trying cases before the court that the court becomes the judge of the law and the fact. It is frequently impossible to declare the law of evidence until the facts are first known. It frequently happens that the judge must hear the evidence before he can tell whether it is competent or incompetent, and the fact that he is trying the facts as well as the law does not change the case in this respect. Courts ought to use all proper caution not to let irrelevant and illegal evidence influence their judgment when they are trying the fact, but no rule can be laid down here determining when they may hear the evidence and when they may not, to determine its competency." *State v. Schneider*, 35 Mo. 533.

Evidence Withdrawn by the Party Offering It. — Where evidence offered by a defendant in a criminal case is withdrawn at his request, the court may properly instruct the jury to disregard it. *State v. Stephens*, 96 Mo. 637.

Evidence Offered but Not Admitted. — An instruction warning the jury against the consideration of evidence which has been offered but properly excluded is perfectly proper, *McCoy v. Bateman*, 8 Nev. 126; but the court need not give such instruction. *Grand Rapids, etc., R. Co. v. Horn*, 41 Ind. 479; *Pfaffenback v. Lake Shore, etc., R. Co.*, 142 Ind. 246. See also *Hooks v. Frick*, 75 Ga. 715.

1. *Penfield v. Carpenter*, 13 Johns. (N. Y.) 350; *Irvine v. Cook*, 15 Johns. (N. Y.) 239; *Chicago v. Wright, etc., Oil, etc., Mfg. Co.*, 14 Ill. App. 119.

Missouri — Criminal Cases. — In Missouri it has been held that it is error in criminal cases to admit illegal evidence and afterwards exclude it by instructions—that the injury may be too deeply fixed in the minds of the jury to be easily eradicated. *State v. Mix*, 15 Mo. 153; *State v. Wolff*, 15 Mo. 168; *State v. Marshall*, 36 Mo. 400; *State v. Thomas*, 99 Mo. 235; *State v. Kuehner*, 93 Mo. 193.

2. *State v. Meader*, 54 Vt. 131; *Connecticut, etc., Rivers R. Co. v. Baxter*, 32 Vt. 805; *Sterling v. Sterling*, 41 Vt. 80; *Boyd v. Readsboro*, 1879, cited in *State v. Meader*, 54 Vt. 131; *Coleman v. People*, 58 N. Y. 555; *Erben v. Lorillard*, 19 N. Y. 299.

"It is now the settled law in this state that illegal evidence, if objected to, though admitted under an offer to so connect it with other proofs as to make it competent, will vitiate a verdict for the party offering it if proposed connection is not established, unless the court is able to say affirmatively that such evidence worked no injury to the adverse party. It is not apparent how any embarrassment can arise in the trial of cases under this rule. The party offering such evidence is simply compelled to take the risk of the experiment. If he fails, he, not his adversary, should be the loser. He has no more right to hold a verdict obtained by such evidence when offered in good faith than one when he offers the evidence in bad faith. The rights of the adversary are imperilled to the same extent in either case, and these are the rights calling for protection. The rule has a tendency to discourage bad faith in parties, in their offers of evidence, as they understand that such evidence cannot ultimately aid them. Chief Justice Pierpont laid down this rule in Connecticut, etc., *Rivers R. Co. v. Baxter*, 32 Vt. 805." *State v. Meader*, 54 Vt. 131.

objectionable evidence been excluded.¹ According to other decisions there must be reason to believe that the evidence improperly influenced the verdict,² and in one decision it has been held that before the judgment can be reversed it must be apparent that the evidence has affected the verdict.³ So some decisions take the view that when testimony is withdrawn it is no longer legally before the jury but out of the case, and that the jury being instructed to disregard it, it is to be presumed that they followed the instruction.⁴

Where Prejudice Apparent. — Of course, if it is apparent that prejudice must have resulted notwithstanding the instruction to disregard the evidence, the error is not thereby cured.⁵

2. What Instructions Sufficient. — Where illegal evidence has been admitted, it is undoubtedly the better practice for the court to withdraw the evidence by a positive direction to the jury to disregard it.⁶ It will not, in general, be sufficient to exclude it by implication only.⁷

1. *Coleman v. People*, 58 N. Y. 555.

2. *Hamblett v. Hamblett*, 6 N. H. 333; *Deerfield v. Northwood*, 10 N. H. 269; *Smith v. Whitman*, 6 Allen (Mass.) 562.

3. *Jones v. Reus*, 5 Tex. Civ. App. 628.

4. *State v. Towler*, 13 R. I. 665; *Com. v. Shepherd*, 6 Binn. (Pa.) 283; *Pennsylvania Co. v. Roy*, 102 U. S. 451.

Testimony Withdrawn to Remove Grounds of Exception. — The fact that testimony is withdrawn, not as incompetent but avowedly to remove all grounds for exception, does not alter the rule. The rule does not depend on the motives which influenced the withdrawal. "The question is, did the withdrawal take the testimony out of the case? If it did, it is to be considered as if it had never been admitted. We think the withdrawal being by consent of court is to be regarded as the act of the court, and that in contemplation of law it purged the case absolutely of the testimony." *State v. Towler*, 13 R. I. 665.

5. *Castleman v. Griffin*, 13 Wis. 539; *State Bank v. Sutton*, 11 Wis. 371; *Remington v. Bailey*, 13 Wis. 332; *Arthur v. Griswold*, 55 N. Y. 400; *Taylor v. Adams*, 58 Mich. 188; *Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99; *Sinker v. Diggins*, 76 Mich. 557.

In a complaint against trustees of a mining corporation the first count alleged fraudulent representations by the defendants, by which the plaintiff was induced to make loans to the cor-

poration; another count was based upon the provision of the act of incorporation declaring the officers of such a corporation who have made a false report liable for the debts of the corporation. Evidence was received of false representations on the part of an agent of the corporation. The court charged that the defendants were not liable for the agent's statements, to which they were not privy. It was held that the reception of the evidence was error, and was not cured by the charge. The evidence constituted the most important fact given, and must have made a serious impression, which the remark of the judge in his charge could not eradicate. *Arthur v. Griswold*, 55 N. Y. 400.

6. *Castleman v. Griffin*, 13 Wis. 535; *Henkle v. McClure*, 32 Ohio St. 202; *Wright v. Gillespie*, 43 Mo. App. 244; *Pavey v. Burch*, 3 Mo. 447; *Griffith v. Hanks*, 91 Mo. 109; *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62; *Scripps v. Reilly*, 35 Mich. 393.

7. *Pavey v. Burch*, 3 Mo. 447.

It is difficult to tell what effect evidence admitted may have upon the triers of fact, but the impression made by hearing what the court has declared to be competent testimony can hardly be removed by anything short of a flat direction that it must be disregarded. *Henkle v. McClure*, 32 Ohio St. 202.

Instance of Sufficient Instruction. — Where a letter which was incompetent was permitted to be put in evidence, it was held to be a sufficient withdrawal of it for the court to say: "Gentlemen,

3. Necessity of Objecting to Evidence. — The weight of authority is to the effect that if incompetent evidence is admitted without objection, the party injured thereby is not entitled to an instruction directing the jury to disregard such evidence.¹ Of course this rule does not apply where the objection is not apparent when the evidence is offered.²

4. Necessity of Requesting Instructions. — Where improper evidence has been admitted, the party aggrieved is entitled, on request, to have the jury instructed to disregard it,³ and the court may so instruct of its own motion,⁴ but it has been held that the court is under no obligation to withdraw such evidence unless requested so to do.⁵

you will not further consider the letter * * * the contents of which have been read to you." *Wright v. Gillespie*, 43 Mo. App. 244.

Instance of Insufficient Instruction. — Where improper evidence has been received, the mere fact that the judge in his charge is silent upon this evidence does not amount to a sufficient withdrawal thereof; such silence is by no means equivalent to a positive direction to the jury to disregard it. *Castleman v. Griffin*, 13 Wis. 539.

1. *Becker v. Becker*, 45 Iowa 239; *State v. Pratt*, 20 Iowa 269; *Fish v. Chicago*, etc., R. Co., 81 Iowa 280; *Edge v. Keith*, 13 Smed. & M. (Miss.) 295; *Harrison v. Young*, 9 Ga. 359; *Maxwell v. Hannibal*, etc., R. Co., 85 Mo. 106; *Missouri Pac. R. Co. v. Mitchell*, 75 Tex. 77; *Ann Berta Lodge No. 42 v. Leverton*, 42 Tex. 22. *Contra*, *Sperry v. Hellman*, 20 Civ. Pro. Rep. (N. Y. C. Pl.) 226; *Hamilton v. New York Cent. R. Co.*, 51 N. Y. 101, in which it is said that an omission to object to testimony is not an accession that it is competent.

Instance. — An expert, while testifying as to an injury received by the plaintiff, was permitted to testify without objection that the plaintiff assured him that he had never suffered with sore eyes or been injured in his eyes. It was held that it was proper to refuse a request to charge the jury not to consider symptoms of injury not testified to by the plaintiff, but stated by him to his physician, as the objection to the evidence was not in time. *Missouri Pac. R. Co. v. Mitchell*, 75 Tex. 77.

Reason for Rule. — To allow a party to permit, without objection, the admission of evidence, and make his objection for the first time in instructions, would be intolerable practice. If he

had an opportunity to interpose an objection, he cannot take the chances that the testimony will be favorable to him and when it turns out otherwise raise his objection, but he must be held to have waived it. *Maxwell v. Hannibal*, etc., R. Co., 85 Mo. 106. It is gross injustice to exclude evidence by a charge after it is too late to bring evidence which would warrant the admission of that sought to be excluded. *Ann Berta Lodge No. 42 v. Leverton*, 42 Tex. 22.

Criminal Cases. — If, on a criminal trial, incompetent evidence reaches the jury without objection made at the moment by the defendant's counsel, but he afterwards prays the court to withdraw it from their consideration by instruction, it is the duty of the court to grant the prayer. *State v. Owens*, 79 Mo. 619; *State v. Cox*, 65 Mo. 29.

2. *State v. Lavin*, 80 Iowa 555.

Evidence Is Frequently Admitted Which, from a Failure to Connect It with Other Evidence with which it had a necessary connection in order to be relevant, eventually turns out to be incompetent. The utmost caution cannot always prevent the introduction of evidence which in the course of the trial is discovered to be clearly inadmissible. *Hamblett v. Hamblett*, 6 N. H. 347.

3. *Greenup v. Stoker*, 7 Ill. 688; *State v. Brown*, 28 La. Ann. 279. See also *Iron Mountain Bank v. Murdock*, 62 Mo. 70.

4. *Utter v. Vance*, 7 Blackf. (Ind.) 514.
5. *Aitkin v. Young*, 12 Pa. St. 15; *Marks v. King*, 64 N. Y. 628; *Platner v. Platner*, 78 N. Y. 101.

Where evidence has been properly received, the party against whom it has been introduced has no absolute right to have it stricken out when its effect has been destroyed by other evidence.

Exclusion of Evidence.—The authorities are not agreed as to whether error in excluding competent evidence is cured by an instruction hypothecated on a state of facts which such evidence, if admitted, would tend to prove. This question has been ruled both ways.¹

XVIII. CAUTIONARY INSTRUCTIONS — 1. As to Credibility of Witnesses — a. IN GENERAL.—The credibility of witnesses and the weight and effect of their testimony is exclusively within the province of the jury,² and it is, of course, proper to so instruct.³

The proper practice, upon a jury trial, is to request the court to charge that such evidence is not to be considered by them, and in case of refusal he will have a good exception. *Gawtry v. Doane*, 51 N. Y. 84.

Depositions.—If depositions offered in evidence in a court of law contain matter supposed to be objectionable, the proper course is to point out the objectionable passages, and then move the court to instruct the jury to disregard them, otherwise error cannot be assigned. *Buster v. Wallace*, 4 Hen. & M. (Va.) 82.

Withdrawing Evidence Otherwise than by Instruction.—It has been held that a judgment will not be reversed on appeal on the ground that the trial judge overruled a motion to exclude illegal testimony which had been detailed to the jury. If, after its admission, the judge of his own motion informed the jury that the testimony had nothing to do with the case, a failure to again inform the jury that it was excluded was immaterial. *Rollins v. O'Farrel*, 77 Tex. 90.

In *Brown v. Matthews*, 79 Ga. 1, it was held that the court having formally withdrawn evidence, it might properly refuse to charge the jury not to consider it.

Martin v. McCray, 171 Pa. St. 575, is to the same effect; and in *Russell v. Nall*, 79 Tex. 664, it was held that where hearsay testimony after being given is excluded on objection, the court need not instruct the jury to disregard it, unless so requested; that if the defendant is apprehensive of the effect of the statement, notwithstanding its exclusion, he should request a special charge.

1. Exclusion of Evidence.—In *State v. Mallon*, 75 Mo. 355, the accused testified with respect to his having broken jail as follows: "I did not break jail because I feared a trial and conviction

on this charge; the reason was, I was mistreated." The answer was objected to and the objection sustained. The court charged, however, that although the jury might believe from the evidence that the defendant did break jail while confined on this charge, yet if they did not believe that he did it from a motive to flee and avoid a trial on this charge, they should not consider it as an element in making up their verdict as to the defendant's guilt or innocence. The reviewing court held that the error was not cured. On the other hand, in *Clark v. Cox*, 32 Mich. 204, a ruling excluding as immaterial evidence offered to prove a custom was held cured by a charge to the jury recognizing a general custom of the character sought to be proved, under limitations as favorable to the party complaining of the ruling as he was entitled to claim.

2. *White v. Fox*, 1 Bibb (Ky.) 371; *Wilson v. Hotchkiss*, 81 Mich. 172; *Heldt v. State*, 20 Neb. 492; *Holloway v. Com.*, 11 Bush (Ky.) 351; *Huff v. Cox*, 2 Ala. 310; *State v. Thomas*, 7 Ired. L. (N. Car.) 381.

3. *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 614; *Dibble v. Northern Assur. Co.*, 70 Mich. 1; *Layton v. State*, 56 Miss. 791; *Madara v. Eversole*, 62 Pa. St. 160; *Bergner v. Thompson*, 74 Pa. St. 168; *McClurkan v. Byers*, 74 Pa. St. 405; *Kreag v. Anthus*, 2 Ind. App. 484; *State v. Kelly*, 73 Mo. 608.

In Utah the court is required by statutes (Comp. Laws Utah, § 5033, subdiv. 6) to charge that the jury are the sole judges of the evidence and the credibility of the witnesses. The words of the statute need not be precisely followed. It will be sufficient that the substance thereof is given in charge. *People v. Chadwick*, 7 Utah 134.

Uncontradicted Testimony.—It is erroneous to withdraw a question of fact from the jury, although the testimony of the only witness be uncontradicted.

The jury have the power to refuse their credit, and no action of the court should control the exercise of their admitted right to weigh the credibility of the testimony.¹

b. IMPEACHED WITNESSES. — Where a witness is impeached as being unworthy of credit, it is entirely within the province of the jury, as exclusive judges of the facts, to say what degree of weight or credibility shall be given to his testimony.² It would, therefore, seem to be error to instruct, as matter of law, that the jury cannot convict on the testimony of an impeached witness unless it is corroborated, and it has been so held,³ but there are decisions which maintain a contrary view.⁴ So it has been held erroneous to charge that an impeached witness is not to be believed,⁵ or that the impeaching evidence should "weigh heavily" against the witness, or that the jury must believe the witness for the state unless they believe that the contradicted witness is entitled to more weight and credit than said witness for the state,⁶ or that the jury are bound to believe an unimpeached witness,⁷ or that a party introducing a witness thereby indorses

dicted; the question of his credibility is still before them. *Madara v. Eversole*, 62 Pa. St. 162; *Dibble v. Northern Assur. Co.*, 70 Mich. 1.

An instruction that the jury are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony is proper, and is not objectionable on the ground that it may lead the jury to believe some of the witnesses unworthy of credit. *Galveston, etc., R. Co. v. Davis*, 4 Tex. Civ. App. 468.

1. *Charleston Ins., etc., Co. v. Corner*, 2 Gill (Md.) 410.

2. *Moore v. State*, 68 Ala. 360; *Addison v. State*, 48 Ala. 478.

Where testimony has been admitted without objection for the purpose of impeachment, it is for the jury to say whether it contradicted the witness, and not for the judge. *People v. Hare*, 57 Mich. 506.

Giving Undue Weight to Impeached Testimony.—An instruction which leads the jury to suppose that it may convict on the testimony of a witness who has been conclusively shown by impeaching evidence to be unworthy of belief, is erroneous. *People v. Lyons*, 51 Mich. 215.

3. *Moore v. State*, 68 Ala. 360; *Ray v. State*, 50 Ala. 104; *Horn v. State*, 98 Ala. 23. See also *Spicer v. State*, 105 Ala. 123; *Green v. Cochran*, 43 Iowa 544; *Chester v. State*, 1 Tex. App. 703.

4. *White v. Cook*, 73 Ga. 169. See

also *Cohen v. State*, 50 Ala. 108, where it was held erroneous to refuse a charge in the following words: "The testimony of a witness for the prosecution who is shown to be unworthy of credit is not sufficient to justify a conviction, without corroborating evidence; and such corroborating evidence, to avail anything, must be a fact tending to show the guilt of the defendant." (This identical charge was held erroneous in *Ray v. State*, 50 Ala. 104), and see *Jackson v. State*, 64 Ga. 345, where the following instruction was sustained: "The corroboration [of the testimony of an impeached witness] ought to be sufficient to satisfy the jury of the truth of the evidence of the accomplice. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks the truth in other parts as to which there may be no confirmation; but the corroboration ought to be as to some fact or facts connecting the prisoner with the offense, the truth or falsehood of which would go to prove or disprove the offense charged against the prisoner."

5. *Coal Co. v. Schuyler*, 3 Leg. Gaz. (Pa.) 106; *Green v. State*, 97 Ala. 59; *Paul v. State*, 100 Ala. 136.

6. *Corley v. State*, 28 Ala. 22.

7. *State v. Smallwood*, 75 N. Car. 104; *Noland v. M'Cracken*, 1 Dev. & B. L.

his credibility,¹ or that a witness may be impeached by a lack of intelligence, as well as by the positive testimony of other witnesses,² or by evidence of the witness's ill-will and unkind feelings toward the defendant;³ or to specify the modes in which a witness may be impeached where there is no evidence on which to base the charge;⁴ or to charge that a witness may impeach himself by confession to infamous conduct which, if true, would exclude him from respectable society.⁵ Where a correct instruction has been given as to how a witness may be impeached, the court may properly charge that it is neglect for the jurors arbitrarily to disregard the evidence of a witness;⁶ or that if a witness has made a statement out of court inconsistent with his testimony at the trial, the jury may look to such facts as "tending to impeach" the witness;⁷ or that the testimony of an impeached witness may be disregarded unless corroborated;⁸ or that evidence of contra-

(N. Car.) 594. *Contra*, Rowland v. Plummer, 50 Ala. 182.

1. Jarnigan v. Fleming, 43 Miss. 710; State v. Brown, 76 N. Car. 225.

"By introducing the witness the party represents him to be truthful, but does not warrant him to be so, under the penalty that if he swears falsely it shall be evidence against the defendant upon the issue on trial. A party cannot foresee that his witness will swear falsely, or prevent him from doing so." State v. Brown, 76 N. Car. 225.

2. Chicago West Div. R. Co. v. Bert, 69 Ill. 388; Hansell v. Erickson, 28 Ill. 259.

3. Skipper v. State, 59 Ga. 65.

4. City Bank v. Kent, 57 Ga. 284; Smith v. State, 63 Ga. 168.

Refusal Proper When Not Based on Evidence. — Where there is some corroborating testimony, the court may properly refuse to charge that the jury ought not to convict unless the witness's testimony is corroborated. *Gilyard v. State*, 98 Ala. 59.

5. *City Bank v. Kent*, 57 Ga. 284. In this case it is said: "What respectable society might do, but has not yet done with a person, is not a standard by which to test his credibility."

6. *State v. Sutfin*, 22 W. Va. 771. See also *McCasland v. Kimberlin*, 100 Ind. 121, where it was held that when an attempt has been made to impeach a witness, the jury are properly told that if he gave a fair, candid, and honest statement they should not disregard his testimony.

7. *Smith v. State*, 142 Ind. 288; *Harvis v. State*, 96 Ala. 24.

In this last case the court said: "Evidence which goes to show that a witness has made statements out of court, or on a former investigation of the case before the coroner or a committing magistrate, which are inconsistent with his testimony as adduced at the trial, tends, as a matter of law, to impeach his veracity. This, indeed, is the sole ground upon which such evidence is admissible, and if it involved no such tendency it would not be competent. Notwithstanding such tendency, the jury may still believe the witness. Whether they do or not is a question for them alone. The court cannot say to them that the witness is or is not thereby impeached; to do so would be an invasion of their exclusive province. But to charge them merely that certain evidence tends to impeachment, or that certain other evidence tends to sustain the witness, or that there is evidence tending in both directions, where such is the case, is not an invasion of their prerogatives, and does not take away from them the right to reach any possible conclusion in the premises, but leaves them free to arrive at what they regard as a just result, after considering all the tendencies of the evidence bearing on the point, and adopting some of these tendencies as leading to the real facts, and discarding others which point away from the real facts as they find them to be upon the whole evidence."

8. *Miller v. People*, 39 Ill. 463; *State v. Ormiston*, 66 Iowa 143; *State v. Miller*, 53 Iowa 210; *Harper v. State*, 101 Ind. 113; *Haymond v. Saucer*, 84 Ind. 3.

In *Miller v. People*, 39 Ill. 463, the

dictory statements made out of court to impeach a witness is regarded by the law as uncertain and somewhat unreliable.¹ Whether or not the court is bound to give a cautionary instruction as to this class of evidence, does not seem to be well settled. There are some decisions which hold that such an instruction should be given.² Others hold that it is not error for the court to instruct as to the effect of the impeaching evidence on the credibility of the witness where no instruction on that question is asked,³ while others hold that it would not be necessary or even proper for the court to give such a charge, unless under extraordinary or peculiar circumstances.⁴

following instruction was approved: "In determining the guilt or innocence of the defendants the jury are to consider the entire evidence in the case, but they are at liberty to disregard the statements of such witnesses (if any there be) as have been successfully impeached either by direct contradiction or by proof of general bad character, unless the statements of such witnesses have been corroborated by other evidence which has not been impeached."

Where a question was asked the defendant as to whether or not he was serving a term of imprisonment for petit larceny upon a certain day, simply to contradict his statement that he was working for his father on the day named, an instruction that "the defendant here admits that he has been convicted of petit larceny. As to how much credit such a man is entitled to, is for you to determine," is a violation of the rule that it is the exclusive province of the jury to weigh the evidence and find the facts; and of section 1847 of the Code of Civil Procedure, which provides that the jury are the exclusive judges of the credibility of a witness. *People v. Murray*, 86 Cal. 31.

1. *State v. Roberts*, 63 Vt. 139.

2. In *State v. Davis*, 78 N. Car. 433, it was held that where a witness is impeached it is the duty of the court to guide the minds of the jury to the application of the impeaching evidence.

In *Henderson v. State*, 1 Tex. App. 433, it was held that where a verdict depends upon the evidence of the prosecuting witness alone, and he is proved to have made different statements out of court, the jury should be instructed as to the nature and application of the evidence as a part of the law.

In *Wolfé v. State*, 25 Tex. App. 709, it was held that under the peculiar facts of the case, a charge which in enumerat-

ing the matters and things to which the jury might look in passing upon the credibility of the witnesses, and the weight to be given to their evidence, omitted any reference to the effect of impeachment, was erroneous.

3. *Smith v. Page*, 72 Ga. 539; *Stevens v. Central R., etc., Co.*, 80 Ga. 19; *Merchants', etc., Nat. Bank v. Masonic Hall*, 62 Ga. 272; *Thomas v. State*, 95 Ga. 484; *Sullivan v. State*, 75 Wis. 650; *State v. Kirkpatrick*, 63 Iowa 554. In the last case it was said that the impeachment of a witness does not constitute a defense, but merely relates to the credibility to be given to the testimony, and a failure to instruct as to the effect of an effort to impeach does not constitute a failure to state the issues in the case.

Modes of Impeachment. — Where the court charges correctly as to how the jury shall deal with evidence tending to impeach witnesses, and as to the effect of the same, failure to charge the statutory methods of impeachment, in the absence of request, will not operate to reverse. *Lewis v. State*, 91 Ga. 168.

4. *Thurmond v. State*, 27 Tex. App. 371, in which the court further says that the rule announced in *Henderson v. State*, 1 Tex. App. 432, "has never been enforced indiscriminately, and its correctness as a general one is, to say the least of it, questioned in *Rider v. State*, 26 Tex. App. 334." In the last mentioned case we find this statement: "There was no such impeachment of the witness as required of the court an instruction upon that matter. If such charge is required it is only in those cases where the witness has been properly impeached as to his truth and veracity. *Henderson v. State*, 1 Tex. App. 432. There was but one of the state's witnesses thus attempted to be impeached, and he was attempted to be

c. INTEREST, RELATIONSHIP, ETC. — (1) In General. — It is proper to instruct that the accused is a competent witness for himself, and that the jury must consider his testimony¹ and give it such weight as they believe it is entitled to,² and no more;³ that the jury are under no legal obligations to believe the testimony of the accused, but may disregard it if not convinced of its truth;⁴ and that the jury may take into consideration the fact that the defendant's testimony has been contradicted.⁵ So the accused is entitled to an instruction that the fact that he is the defendant is not of itself sufficient to impeach his testimony as evidence.⁶

(2) Instructions that Jury "May" Take This into Consideration. — Except in two states⁷ it is well settled that the trial court may, in both civil and criminal cases, instruct the jury that they are authorized to take into consideration the interest of the party or the relationship of the witness testifying to the party in interest, in determining his credibility.⁸

impeached by one single witness only, which is not sufficient nor satisfactory for such a purpose."

1. *State v. Sterrett*, 71 Iowa 388; *Creed v. People*, 81 Ill. 569.

2. *Bressler v. People*, 117 Ill. 439; *Solander v. People*, 2 Colo. 48; *Barber v. State*, 13 Fla. 675; *Miller v. State*, 15 Fla. 577.

3. *State v. Sterrett*, 71 Iowa 388; *Meyer v. Blakemore*, 54 Miss. 575.

4. *Creed v. People*, 81 Ill. 569; *State v. Elliott*, 90 Mo. 350; *People v. O'Neal*, 67 Cal. 378; *People v. Cronin*, 34 Cal. 195; *People v. Morrow*, 60 Cal. 147; *Lewis v. State*, 88 Ala. 11.

5. *Rider v. People*, 110 Ill. 13. See also *Hinton v. Cream City R. Co.*, 65 Wis. 323.

6. *State v. Metcalf*, 17 Mont. 417.

7. In *Kentucky and Mississippi* such an instruction would probably not be authorized, at least in a criminal case. In *Kentucky* it has been held that "the court had no right to direct attention to the interest of any witnesses in the result or character of statements made by them, the jury being the sole judges of the weight of the evidence and of the credibility of the witnesses." *Wright v. Com.*, 85 Ky. 123.

In *Mississippi* it has been held error to instruct the jury that in weighing the defendant's testimony they "should consider the interest he has in the result of the same, and they may disregard it altogether." In this case the court said: "A defendant has the right to submit his testimony to the jury to be judged of by it, uninfluenced by any

suggestions of its probable falsity or an authorization to the jury to throw it aside as unworthy of belief because of the strong temptation to the defendant to swear falsely. There is little danger that juries will be unduly influenced by the testimony of defendants in criminal cases. They do not need any cautioning against too ready credence to the exculpation furnished by one on trial for a felony. The accused should be allowed to exercise his right to testify, unimpaired by any suggestions calculated to detract from its value in the estimation of the jury." *Buckley v. State*, 62 Miss. 707.

In *Woods v. State*, 67 Miss. 575, an instruction practically the same as the above was condemned. In *Townsend v. State*, (Miss. 1892), 12 So. Rep. 209, the report does not show what the instructions given were, but the court says: "The two instructions for the state are clearly erroneous. They fall squarely under the condemnation of this court pronounced in *Buckley v. State*, 62 Miss. 705, on a similar instruction." In the two first cases the court, in directing attention to the interest of the defendant, said that the court "should" instead of "may" consider the interest of the defendant in determining his credibility; but it seems clearly apparent from the quotation from *Buckley v. State*, *supra*, that the instructions would have been condemned if the word "may" instead of "should" had been used.

8. *Alabama*. — *Norris v. State*, 87 Ala. 85.

Not a Violation of Rule Against Singling Out Witness. — Such an instruction does not violate the rule against singling out witnesses for comment; ¹ but it is not proper to give instructions as to the interest of a witness on one side without also applying the same test to interested witnesses on the other side. This would be obnoxious to the rule mentioned. ²

Arkansas. — *Felker v. State*, 54 Ark. 489.

California. — *People v. Knapp*, 71 Cal. 1.

Illinois. — *Siebert v. People*, 143 Ill. 571; *Rider v. People*, 110 Ill. 13; *Bulliner v. People*, 95 Ill. 407; *West Chicago St. R. Co. v. Nash*, 166 Ill. 528; *Bressler v. People*, 117 Ill. 439; *Chicago, etc., R. Co. v. Anderson*, 166 Ill. 572.

Indiana. — *Lake Erie, etc., R. Co. v. Parker*, 94 Ind. 91; *Goodwine v. State*, 5 Ind. App. 63; *Randall v. State*, 132 Ind. 544; *Young v. Gentis*, 7 Ind. App. 199.

Kansas. — *State v. Bohan*, 19 Kan. 35.

Michigan. — *McDonnell v. Rifle Boom Co.*, 71 Mich. 61.

Missouri. — *State v. Patterson*, 98 Mo. 283; *State v. Parker*, 39 Mo. App. 116; *State v. Wisdom*, 84 Mo. 190; *State v. Miller*, 93 Mo. 263; *State v. Kelly*, 9 Mo. App. 512; *State v. Wells*, 111 Mo. 533; *State v. McGinnis*, 76 Mo. 326; *State v. Maguire*, 69 Mo. 197; *State v. Zorn*, 71 Mo. 415.

Montana. — *State v. Metcalf*, 17 Mont. 417.

Nebraska. — *Clark v. State*, 32 Neb. 246; *Harvard v. Crouch*, 47 Neb. 133; *Dixon v. State*, 46 Neb. 298; *Barmby v. Wolfe*, 44 Neb. 77.

New Mexico. — *Territory v. Romine*, 2 N. Mex. 114; *Faulkner v. Territory*, 6 N. Mex. 464.

New York. — *Ney v. Troy*, (Supreme Ct.) 3 N. Y. Supp. 679.

Texas. — *Brown v. State*, 2 Tex. App. 115.

Washington. — *State v. Carey*, 15 Wash. 549; *State v. McCann*, 16 Wash. 249.

Wyoming. — *Haines v. Territory*, 3 Wyoming 167.

In Criminal Cases. — The following instructions in criminal cases have been approved: "In case of the defendant you have the right to take into consideration the great interest he has in your verdict." *State v. Bohan*, 19 Kan. 35. That the defendants, having become witnesses in their own behalf, are subject to the same rules as other

witnesses, and that their interest and the contradiction of their testimony by other witnesses may be taken into consideration in determining their credibility. *Siebert v. People*, 143 Ill. 571. "The fact that such witness is specially interested in the result of the action, or of your deliberations, may be taken into account by you." *Faulkner v. Territory*, 6 N. Mex. 464. That their [the defendants'] interest in the result of the trial is a matter proper to be taken into consideration by the jury in determining what weight ought to be given to their testimony. *Haines v. Territory*, 3 Wyoming 167. That "the jury are instructed that by the statutes of this state the defendant is a competent witness in his own behalf, but the fact that he is a witness testifying in his own behalf may be considered by the jury in determining the credibility of his testimony." *State v. Maguire*, 69 Mo. 197. That the jury, in weighing the testimony of the defendant's wife, may take her relationship to the defendant into consideration. *State v. Parker*, 39 Mo. App. 116.

In Civil Cases. — "It is said that some of these witnesses are interested in or in the employ of the boom company, and you are to consider that circumstance in weighing your testimony. You have a right to do that, gentlemen, and if you think any circumstance of that kind has operated upon their judgment, so that they have not been able to form an impartial judgment, you must consider their testimony for what it is worth." *McDonnell v. Rifle Boom Co.*, 71 Mich. 61.

Instructing that Jury May Disbelieve on That Ground Alone. — It has been held error to refuse an instruction that the jury "have the right to disbelieve the evidence of any interested witness, upon no other ground than the fact of interest." *Hunter v. State*, 29 Fla. 486.

1. *Haines v. Territory*, 3 Wyoming 167; *Chicago, etc., R. Co. v. Anderson*, 166 Ill. 572.

2. *Phenix Ins. Co. v. La Pointe*, 118 Ill. 384; *Pennsylvania Co. v. Versten*, 140 Ill. 637. In this last case it was

(3) *Instructions that Jury "Should" Take This into Consideration* — (a) *Jurisdictions Where Practice Approved.* — The next question which arises in this connection is not so well settled. It is this: Is it competent for the trial judge to use the word "should" instead of "may" in giving such an instruction? The weight of authority, it is believed, both in civil and criminal cases, holds that it is not objectionable for the trial court to charge that the jury "should" take into consideration the interest in the result of the trial of the person testifying, in determining what weight shall be given to his testimony.¹

said that the instruction asked by the appellant "to the effect that the jury might take into consideration the plaintiff's interest in the result of the suit was properly refused, because, in directing the jury to apply the test of interest in weighing the testimony, it singled out the plaintiff, whereas the same test was applicable to other witnesses in the case."

1. *California.* — *People v. Knapp*, 71 Cal. 1; *People v. Cronin*, 34 Cal. 192; *People v. Morrow*, 60 Cal. 142; *People v. Wheeler*, 65 Cal. 77; *People v. O'Neal*, 67 Cal. 378.

Colorado. — *Salazar v. Taylor*, 18 Colo. 538.

Connecticut. — *State v. Fiske*, 63 Conn. 392.

Georgia. — *Rogers v. King*, 12 Ga. 229.

Illinois. — *West Chicago St. R. Co. v. Estep*, 162 Ill. 130.

Iowa. — *State v. Sterrett*, 71 Iowa 386; *Little v. McGuire*, 43 Iowa 450; *Hatfield v. Chicago, etc., R. Co.*, 61 Iowa 440; *State v. Viers*, 82 Iowa 397.

Michigan. — *People v. Calvin*, 60 Mich. 114; *People v. Herrick*, 59 Mich. 563.

Minnesota. — *State v. Hogard*, 12 Minn. 293.

Missouri. — *State v. Young*, 105 Mo. 634; *State v. Renfrow*, 111 Mo. 589; *State v. Morrison*, 104 Mo. 642; *State v. Turner*, 110 Mo. 196; *State v. Brown*, 104 Mo. 374; *State v. Mounce*, 106 Mo. 226; *State v. Cook*, 84 Mo. 40; *State v. Lingle*, 128 Mo. 537; *State v. Young*, 99 Mo. 666. *Contra*, *State v. Fairlamb*, 121 Mo. 139; *Kansas City, etc., R. Co. v. Dawley*, 50 Mo. App. 480.

Nebraska. — *St. Louis v. State*, 8 Neb. 418; *Murphy v. State*, 15 Neb. 389; *Johnson v. State*, 34 Neb. 257. *Compare* *Lincoln v. Beckman*, 23 Neb. 677.

Nevada. — *State v. Hymer*, 15 Nev.

51; *State v. Streeter*, 20 Nev. 403; *State v. Slingerland*, 19 Nev. 135.

In *State v. Cook*, 84 Mo. 40, the court by Martin, C., adverts to the common-law disqualification of witnesses in criminal cases from testifying, and states the provisions of the Missouri statutes removing this disqualification, and prohibiting comments on the defendant's failure to testify. In alluding to these statutes the court says: "They unquestionably regard the accused on trial as occupying an attitude materially different from that of all other witnesses in the case; in disabling the state from calling him as a witness. * * * If the attitude of the accused when he takes the witness stand is in truth different from that of all other witnesses, according to our laws, I am at a loss to perceive any error in the court so treating him, and in reminding the jury of such undoubted fact. This, I conceive, the court can do without subjecting itself to the criticism of singling out a witness in its instructions for the purpose of throwing distrust upon his testimony. * * *

The fact of which the jury is thus reminded is one which they ought to consider. * * * The instructions approved in the foregoing cases constitute nothing more than a prudent reminder of this duty. It is upon no other construction they can be interpreted as having any point or meaning, for they assert in words merely that the jury is at liberty to consider a certain fact which in its nature and tendency bears upon the credibility of the accused when testifying in his own behalf. Why should the court refer to this important and material fact, distinguishing the accused from all other witnesses, unless it intended that they should not overlook but remember it in their deliberations? The instruction complained of in this case only performs

(b) **Jurisdictions Where Practice Condemned.** — There are, however, jurisdictions in which this form of instruction has been condemned, and it is held that as to the credibility of all classes of witnesses other than those to whom an artificial credibility is fixed by statute, and as to the weight of every species of evidence except such as by law is given a special weight, the jury are to be the judges, and the exclusive judges, and the court should not by its charge, to any extent, interfere with their prerogative.¹

the same office in language slightly changed. In other words, the object and import of the instructions heretofore approved by this court will be found clearly expressed in the instruction complained of. It certainly does not, any more than the previous instructions, assume to declare how the fact shall be considered, whether favorably or unfavorably to the accused. It simply declares to them that they should consider it as bearing on the credibility of the accused. As it is a fact which in our laws, as well as in the nature of things, bears upon his credibility, I see no error in telling the jury that they should consider it thus, in its true tendency and light."

The Accused in Criminal Cases. — An instruction that the jury "shall" instead of "may" take into consideration the interest of the accused as affecting his credibility, is not erroneous. *State v. Renfrow*, 111 Mo. 589.

So it has been held proper to charge: "Above all, you are to take into consideration the fact that he is the accused in the case; and, taking those facts into consideration, you are to give to his statements in court, or any statements made by him out of court, such effect and such force as you think they justly should have." *State v. Fiske*, 63 Conn. 392. So the following instruction, or one substantially equivalent, has been approved in a number of cases: That "in addition to noticing his manner and the probability of his statements, taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, the consequences to him relating from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation." * * * If convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." *People v. Cronin*, 34 Cal. 192; *People*

v. Morrow, 60 Cal. 142; *People v. Wheeler*, 65 Cal. 77; *State v. Streeter*, 20 Nev. 403.

Testimony of Relation. — It is proper to charge the jury to take into consideration the fact that a person testifying in the defendant's behalf is his wife. *State v. Young*, 99 Mo. 666; *State v. Lingle*, 128 Mo. 537. So it is proper to charge that "the jury should consider and decide whether such relationship [of any of the witnesses to the complaining witness or defendant] acted upon the witnesses, or either of them, to make false statements in their evidence, or whether such relationship influenced said witnesses and swerved them from the truth." *State v. Hogard*, 12 Minn. 293. See also *Rogers v. King*, 12 Ga. 229.

Testimony of Prosecuting Witness. — A charge may caution the jury to consider the relation the prosecuting witness bore to the accused in determining what weight to give the testimony of such witness. *People v. Herrick*, 59 Mich. 563.

Testimony of Agents or Employees. — An instruction that if the jury find it necessary to consider the testimony given by the agents or employees of railroad companies they "should bear in mind the interest" such agents or employees have in protecting their company and themselves, was held erroneous as suggesting that suspicion attached to their testimony. "We think it is not within the province of a court to instruct a jury, or suggest to them, that any suspicion attaches to the testimony of agents or servants of a corporation or individual by reason of their employment, or that they have any such interest as requires them to be dealt with differently from other witnesses." *Marquette, etc., R. Co. v. Kirkwood*, 45 Mich. 53.

1. *Muely v. State*, 31 Tex. Crim. Rep. 155; *Eddy v. Lowry*, (Tex. Civ. App. 1894) 24 S. W. Rep. 1076; *Willis v.*

(4) *Instructions Tending to Discredit Witness.* — A trial judge must not make hostile comments on the testimony of the accused,¹ or intimate that he does not think the testimony of the accused is entitled to much weight.² So it is not proper to instruct that the weight to be given to the testimony of the parties depends upon the interest each may have in the result of the suit;³ or that the testimony of an interested witness must be

Whitsitt, 67 Tex. 673; *Unruh v. State*, 105 Ind. 118; *Woollen v. Whitacre*, 91 Ind. 502.

The Rule in Indiana. — In Indiana there seems to be considerable conflict of authority on this question. In *Unruh v. State*, 105 Ind. 118, it was held that an instruction that the jury "should" consider the interest of parties and other witnesses in relationship to the parties in weighing their testimony was erroneous as invading the province of the jury, and as indicating to them as matter of law that the testimony of such witnesses was entitled to less weight than that of others. To the same effect is *Woollen v. Whitacre*, 91 Ind. 502; *Lynch v. Bates*, 139 Ind. 210; *Bird v. State*, 107 Ind. 154; *Hartford v. State*, 96 Ind. 46.

On the other hand, the decision of *Anderson v. State*, 104 Ind. 467, is clearly in conflict with the above decisions. In this case the following instruction was approved: "In determining the weight to be given the testimony of the different witnesses, you should take into account the interest or want of interest they have in the case, their manner on the stand, the probability or improbability of their testimony, with all other circumstances before you which can aid you in weighing their testimony. The defendant has testified as a witness, and you should weigh his testimony as you weigh that of any other witness. Consider his interest in the result of the case, his manner, and the probability or improbability of his testimony."

To the same effect is *Deal v. State*, 140 Ind. 354. This seems to be the latest decision on this question. In attempting to distinguish this case from *Unruh v. State*, 105 Ind. 118, the court says: "The instruction condemned in *Unruh v. State*, 105 Ind. 117, related to certain admissions of the parties which had been put in evidence. The court told the jury, in substance, that admissions of a certain described character

would be entitled to very great weight; and, on the other hand, that certain other described admissions should have but little reliance placed upon them. Such an instruction was held to be an invasion of the jury's exclusive right to judge of the credibility and weight of evidence." It is true that the court in such decision condemned the instruction mentioned, but it also condemned the following instruction: "The relatrix and defendant have testified, and they are both interested in the event of the suit. This fact should be considered in weighing their evidence, in connection with the other facts and circumstances which I have indicated apply to witnesses generally." In this case the court said: "We think that this instruction is also erroneous. It very clearly discredits the parties named, because they are interested in the event of the suit." The decision of *Deal v. State*, 140 Ind. 354, seems to show that the court is somewhat lacking in candor. It is a palpable attempt to evade the force of the earlier decisions, for it is impossible that they could have overlooked this point.

1. *Hicks v. U. S.*, 150 U. S. 442.

2. *Alleson v. U. S.*, 160 U. S. 203.

On a trial for murder an instruction that the circumstances in the case against the defendant "cannot be bribed, cannot be dragged into perjury," but stand "in opposition to and confronting this defendant, who stands before you as an interested party," is erroneous. *Hickory v. U. S.*, 160 U. S. 408.

3. *Dodd v. Moore*, 91 Ind. 522.

When Harmless Error. — An instruction that "the credit and weight that should be attached to the testimony of a witness depends upon his * * * disinterestedness in the result of the suit and his freedom from bias or prejudice" will not operate to reverse unless it is shown to be more prejudicial to one party than to the other. *Hess v. Lowrey*, 122 Ind. 225.

disregarded unless corroborated,¹ or may be believed or disbelieved according as it is or is not corroborated;² or that the evidence of parties and their relations is not entitled to so much weight as that of disinterested witnesses;³ or that the jury may disregard the testimony of the accused, because he is the accused, if they consider that reason sufficient;⁴ or that an important witness was "apparently interested;"⁵ or that a witness's interest "does" affect his credit;⁶ or that "one interested will not, usually, be as honest and candid as one not so;"⁷ or that if witnesses are otherwise equally credible the testimony of the one having the greater interest would be entitled to the lesser weight;⁸ or that the testimony of a witness is to be distrusted because of his interest in the result.⁹ But it has been held (erroneously) it

1. *Prowattain v. Tindale*, 80 Pa. St. 297. In this case it is said: "Such testimony, just as any other, must be submitted to the jury, and it is for that body to say how far the interest of the witnesses giving it shall affect its credibility." To the same effect is *Coloritype Co. v. Williams*, 78 Fed. Rep. 450.

"To Leave Parties as It Finds Them." — Where the plaintiff testifies one way and the defendant another, it is error to charge the jury to leave the parties as it finds them unless other evidence corroborates the one or the other. The jury have a right to believe one and discredit the other. *McLean v. Clark*, 47 Ga. 24.

Contradictory Statements by Accused. — The court may instruct that if the jury believe that the defendant has made statements as to material matters, at other times and places, at variance with what he stated upon the witness stand, "then you are instructed that these facts tend to impeach either the recollection or truthfulness of the witness, and you should consider these facts in estimating the weight which ought to be given to his testimony." *Faulkner v. Territory*, 6 N. Mex. 464.

2. *State v. Patterson*, 98 Mo. 283. See also *Allen v. State*, 87 Ala. 107.

It is error to charge that "the jury have the right, and may take the liberty, of disregarding the witnesses of the defendant if they consider them interested, even though they be not contradicted or impeached." *Berzevitz v. Delaware, etc., R. Co.*, 19 N. Y. App. Div. 309.

3. *Nelson v. Vorce*, 55 Ind. 455; *Platz v. McKean Tp.*, 178 Pa. St. 601; *Omaha*

Belt R. Co. v. McDermott, 25 Neb. 714; *Weaver v. Grant*, 56 Hun (N. Y.) 103; *Lee v. State*, 74 Wis. 45. See also *Potts v. House*, 6 Ga. 324. Compare *Hinton v. Cream City R. Co.*, 65 Wis. 335, where an instruction that the testimony of interested witnesses is to be examined with greater care than that of disinterested witnesses was affirmed.

4. *Allen v. State*, 87 Ala. 107.

5. *Lellyett v. Markham*, 57 Ga. 13.

6. *Davis v. Central R. Co.*, 60 Ga. 329. In this case it was held not a ground of reversal so to charge, but that the proper expression would be "may" affect his credit.

7. *Veatch v. State*, 56 Ind. 584; *Greer v. State*, 53 Ind. 420. See also *Pratt v. State*, 56 Ind. 179, in which the following instruction was condemned: "If the witness is interested in the result of the prosecution, this tends to discredit" him.

"If the proposition be true, it is not a legal presumption, but matter of fact, of which the jury were the exclusive judges, and concerning which the court could not, without going out of its province, undertake to instruct them." *Greer v. State*, 53 Ind. 420.

Interest of Expert Witness. — An attempt in an instruction to cast discredit upon a medical witness because he had attended the trial from a neighboring state to testify in behalf of a defendant, with the expectation that his expenses would be paid by the defendant or others for him, the defendant being a stranger to such witness, is improper. *Bradley v. State*, 31 Ind. 492.

8. *Lee v. State*, 74 Wis. 45.

9. *Com. v. Pease*, 137 Mass. 577.

is believed) that it is proper to charge that "the law regards with suspicion the testimony of near relations." ¹

Test as to the Credibility of Interested and Disinterested Witnesses Not the Same. — While an instruction that the testimony of an interested witness is subject to the same test as the testimony of any other witness has been permitted to pass unchallenged,² and an instruction that the jury are not bound to treat the testimony of the defendant the same as that of other witnesses has been condemned,³ it has been held proper to refuse an instruction that it is the duty of the jury to weigh, examine, and take the defendant's testimony into consideration "the same as it does the testimony of all the other witnesses in the case," ⁴ and an instruction that the jury must give the defendant's testimony the same consideration they would that of any other witness.⁵ So an instruc-

1. *State v. Nash*, 8 Ired. L. (N. Car.) 35. To the same effect is *State v. Byers*, 100 N. Car. 512, where it was held that where a prisoner and his relatives, or an associate in the crime, testify on behalf of the prisoner, the law directs the jury to scrutinize their testimony carefully, because of their interest in the result, and the judge may so caution the jury. But in *Wiseman v. Cornish*, 8 Jones L. (N. Car.) 218, a failure of the court to do so was held not assignable as error.

Transactions with a Deceased Party. — The court may instruct the jury that they should receive with circumspection and caution testimony by a party to the suit as to conversations and transactions with one deceased, because of the impossibility of producing negative testimony. *Meyer v. Blake-more*, 54 Miss. 575.

2. *People v. Petmecky*, 99 N. Y. 415. See also *State v. Sterrett*, 71 Iowa 388.

3. *Chambers v. People*, 105 Ill. 412. The reasoning of the court on this question was as follows: "The language of the statute is: 'No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime,' thus expressly placing the defendant and all other witnesses, as respects competency, on an equality; 'but,' the statute proceeds, 'such interest or conviction may be shown for the purpose of affecting his credibility;' so, also, in this respect as in others, subjecting his evidence to like tests, for the purpose of determining the amount

of reliance to be placed upon it, as those to which the evidence of other witnesses is subject; for, in all cases, the interest or bias which may sway a witness to pervert the truth is to be taken into consideration, for the purpose of determining what credit shall be given his evidence. * * * It cannot, therefore, be true that the evidence given by the defendant charged with crime is not to be treated the same as the evidence of other witnesses. It could not even be true, as a universal proposition, that, as matter of law, it is not to have the same effect as the evidence of other witnesses. Many times it certainly cannot have that effect, but there are times when it can and should, and of this the jury are made the judges."

4. *People v. Cowgill*, 93 Cal. 596. See also *McKee v. State*, 82 Ala. 32, where it was held proper to refuse an instruction that the jury must give the defendant's testimony the same consideration they would give to that of any other witnesses.

5. *People v. Calvin*, 60 Mich. 114; *McKee v. State*, 82 Ala. 33, on the ground that it is for the jury to decide what weight they will give to the testimony of any witness. To the same effect, see *Childress v. State*, 86 Ala. 77. See also *Bulliner v. People*, 95 Ill. 406. In this case the defendants asked an instruction that "under the law the evidence of the defendants is just as proper for your consideration in determining their guilt or innocence as the evidence of other witnesses." The court modified the instruction by striking out the words, "as the evidence of other witnesses," and adding, "and should receive such weight as you think

tion that the accused does "not stand in the same position as a witness who is entirely disinterested" has been held not erroneous.¹

Conclusion Deducible from Authorities. — The conclusion which may be drawn from these decisions is that the weight of authority and of reason is against placing the testimony of interested and disinterested witnesses on the same footing in giving instructions.

(5) *Unsworn Statement of Accused.* — The unsworn statement of the accused of matters of defense which some statutes authorize, if not technically evidence in the broadest acceptation of the word, is "in the nature of evidence," and is to be weighed in connection with all the evidence in determining the issue of guilt or innocence;² and in instructing as to such statement the court should lay down no arbitrary or artificial rule by which to estimate the credit to which it is due.³ Accordingly it is error to charge that the jury should not receive such statement unless corroborated,⁴ or that such statement would warrant them in setting aside unimpeached sworn evidence.⁵ So it is error to charge that the defendant's statement, to avail him, must be in those parts that are in conflict with the evidence in material matters.⁶ On the other hand a charge that the defendant's statement "is to be given no less credence on account of its not being made under oath" is properly refused,⁷ for this would be an unwarranted invasion of the province of the jury. It is, of course, proper to charge that the statement of the prisoner is entitled to such weight as the jury should think it worthy.⁸ And it is proper to charge that the jury may believe the defendant's statement in

it entitled to." The reviewing court held that this was entirely unobjectionable.

1. *People v. Ferry*, 84 Cal. 31. In this case the court, in charging as to interested witnesses, said: "They have a right to be heard, and have their testimony submitted to the consideration of twelve men, who are supposed, from their experience in the affairs of mankind, to give it proper weight and no more; but they do not stand in the same position as a witness who is entirely disinterested. The time has not yet come when men who confess themselves guilty of crime are to stand alongside of and made equal to men who have lived upright and honest lives. But the value of their testimony is to be entirely estimated by you." The court held that though this charge was not erroneous, it was on the verge of error. See also opinion of Martin, C., in *State v. Cook*, 84 Mo. 40, in which a very strong argument is made against placing the testimony of interested and

disinterested witnesses on the same footing.

2. *Beasley v. State*, 71 Ala. 328; *People v. Arnold*, 40 Mich. 715.

3. *De Foe v. People*, 22 Mich. 224; *People v. Jones*, 24 Mich. 226.

In determining the credit to which the jury may think it entitled, they are not to be precluded by any artificial rule from giving full weight to every consideration, or to any feature of such statement which may tend in any way to produce belief or disbelief, either of the statement itself or of the evidence of witnesses to which it relates. *De Foe v. People*, 22 Mich. 226.

4. *People v. Arnold*, 40 Mich. 710.

5. *Durant v. People*, 13 Mich. 355.

6. *Lovejoy v. State*, 82 Ga. 87.

The fact that the defendant's statement is not contradicted does not render it unworthy of consideration. *Lovejoy v. State*, 82 Ga. 87.

7. *Blackburn v. State*, 71 Ala. 319.

8. *Durant v. People*, 13 Mich. 355; *Blackburn v. State*, 71 Ala. 319; *De Foe*

preference to the sworn testimony in the case, if the jury believe it to be entitled to more weight;¹ or to call the jury's attention to the fact that the statement is not made under oath and that no penalty attaches to the accused for not telling the truth.²

d. MANNER IN TESTIFYING, BIAS, ETC. — The court may properly instruct the jury that they may consider the demeanor of the witnesses in testifying on the stand,³ but a failure to give such an instruction is not error in the absence of a request for a charge to that effect.⁴ There is some conflict of authority as to whether it is proper to instruct that the jury may consider

v. People, 22 Mich. 226; *Poppell v. State*, 71 Ga. 277.

1. *People v. Jones*, 24 Mich. 216; *Poppell v. State*, 71 Ga. 277; *Harrison v. State*, 83 Ga. 129.

The jury are not precluded from considering the prisoner's statement throughout by instructing them that the statute allows them to believe it on material matters in preference to the sworn testimony; such an instruction is not objectionable on the ground that it instructs the jury that the prisoner's statement could not avail him unless in conflict with the sworn testimony, and as denying him the benefit of his statement if sustained or corroborated by the witnesses. *Harrison v. State*, 83 Ga. 129.

2. *Poppell v. State*, 71 Ga. 276.

In charging the jury on the effect of the prisoner's statement, nothing is better to be used than the language of the statute. The statute says that the statement is to have such force only as the jury think proper to give it. Doubtless the object of the statement is to enable the jury better to understand the testimony; still, the effect which they think proper to give it is the effect it is to have. Of course the jury should not lose sight of the terms of their oath. They swear to give a true verdict "according to the evidence," and this they should do. Where the evidence and the statement conflict, the latter should yield to the former. As a general rule, sworn evidence must be more trustworthy than the prisoner's bare word. *Brown v. State*, 60 Ga. 212.

"In connection with all the other proofs in the case, you have a right to take into consideration the statement of the prisoner, and give it such weight and credit as you think it entitled to, under all the facts and circumstances of the case. And you may even give it

more weight than the sworn testimony of unimpeached witnesses, if, under all the facts and circumstances of the case, you honestly believe it entitled to such weight; but in order to find what weight you ought to give to his statement, you should consider whether it is consistent with the other facts which may have been proven to your satisfaction, and whether his statement is corroborated or not by other proofs, facts, or circumstances of the case.' Taken together, we think this charge is not open to the objection urged, and that it laid down no arbitrary or artificial rule by which to estimate the credit due to the prisoner's statement." *People v. Jones*, 24 Mich. 226.

3. *State v. Nat*, 6 Jones L. (N. Car.) 115; *Felker v. State*, 54 Ark. 489; *Anderson v. State*, 104 Ind. 472; *Young v. Gentis*, 7 Ind. App. 199; *State v. Viers*, 82 Iowa 397; *Klepsch v. Donald*, 4 Wash. 436; *State v. Wells*, 111 Mo. 533; *Bevelot v. Lestrade*, 153 Ill. 625; *State v. Bohan*, 19 Kan. 35.

Instances. — The following instructions have been approved: Where witnesses, upon a trial, exhibit bias, feeling, and partiality, the presiding judge may with propriety comment upon such deportment, and point it out as a circumstance calculated to affect their credit. *State v. Nat*, 6 Jones L. (N. Car.) 114. So it is proper to instruct that the jury may consider the apparent candor and intelligence of the witnesses and other matters of like character, so far as they are in evidence or observable from the demeanor of the witnesses upon the stand, *Young v. Gentis*, 7 Ind. App. 199; or that the jury may judge of the weight to be given to a witness's testimony from his manner of testifying, *Brown v. Stacy*, 5 Ark. 403.

4. *Johnson v. People*, 140 Ill. 350.

the accused's conduct or demeanor while testifying. According to one decision this is proper.¹ According to another decision, where the defendant does not take the stand it is error to instruct the jury that they may consider his conduct and demeanor during the trial,² and a later decision in the same state extends this doctrine to cases where the defendant takes the stand in his own behalf.³

e. Accomplice Testimony — (1) *Introductory Statement*. — In a number of jurisdictions it is provided by statute that a conviction cannot be sustained on the uncorroborated testimony of an accomplice.⁴ But in the absence of statutes the rule is well-nigh universal that a conviction on the testimony of an accomplice, uncorroborated, is legal.⁵ The rule requiring the

1. *Felker v. State*, 54 Ark. 489.

2. *Purdy v. People*, 140 Ill. 46.

3. *Vale v. People*, 161 Ill. 309.

4. 1 Am. and Eng. Encyc. of Law (2d ed.), p. 401.

5. *Arkansas*. — *Hudspeth v. State*, 50 Ark. 534.

Connecticut. — *State v. Stebbins*, 29 Conn. 463; *State v. Wolcott*, 21 Conn. 272.

District of Columbia. — *U. S. v. Neverson*, 1 Mackey (D. C.) 154.

Florida. — *Tuberson v. State*, 26 Fla. 472.

Illinois. — *Collins v. People*, 98 Ill. 589; *Earl v. People*, 73 Ill. 333; *Cross v. People*, 47 Ill. 152; *Gray v. People*, 26 Ill. 347; *Friedberg v. People*, 102 Ill. 160.

Indiana. — *Stocking v. State*, 7 Ind. 326; *Ulmer v. State*, 14 Ind. 52.

Louisiana. — *State v. Prudhomme*, 25 La. Ann. 525.

Maine. — *State v. Litchfield*, 58 Me. 267; *State v. Cunningham*, 31 Me. 355.

Mississippi. — *Fitzcox v. State*, 52 Miss. 923; *Dick v. State*, 30 Miss. 593.

Missouri. — *State v. Watson*, 31 Mo. 361; *State v. Dawson*, 124 Mo. 418.

Nebraska. — *Olive v. State*, 11 Neb. 1.

New Jersey. — *State v. Hyer*, 39 N. J. L. 603.

New York. — *Linsday v. People*, 63 N. Y. 143; *People v. Costello*, 1 Den. (N. Y.) 83; *People v. Doyle*, 21 N. Y. 578; *Brown's Case*, 3 C. H. Rec. (N. Y.) 56; *McDowell's Case*, 5 C. H. Rec. (N. Y.) 94.

North Carolina. — *State v. Holland*, 83 N. Car. 624.

South Carolina. — *State v. Brown*, 3 Strobb. L. (S. Car.) 508.

Virginia. — *Brown v. Com.*, 2 Leigh (Va.) 769.

West Virginia. — *State v. Betsall*, 11 W. Va. 704.

Wisconsin. — *Ingalls v. State*, 48 Wis. 647.

United States. — *U. S. v. Babcock*, 3 Dill. (U. S.) 619; *Steinham v. U. S.*, 2 Paine (U. S.) 168.

England. — *Rex v. Jones*, 2 Campb. 131; *Rex v. Wilkes*, 7 C. & P. 272, 32 E. C. L. 507; *Rex v. Atwood*, 1 Leach C. C. 464; *Rex v. Durham*, 1 Leach C. C. 478.

Contra. — *Shelly v. State*, 95 Tenn. 152.

"No one can seriously doubt that a conviction is legal, though it proceed on the evidence of an accomplice only. Judges, in their discretion, will advise a jury not to believe an accomplice unless he is confirmed." *Per Lord Ellenborough in Rex v. Jones*, 2 Campb. 131.

"It is not a rule of law that accomplices must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may act on the unconfirmed testimony of an accomplice." *Reg. v. Stubbs*, 33 Eng. L. & Eq. 551.

The degree of credit to be given an accomplice is a matter exclusively within the province of the jury; they may, if they see fit, act upon his evidence, even in a capital case, without any confirmation of his statements." *U. S. v. Neverson*, 1 Mackey (D. C.) 154.

Instance of Instruction Held Proper Under This Rule. — The following instruction has been approved: "The court instructs the jury that it is competent to convict upon the uncorroborated evidence of an accomplice, if the jury, weighing the probability of his testimony, think him worthy of belief." *Earl v. People*, 73 Ill. 333.

evidence of an accomplice to be corroborated is one of practice, not of law.¹

(2) *Instructing Jury to View with Caution* — (a) *Propriety of So Instructing*. — Whether or not it is necessary, to sustain a conviction, that the testimony of an accomplice be corroborated, it is always proper to instruct that such evidence should be received with great caution and carefully scrutinized,² and that, too, although the evidence to show that the witness is an accomplice is very slight,³ and it is the almost universal custom so to receive it.⁴

(b) *Necessity of So Instructing*. — In some decisions it is said that it is the duty of the court so to instruct the jury.⁵ So in some

1. *Linsday v. People*, 63 N. Y. 143; *State v. Prudhomme*, 25 La. Ann. 525.

2. *Colorado*. — *Wisdom v. People*, 11 Colo. 170.

Kansas. — *State v. Kellerman*, 14 Kan. 135.

Massachusetts. — *Com. v. Price*, 10 Gray (Mass.) 472, 71 Am. Dec. 668; *Com. v. Brooks*, 9 Gray (Mass.) 299. See also *Harrington v. Harrington*, 107 Mass. 333.

Mississippi. — *Cheatham v. State*, 67 Miss. 335.

Missouri. — *State v. Chyo Chiagk*, 92 Mo. 414; *State v. Donnelly*, 130 Mo. 642; *State v. Miller*, 100 Mo. 606; *State v. Walker*, 98 Mo. 95; *State v. Harkins*, 100 Mo. 666; *State v. Minor*, 117 Mo. 302; *State v. Jackson*, 106 Mo. 174.

Nebraska. — *Olive v. State*, 11 Neb. 4; *Long v. State*, 23 Neb. 33.

New York. — *People v. Costello*, 1 Den. (N. Y.) 87.

North Carolina. — *Ferrall v. Broadway*, 95 N. Car. 551; *State v. Hardin*, 2 Dev. & B. L. (N. Car.) 407; *State v. Miller*, 97 N. Car. 484; *State v. Barber*, 113 N. Car. 711.

South Carolina. — See *State v. Brown*, 3 Strobb. L. (S. Car.) 508.

Wyoming. — *Arnold v. State*, (Wyoming 1895) 40 Pac. Rep. 967.

United States. — *U. S. v. Ybanez*, 53 Fed. Rep. 536; *U. S. v. Harries*, 2 Bond (U. S.) 311; *U. S. v. Babcock*, 3 Dill. (U. S.) 619.

In a case where all the evidence against the prisoner was the uncorroborated testimony of accomplices, an instruction that such evidence is unsafe on account of its suspicious source, and that the jury had better acquit, but that the jury have the power to convict on such testimony, and if from the whole evidence they are convinced beyond a reasonable doubt of the defendant's guilt, their verdict should be guilty, is

unexceptionable. *Com. v. Price*, 10 Gray (Mass.) 472, 71 Am. Dec. 668.

Exceptions — *Rule in West Virginia*. — In West Virginia it is improper for the court to give any instruction whatever to the jury as to the weight of accomplice testimony. *State v. Betsall*, 11 W. Va. 704.

Where Accomplice is Called by Defendant. — In a criminal prosecution an instruction that "the testimony of an accomplice ought to be viewed with distrust" was error where the accomplice had been called as a witness by the defendant and not by the prosecution. Such an instruction tends to discredit a witness for the defendant, and charges the jury with respect to matters of fact. *People v. O'Brien*, 96 Cal. 171; *People v. Bonney*, 98 Cal. 278.

Charge that Jury Are Bound to Accept Testimony of Accomplice. — An instruction that the jury are bound to accept and credit testimony of an accomplice, either standing alone or more or less corroborated, should not be given. It is their province to determine whether he is to be credited at all, and if so, to what extent. *Hamilton v. People*, 29 Mich. 174.

3. *Arnold v. State*, (Wyoming 1895) 40 Pac. Rep. 967.

4. *State v. Miller*, 97 N. Car. 484.

5. *State v. Dana*, 59 Vt. 614; *State v. Stebbins*, 29 Conn. 473; *U. S. v. Sykes*, 58 Fed. Rep. 1004.

The source of this evidence is so corrupt that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation, hence the courts have considered it their duty to advise a jury to acquit where there is no evidence other than the uncorroborated testimony of an accomplice. *Com. v. Bosworth*, 22 Pick. (Mass.) 398; *Rex v. Durham*, 1 Leach C. C. 478.

jurisdictions a neglect to do so, especially when requested, has been held reversible error.¹ But in others it has been held that if this is error, it is not sufficient ground to reverse.² So in some jurisdictions error cannot be assigned of a failure to charge as to accomplice testimony in the absence of a request.³

Nothing to Show Witness Accomplice. — Of course, where there is no evidence tending to show that a witness is an accomplice, it is unnecessary to charge as to the law governing the testimony of accomplices.⁴

No Testimony by Accomplice. — So no instruction as to the effect of accomplice testimony should be given where the accomplice has not testified.⁵

(3) *Advising Acquittal Where Testimony Is Uncorroborated* —
(a) **In General.** — It is always proper to advise a jury to acquit

"It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance." *Reg. v. Farler*, 8 C. & P. 106, 34 E. C. L. 314.

1. *State v. Woolard*, 111 Mo. 248; *State v. Patterson*, 52 Kan. 335; *Hoyt v. People*, 140 Ill. 588. See also *State v. Jones*, 64 Mo. 394. In this case the defendant asked the following instruction: "The testimony of parties aiding, assisting, encouraging, and abetting the crime is admissible; yet their evidence, when not corroborated by the testimony of others not implicated in the crime, as to matters material to the issue, ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they should convict defendant on such testimony." The court said that this instruction should have been given.

2. *Cheatham v. State*, 67 Miss. 335; *Solander v. People*, 2 Colo. 48.

3. *State v. McLane*, 15 Nev. 345; *Porath v. State*, 90 Wis. 527; *State v. Rook*, 42 Kan. 419.

Thus a defendant who claims that a witness against him was an accomplice, and must be corroborated, has the right to have the court instruct the jury what constitutes an accomplice; but if he fails to ask such an instruction he cannot complain of the court's failure to give it. *Carroll v. State*, 45 Ark. 539.

4. *Pitner v. State*, 23 Tex. App. 366; *Lawrence v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 530; *Kerrigan v. State*, 21 Tex. App. 487; *Brown v. State*, 6 Tex. App. 286; *Smith v. State*,

28 Tex. App. 309; *Wilson v. State*, 32 Tex. Crim. Rep. 22; *Mason v. State*, 29 Tex. App. 24; *O'Connor v. State*, 28 Tex. App. 289; *People v. Chadwick*, 7 Utah 134; *Tuberson v. State*, 26 Fla. 472; *State v. Morgan*, 35 W. Va. 260; *State v. Lee*, 29 S. Car. 113.

Effect of Knowledge or Silence on Necessity for Charge. — Mere knowledge on the part of a witness that the defendant committed the crime does not render such witness an accomplice so as to require corroboration of his testimony; and to require or warrant an instruction on accomplice testimony there must be some evidence of a witness's complicity in the crime for which the defendant is being tried. *Smith v. State*, 28 Tex. App. 315.

Where, on a murder trial, it appeared that certain eye-witnesses of the murder were foreigners who did not know the English language, and were several hundred miles away from their homes when the crime was committed, it was held that the mere fact that they remained silent as to the murder did not warrant an instruction on accomplice testimony. *O'Connor v. State*, 28 Tex. App. 288.

5. *Wagoner v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 896.

Refusal to Charge that No Presumption Arises from Silence of Accomplice, Error. — It is error to refuse to instruct that the refusal of alleged conspirators to testify when placed on the witness stand should not be considered by the jury in determining the question of guilt or innocence, and that the jury should not presume therefrom that the testimony, if given, would be against the defendants. *People v. Irwin*, 77 Cal. 494.

where the testimony of an accomplice is not corroborated.¹ But while this is true, it is very generally held that it is not ground of reversal for the court to neglect or refuse so to do,² although some courts have said that it is the duty of the trial judge to give such an instruction.³ The majority of the decisions take the view that the giving of such an instruction is a rule of practice merely and not of law.

(b) **Under Statutes Making Corroboration Necessary to Conviction.** — In some jurisdictions, as before stated, a conviction cannot be based upon the uncorroborated testimony of an accomplice, and it is, of course, proper so to instruct;⁴ and a refusal to give an instruc-

1. *Connecticut*. — *State v. Williamson*, 42 Conn. 263.

District of Columbia. — *U. S. v. Neverson*, 1 Mackey (D. C.) 154.

Illinois. — *Collins v. People*, 98 Ill. 584; *Schulz v. Schulz*, (Ill. 1892) 30 N. E. Rep. 317.

Louisiana. — *State v. Mason*, 38 La. Ann. 476.

Massachusetts. — *Com. v. Price*, 10 Gray (Mass.) 472, 71 Am. Dec. 668; *Com. v. Wilson*, 152 Mass. 12; *Com. v. Bosworth*, 22 Pick. (Mass.) 398; *Com. v. Bishop*, 165 Mass. 148.

Missouri. — *State v. Chyo Chiagk*, 92 Mo. 415.

New Jersey. — *State v. Hyer*, 39 N. J. L. 603.

Ohio. — *Allen v. State*, 10 Ohio St. 288.

Pennsylvania. — *Cox v. Com.*, 125 Pa. St. 94; *Walson v. Com.*, 95 Pa. St. 424.

South Carolina. — *State v. Green*, 48 S. Car. 136.

Vermont. — *State v. Potter*, 42 Vt. 495.

Wisconsin. — *Ingalls v. State*, 48 Wis. 647; *Mack v. State*, 48 Wis. 286; *Black v. State*, 59 Wis. 471.

Wyoming. — *McNealley v. State*, (Wyoming 1894) 36 Pac. Rep. 827.

United States. — *Steinham v. U. S.*, 2 Paine (U. S.) 180.

England. — *Rex v. Wilkes*, 7 C. & P. 272, 32 E. C. L. 507; *Reg. v. Stubbs*, 33 Eng. L. & Eq. 551.

Contra. — *People v. Jenness*, 5 Mich. 305.

Repetition of Instructions Unnecessary. — Where the charge of the court announces the law governing accomplice testimony, it is not error to refuse further special instructions on the subject. *Mercer v. State*, 17 Tex. App. 452.

2. *Com. v. Bishop*, 165 Mass. 148; *Com. v. Wilson*, 152 Mass. 12; *Cox v. Com.*, 125 Pa. St. 94; *State v. Potter*,

42 Vt. 495; *Black v. State*, 59 Wis. 471; *Allen v. State*, 10 Ohio St. 288; *Cheatam v. State*, 67 Miss. 335.

In *State v. Potter*, 42 Vt. 495, the judge failed to advise the jury to acquit the prisoner, against whom there stood as evidence only the uncorroborated testimony of an accomplice; and while the court disapproved of this, it said that the contrary, although generally regarded as the rule of practice, was merely a rule of practice and not of law, and that although it did not approve of the neglect of the court to give the customary caution, it could not treat such neglect as legal error.

3. *McNealley v. State*, (Wyoming 1894) 36 Pac. Rep. 827.

4. *Bernhard v. State*, 76 Ga. 613.

Defining Corroborating Testimony. — The charge need not define the term "corroborating testimony," as its meaning is plain and needs no definition. *Hozier v. State*, 6 Tex. App. 501.

What Corroboration Sufficient. — The following instruction has been approved: "The corroboration ought to be sufficient to satisfy the jury of the truth of the evidence of the accomplice. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks the truth in other parts as to which there may be no confirmation; but the corroboration ought to be as to some fact or facts connecting the prisoner with the offense, the truth or falsehood of which would go to prove or disprove the offense charged against the prisoner." *Jackson v. State*, 64 Ga. 345.

An instruction on the law of accomplice testimony should tell the jury that the corroboration of the testimony of the accomplice should go so far as to

tion to this effect,¹ or to charge that such testimony should be viewed with great caution and distrust,² has been held reversible error.

Whether or Not It Is Necessary So to Charge in the Absence of a Request is not so well settled. In some states it is necessary for the court to instruct as to the law governing the effect of accomplice testimony, whether or not any request for such instruction has been made.³

identify the person of the prisoner against whom the accomplice testified. *State v. Chyo Chiagk*, 92 Mo. 395; *State v. Pratt*, 98 Mo. 482.

So an instruction in regard to the testimony of an accomplice is faulty which fails to explain to the jury what is meant by the words "matters material to the issue," where the jury were told that, as to such matters, there must be corroboration. *State v. Chyo Chiagk*, 92 Mo. 395.

Declaration of Co-conspirator Made Before Trial.—Where the declarations of one conspirator not on trial, and made before trial, have been admitted in evidence, it is proper for the court to instruct the jury to disregard them unless the conspiracy is satisfactorily proved. *People v. Geiger*, 49 Cal. 643.

1. *Craft v. Com.*, 80 Ky. 349.

2. *People v. Bonney*, 98 Cal. 278; *People v. Strybe*, (Cal. 1894) 36 Pac. Rep. 3; *People v. Sternberg*, 111 Cal. 3, 11.

Code of Civil Procedure, § 2016, providing that the court shall instruct the jury in a criminal prosecution, "on all proper occasions," that "the testimony of an accomplice ought to be viewed with distrust," does not require the court to charge the jury with respect to matters of fact. *People v. Bonney*, 98 Cal. 278.

3. *Barrara v. State*, 42 Tex. 260; *Watson v. State*, 9 Tex. App. 237; *Hunnicut v. State*, 18 Tex. App. 522; *Boren v. State*, 23 Tex. App. 28; *Stone v. State*, 22 Tex. App. 185; *Anderson v. State*, 20 Tex. App. 312; *Martin v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 587; *Coburn v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 442; *Williams v. State*, 42 Tex. 392; *Stewart v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 766; *Owens v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 558; *Wicks v. State*, 28 Tex. App. 448; *Coffelt v. State*, 19 Tex. App. 436; *Sitterlee v. State*, 13 Tex. App. 587; *Freeman v. State*, 11 Tex. App. 92; *Conde v. State*, 33 Tex. Crim. Rep. 10; *Winn v. State*, 15 Tex.

App. 169; *Hines v. State*, 27 Tex. App. 104; *Miller v. State*, 4 Tex. App. 251; *Fuller v. State*, 19 Tex. App. 380; *Beach v. State*, 32 Tex. Crim. Rep. 240; *Ray v. State*, 1 Greene (Iowa) 324.

Unnecessary that Evidence Should Show Conclusively that Witness Is an Accomplice.—Although it is not conclusively shown that the witness was neither a principal, an accomplice, nor an accessory, if it does show a state of facts which tends strongly to prove that he was an accessory, and was endeavoring by his acts, declarations, and conduct after the homicide to screen and shield the defendant, and by assuming to be the guilty party himself, thereby enable the defendant to evade arrest or trial for the offense, the court should charge the law with regard to the necessity of corroboration. *Hunnicut v. State*, 18 Tex. App. 522. So one jointly indicted with a defendant on trial, and who testifies upon a condition that all prosecutions concerning the affair of which he is called to testify be dismissed, is considered an accomplice, and in such case the defendant is entitled to an instruction that the jury shall not convict upon the unsupported testimony of such accomplice; and it is so held although the defendant denies the fact of his guilt. *Barrara v. State*, 42 Tex. 260.

Evidence Sufficient to Warrant an Instruction as to Accomplice Testimony.—In a trial for attempting to produce an abortion, the female's father was a witness for the prosecution, and testified that the defendant informed him of his daughter's pregnancy, and suggested that he (the defendant) could give her a drug that would remove it, whereupon he (the witness) replied: "All right; anything to save my child." It was held that this evidence necessitated a proper instruction on the corroboration of his testimony required by the statute. *Watson v. State*, 9 Tex. App. 237.

What Charges as to Necessity for Corroboration Sufficient.—An instruction that the jury could not convict the de-

But in one state it has been held that a failure to charge that the defendant cannot be convicted upon the uncorroborated testimony of an accomplice is not erroneous, unless a request has been made therefor;¹ and in another that the court need not so charge without request, where the state does not rely wholly on the accomplice testimony to convict.²

(4) *Instructions as to Who Are Accomplices.* — The question as to whether or not a witness is an accomplice should in general be left to the jury.³ But where a witness is admitted to testify solely in the character of an accomplice, his guilt is a conceded fact, and the court may properly assume in charging that he is an accomplice.⁴ Even under these circumstances it is not error to submit the question to the jury, but great care should be taken to instruct clearly and fully as to what constitutes an accomplice.⁵

f. EXPERT WITNESSES — (1) *Weight to Be Given Testimony.* — In giving cautionary instructions as to the weight to be given to expert testimony, the court must be careful not to disparage such testimony, and on the other hand, nothing should be said to lead the jury to attach undue weight to it.⁶ The evidence of expert

fendant accused of receiving stolen goods upon the testimony of the thief, unless corroborated by other evidence, which, in itself, without the aid of the testimony of the thief, "tends to impute" to the defendant a knowledge that the goods were stolen, is not erroneous because of the expression "tends to impute," instead of "imputes." *People v. Ribolsi*, 89 Cal. 492. So it has been held that in charging on accomplice testimony it will be sufficient to charge in general terms as to the necessity of corroborating the evidence of an accomplice, where no instruction applying the law to the facts in the case is requested. *Lockhart v. State*, 29 Tex. App. 35.

1. *State v. Lawlor*, 28 Minn. 224.

2. *Robinson v. State*, 84 Ga. 674.

3. *People v. Sansome*, 98 Cal. 235; *People v. Curlee*, 53 Cal. 604.

If there is evidence which strongly tends to show that a witness is an accomplice, an instruction should be given as to the law governing accomplice testimony, and the question whether or not the witness is an accomplice be left to the jury. *Ballew v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 616.

Improper Assumption. — It is not proper for the court, in a criminal case, to designate the evidence of a witness who is not an acknowledged accomplice, and caution the jury against giv-

ing credence to it. *Rafferty v. People*, 72 Ill. 37.

4. *Barrara v. State*, 42 Tex. 260; *Zollicoffer v. State*, 16 Tex. App. 316.

"When the witness * * * only consents to testify on condition of exemption from prosecution, and is promised that exemption by the representatives of the state, with the consent of the court, we think he is treated as an accomplice by those authorities, and himself consents to assume that character, and must be so regarded by the court in its charge." *Barrara v. State*, 42 Tex. 264.

5. *Zollicoffer v. State*, 16 Tex. App. 312.

Explanatory Charges as to Who Are Accomplices. — A charge on the subject of accomplices should explain to the jury who are accomplices in the sense requiring corroboration. *Myers v. State*, 6 Tex. App. 1.

Instruction to Consider Dismissal of Indictment as to Accomplice. — Where the defendant and an accomplice are jointly indicted for murder, and the indictment against the accomplice is dismissed in order that he may testify for the state, it is error to charge the jury that this fact should not be taken into consideration in determining the credibility of the accomplice. *Gill v. State*, 59 Ark. 422.

6. See article EXPERT WITNESSES, vol. 8, p. 774.

witnesses is to be received and treated by the jury precisely as other testimony, and should be tested by the same general rules as the testimony of other witnesses in estimating its value, and such credit and weight should be given to it as the jury may deem it entitled to from all the circumstances, and no more.¹

(2) *Instructions Disparaging Testimony.* — Accordingly an instruction that expert testimony should be received and weighed with great caution,² or is usually of very little value,³ or that the opinion of experts is entitled to no weight, or to no greater weight than that of persons not allowed to give any opinion,⁴ or that the testimony of witnesses who had better opportunities for observation and acquisition of knowledge on the particular matter in issue is entitled to the greater weight,⁵ is erroneous.⁶

1. *Arkansas.* — *Williams v. State*, 50 Ark. 511.

Indiana. — *Humphries v. Johnson*, 20 Ind. 190; *Eggers v. Eggers*, 57 Ind. 461; *Cuneo v. Bessoni*, 63 Ind. 524.

Kansas. — *Ball v. Hardesty*, 38 Kan. 542; *Atchison, etc., R. Co. v. Thul*, 32 Kan. 255.

Michigan. — *People v. Seaman*, (Mich. 1895) 65 N. W. Rep. 209; *Rivard v. Rivard*, (Mich. 1896) 66 N. W. Rep. 681; *People v. Vanderhoof*, 71 Mich. 158; *Turnbull v. Richardson*, 69 Mich. 400.

Mississippi. — *Louisville, etc., R. Co. v. Whitehead*, 71 Miss. 451.

Missouri. — *Hampton v. Massey*, 53 Mo. App. 501.

United States. — *Carter v. Baker*, 1 Sawy. (U. S.) 525.

"The evidence of expert witnesses is to be received and treated by the jury precisely as other testimony. Its value may be very great or it may be of little worth. It may be conclusive, or it may be not even persuasive. Its weight will be determined by the character, the capacity, the skill, the opportunities for observation and the state of mind of the experts themselves, as seen and heard and estimated by the jury, and, it should be added, by the nature of the case and all its developed facts." *Louisville, etc., R. Co. v. Whitehead*, 71 Miss. 451.

2. *Atchison, etc., R. Co. v. Thul*, 32 Kan. 255; *Louisville, etc., R. Co. v. Whitehead*, 71 Miss. 451; *People v. Seaman*, (Mich. 1895) 65 N. W. Rep. 208; *Kankakee, etc., R. Co. v. Horan*, 23 Ill. App. 259; *Weston v. Brown*, 30 Neb. 609.

3. *Eggers v. Eggers*, 57 Ind. 461. See also *Reichenbach v. Ruddach*, 127 Pa. St. 564.

Instruction that Opinion Evidence Entitled to Little Weight Properly Refused.

— It is, of course, proper to refuse an instruction that "the expert testimony in this case was uncertain and unreliable, and that but little weight should be given to it." *Rivard v. Rivard*, (Mich. 1896) 66 N. W. Rep. 681.

4. *Templeton v. People*, 3 Hun (N. Y.) 360.

5. *Mewes v. Crescent Pipe Line Co.*, 170 Pa. St. 369. Compare *Fulwider v. Ingels*, 87 Ind. 415.

6. **Expressing Doubt that Expert Testimony Will Aid Jury's Conclusions.** — In questions of insanity the knowledge and experience of medical experts is of great value, and where evidence has been given of their observation, experience, and skill, sufficient to enable them to form intelligent opinions, and they have testified to these opinions, it is error to charge the jury as follows: "We question very much whether you will realize much, if any, valuable aid from them in coming to a correct conclusion as regards the responsibility for crime by this prisoner." *Pannell v. Com.*, 86 Pa. St. 260.

Stating that Experts Can Be Employed to Swear on Both Sides of Any Question is prejudicial error. *People v. Webster*, 59 Hun (N. Y.) 398.

Contrasting Expert Testimony with Textbook Statements. — For the judge to say that a book on farriery which had been read by counsel was entitled to as much authority as a witness who had been examined as an expert in the science of diseases of horses, was a clear violation of the statute forbidding an expression of opinion on the facts. *Melvin v. Easley*, 1 Jones L. (N. Car.) 386.

(3) *Instructions Giving Undue Weight to Testimony.* — On the other hand it is error to charge that the testimony of experts is supposed to be the best that can be furnished,¹ or that their opinions on questions involving science and skill are authoritative, and that in all doubtful cases in which such questions are involved such opinions should control the jury;² or to give an instruction assuming that the testimony of one party's expert witnesses³ is conclusive; or to give a charge which gives too much prominence to the mere skill of the expert, leaving out of view his credibility,⁴ or which gives too much prominence to the mere

Testamentary Capacity — Instructing that Opinion of Testator's Neighbors Was More Weighty than Expert Opinion. —

An instruction that in regard to testamentary capacity the opinions of the testator's neighbors, if they were persons of good common sense, were entitled to more weight than that of expert witnesses, is erroneous. *Taylor v. Cox*, 153 Ill. 220.

That Evidence of Eye-Witness Weightier than Expert Opinion Proper. —

In *Bruner v. Wade*, 84 Iowa 698, it was held that where the witness testified that he saw the defendant sign the note, it was not error to instruct that expert testimony as to the handwriting should not overcome the testimony of a credible witness who testified from personal knowledge. So in *Buxly v. Buxton*, 92 N. Car. 479, it was held proper for the judge to tell the jury that the evidence that the intestate had seen the bond, and admitted that he had executed it, if believed by the jury to be true, was entitled to more weight than the opinions of expert witnesses as to the genuineness of the signature, and that such opinions should be received with caution.

1. *Kansas City, etc., R. Co. v. Ryan*, 49 Kan. 1. Compare *Tinney v. New Jersey Steamboat Co.*, 12 Abb. Pr. N. S. (N. Y. Supreme Ct.) 3, where it was held error to refuse the following instruction: "Considering the extraordinary character of the injuries alleged in this case, and the great difficulty attendant upon their proper investigation, great weight should be given by the jury to the opinion of scientific witnesses accustomed to investigate the causes and effect of injuries to the eye, and a distinction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes, and who are acquainted with the most recent discoveries of science and most

approved methods of treatment and investigation."

2. *Humphries v. Johnson*, 20 Ind. 190. See also *Anthony v. Stinson*, 4 Kan. 211, where it was held error for the court to charge that "such testimony [evidence of experts as to personal services] is the guide of the jury in finding the amount justly due, and in this case you must take the testimony of these witnesses and be governed by it."

That the Law Attaches Peculiar Importance to Expert Testimony. — An instruction that the law attaches peculiar importance to the opinion of medical men who have the opportunity of observation upon a question of mental capacity is not an invasion of the province of the jury. *Flynt v. Bodenhamer*, 80 N. Car. 205. See also *State v. Owen*, 72 N. Car. 605.

Contrasting Opinions of Experts. — In an action where the testator's mental capacity to make a will was involved, a charge that the opinion of experts who had treated him was entitled to more weight than the opinions of other experts based on hypothetical questions was properly refused. *Bever v. Spangler*, 93 Iowa 576.

3. *Fox v. Peninsular White Lead, etc., Works*, 84 Mich. 676.

A charge that experts testifying in the defendant's behalf were, by reason of their employment, entitled to little credit, and that the testimony of experts testifying for the state was entitled to greater weight, was erroneous. *Persons v. State*, 90 Tenn. 291.

4. *Blough v. Parry*, 144 Ind. 463. In this case the court charged that "in weighing such testimony it will be proper for you to consider the degree of learning and skill possessed by such witnesses; their capacity to determine, as experts in that branch of knowledge, the probable or actual condition of the

experience of the expert, leaving out his opportunities, his aptitude, his skill, and other possible qualifications.¹

Application of Same Rules as with Other Evidence. — It has, however, been held proper to charge that the opinions of medical experts should be considered in connection with all the other evidence, but that the jury are not bound to act upon them to the entire exclusion of other evidence; that the jury should apply the same general rules to the testimony of experts that are applicable to the testimony of other witnesses in determining its weight; that taking into consideration the opinions of experts, and giving them just weight, the jury should determine the matter in issue for themselves.²

(4) *Other Instructions.* — It is proper to instruct that the jury should not take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true.³ In the absence of a request, it is not error to

testator's mind from the facts submitted."

1. *Cuneo v. Bessoni*, 63 Ind. 524.

Error Cured by Subsequent Instructions.

— "Although the preponderance of the evidence is not always determined by the number of witnesses, still, in a case where a question is to be determined by the testimony of men of great scientific attainments, other things being equal, the greater number would carry greater weight; that is, the testimony of eight or nine such witnesses would be entitled to greater weight than that of two. * * * But in this case it is your province to give such weight to the testimony of the experts, when viewed in connection with all the other evidence in the case, as you think and believe it should receive." This charge was held not to have been erroneous. *Spensley v. Lancashire Ins. Co.*, 62 Wis. 443.

Where the Subject under Consideration Is Not One of General Knowledge and Observation, but one of science, upon which no witness not specially qualified as an expert can testify, it is error to instruct that in determining the issue the jury may infer what was the fact from the evidence of the experts, or from such personal knowledge as they may have in relation to matters of this kind. *Douglass v. Trask*, 77 Me. 36.

2. *Epps v. State*, 102 Ind. 539. See also *Guetic v. State*, 66 Ind. 107, where the following charge was approved: "The opinions of medical experts are to be considered by you in connection with all the other evidence in the case;

but you are not bound to act upon them to the entire exclusion of other testimony. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was or was not of sound mind, yielding him the benefit of a reasonable doubt, if such arises from the evidence." An instruction in this identical language was given in *Goodwin v. State*, 96 Ind. 550, and while it was upheld, the court said that it did not regard it as a model worthy of imitation.

3. *Guetic v. State*, 66 Ind. 107; *Goodwin v. State*, 96 Ind. 550.

"You are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine what, if any, are not true. Should you find from the evidence that some of the material statements therein contained are not correct, and that they are of such a character as to entirely destroy the reliability of opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine, from all the evidence, what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. I need hardly remind you (for it will suggest itself to your own minds) that an opinion based upon an hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as

call special attention to the testimony of experts.¹

g. ADMISSIONS AND CONFESSIONS — (1) *Instructions as to Admissions of Record*. — Either party has a right to an instruction which shall tell the jury what facts are admitted of record.²

(2) *View that Court Should Not Caution Against*. — In regard to instructions as to verbal admissions and confessions, there is much conflict of authority, but the weight of authority, it is believed, is to the effect that the trial court should not make any statement which will tend to disparage the value of such evidence. Accordingly it has been held erroneous to charge in substance or effect the rule laid down by Greenleaf expressing the necessity for caution as to evidence of admissions of parties, and the reason for such caution.³ The view taken by these decisions is that the statements made by Mr. Greenleaf are to be regarded as matters

to impair the value of the opinion, is of little or no weight. Upon the matters stated in these hypothetical questions, and which are involved in this investigation, you are to give the defendant the benefit of all reasonable doubt, if any there should be; and where there is a reasonable doubt as to the truth of any one of the material facts stated, resolve it in the defendant's favor." Form of instruction approved in *Gueting v. State*, 66 Ind. 107.

1. *Atlanta v. Champe*, 66 Ga. 660.

2. *Evans v. Foreman*, 60 Mo. 449.

Admissions of Counsel. — It is no error in the court to inform the jury, where such is the fact, that counsel on both sides admit the truth of the statement. *Bond v. State*, 23 Ohio St. 349.

3. *Arkansas*. — *Shinn v. Tucker*, 37 Ark. 580.

California. — *Kauffman v. Maier*, 94 Cal. 269.

Illinois. — *Mauro v. Platt*, 62 Ill. 450; *Frizell v. Cole*, 29 Ill. 465.

Indiana. — *Newman v. Hazelrigg*, 96 Ind. 73; *Garfield v. State*, 74 Ind. 60; *Zenor v. Johnson*, 107 Ind. 70; *Morris v. State*, 101 Ind. 560; *Tobin v. Young*, 124 Ind. 507; *Davis v. Hardy*, 76 Ind. 278; *Finch v. Bergins*, 89 Ind. 362; *Lewis v. Christie*, 99 Ind. 382; *Shorb v. Kinzie*, 100 Ind. 430; *Unruh v. State*, 105 Ind. 121.

Mississippi. — *Ellis v. State*, 65 Miss. 44; *Johnson v. Stone*, 69 Miss. 826.

Montana. — *Wastl v. Montana Union R. Co.*, 17 Mont. 213; *Knowles v. Nixon*, 17 Mont. 473.

Texas. — *Castleman v. Sherry*, 42 Tex. 59; *Harris v. State*, 1 Tex. App. 75; *Collins v. State*, 20 Tex. App. 420.

Washington. — *White v. Territory*, 3 Wash. Ter. 397.

Instances of Instructions Held Erroneous. — That evidence of the admissions of a party is dangerous and liable to abuse. *Castleman v. Sherry*, 42 Tex. 59. That evidence of admissions should be received with great care, caution and allowance; that the jury should judge of the weight to be given to proof of this character; that much depends upon the accuracy of the memory of the witness, and the circumstances under which the admissions were made. *Frizell v. Cole*, 29 Ill. 465. That admissions of a party should be received with great caution, because a witness may not have correctly understood them or may not have correctly remembered and repeated them. *Zenor v. Johnson*, 107 Ind. 69. That an admission is a weak kind of evidence. *Mauro v. Platt*, 62 Ill. 450. That evidence of oral admissions should be scrutinized closely, because of the possibility that the party might not have expressed himself clearly, and that the witness might not hear or repeat correctly. *Newman v. Hazelrigg*, 96 Ind. 73; *Garfield v. State*, 74 Ind. 60. Or that as a general rule the statement of a witness as to verbal admissions should be received with caution, because that kind of evidence is subject to much imperfection and mistake. *Knowles v. Nixon*, 17 Mont. 473; *Wastl v. Montana Union R. Co.*, 17 Mont. 213; *Kauffman v. Maier*, 94 Cal. 269. That admissions if fully and deliberately made to a disinterested person are of weight, but that casual declarations made in idle conversation do not deserve much consideration. *Johnson v. Stone*, 69 Miss. 826.

of argument rather than rules of evidence having the force of law;¹ that while it is a matter of common knowledge that such evidence is liable to be erroneous, and for that reason it should be received with caution, yet such conclusion is only an inference of fact which must be made by the jury and not a presumption or a conclusion of law to be declared by the court.² It has been held, however, in a state where this view is taken, that it is proper to instruct that evidence of admissions may be subject to much imperfection and mistake.³

Criminal Cases. — Of course any statement by the trial court by way of disparagement of confessions and admissions in criminal cases, being in favor of the defendant, would not be a subject of appellate review, as the state is not entitled to an appeal or writ of error, but a request for an instruction that confessions should be received with caution should be refused.⁴

(3) *View that Court May Caution Against.* — On the other hand, it has been held in some jurisdictions that the court may caution the jury against evidence of verbal admissions and state

1. *Castleman v. Sherry*, 42 Tex. 59; *Davis v. Hardy*, 76 Ind. 272; *Garfield v. State*, 74 Ind. 60.

2. *Kauffman v. Maier*, 94 Cal. 269.

"The reasons which are to be urged in favor of receiving such statements with caution are based upon human experience, and vary in strength and conclusiveness with the facts and circumstances of each case, and their sufficiency in any particular case is an inference which the reason of the jury makes from those facts and circumstances; but there is no rule of law which directs the jury to invariably make such an inference from the mere fact that the proof of the admission is by oral testimony. That deduction, called a presumption, which the law expressly directs to be made from particular facts, is uniform, and not dependent upon the varying conditions and circumstances of individual cases. To weigh the evidence and find the facts in any case is the province of the jury, and that province is invaded by the court whenever it instructs them that any particular evidence which has been laid before them is or is not entitled to receive weight or consideration from them." *Kauffman v. Maier*, 94 Cal. 269.

"It is not every statement of the law found in a text-book or opinion of a judge, however well and accurately put, which can properly be embodied in an instruction. * * * The instruction under consideration does not

contain a single proposition of law, but only declarations of supposed facts, which common experience has perhaps established as true. The teachings of experience on questions of fact are not, however, doctrines of law, which may be announced as such from the bench. * * * They may well enter into the arguments of attorneys, * * * but the jury, not the judge, is the arbiter of such contentions. * * * The most that the judge may do, under our practice, which leaves questions of fact entirely to the jury, is to direct the attention of the jurors to such propositions and leave them, in the light of their experience, to say what credit should be given to any testimony on account of its alleged doubtful character." *Garfield v. State*, 74 Ind. 60.

3. *Koerner v. State*, 98 Ind. 20.

4. *Collins v. State*, 20 Tex. App. 400; *Thuston v. State*, 18 Tex. App. 26.

Compare Mercer v. State, 17 Ga. 146. In this case the judge was asked, generally, by the prisoner's counsel, as the jury were about retiring, to charge them "as to confessions;" whereupon he gave them in charge the general principles on this subject, in which he stated that confessions, when freely and voluntarily made, were the highest kind of evidence; but in the course of his remarks also told them that they must weigh such confessions as any other testimony. It was held that this charge, under the circumstances, was sufficiently correct.

the reasons therefor.¹ These decisions give Greenleaf's statement as to this class of evidence the effect of a rule of law.²

(4) *Instructions Giving Undue Weight to.* — The weight of authority is also against the propriety of instructing that, under certain circumstances, confessions³ or admissions⁴ are strong evidence, the view being taken that the statements of text-writers

1. *Allen v. Kirk*, 81 Iowa 658; *Martin v. Algona*, 40 Iowa 392; *Stewart v. De Loach*, 86 Ga. 729; *Nash v. Hoxie*, 59 Wis. 384; *Dreher v. Fitchburg*, 22 Wis. 680; *Tozer v. Hershey*, 15 Minn. 257; *Botts v. Williams*, 17 B. Mon. (Ky.) 697. See also *Higgs v. Wilson*, 3 Metc. (Ky.) 338; *Com. v. McCann*, 97 Mass. 580. In this case the trial court instructed that "a free and voluntary confession by a defendant * * * is a kind of evidence peculiarly liable to mistake, and is to be received with caution, and scrutinized with care;" but that if, on the whole evidence, including that of the alleged confessions, they were convinced beyond a reasonable doubt of the defendant's guilt, their verdict should be that he was guilty. No exception was taken to this instruction, and the reviewing court affirmed the judgment.

That Admissions Are "the Weakest Kind of Evidence." — "It is further claimed that the court erred in telling the jury that admissions of a party were 'the weakest kind of evidence that could be produced.' But this language is not materially different from that generally used in elementary works and by courts, in regard to this class of evidence. Greenleaf, in his work on Evidence, vol. 1, § 200, says it should be 'received with great caution,' and that it is 'subject to much imperfection and mistake.' Judge Redfield, in his edition of that work, in continuation of the same paragraph, after alluding to the various reasons which create a probability of error in this kind of evidence, says: 'We must conclude there is no substantial reliance upon this class of testimony.' It has often been characterized as the 'most unsatisfactory,' 'the most dangerous,' of all evidence. And it does not seem materially different to say it is the 'weakest kind of evidence.' This does not imply that an admission deliberately made, and clearly proved beyond mistake, would not have very great inherent force as evidence. But the weakness of this testimony consists in the uncertainty

and liability to mistake on these preliminary questions." *Dreher v. Fitchburg*, 22 Wis. 680.

2. **The Rule in North Carolina.** — In this state it has been held not erroneous to refuse to charge that admissions are to be received with caution; the court may so charge or not, and in the exercise of a wise discretion should be guided by the circumstances of each particular case. *State v. Hardee*, 83 N. Car. 619.

South Carolina. — It has been held not erroneous for the court, after referring to Greenleaf's statement, to charge that the reasons stated therein constitute a strong argument, but that the jury are to determine the weight of the evidence according to their own views, and that Greenleaf's argument may or may not be adopted by the jury in passing upon the facts of the case. *Moore v. Dickinson*, 39 S. Car. 441.

3. *Morrison v. State*, 41 Tex. 516; *Ledbetter v. State*, 21 Tex. App. 344; *Harris v. State*, 1 Tex. App. 79; *Hogsett v. State*, 40 Miss. 522; *Brown v. State*, 32 Miss. 443.

Instances. — Thus it has been held error to instruct that "confessions made by a prisoner charged with an offense, when made voluntarily, and not obtained by force, fraud, or threats, are regarded by the law as the highest and most satisfactory character of proof," *Brown v. State*, 32 Miss. 433; or that "voluntary confessions * * * are to be regarded as the strongest proofs in the law," *Morrison v. State*, 41 Tex. 516; or that a confession is of the most weighty nature in law *Ledbetter v. State*, 21 Tex. App. 344.

4. *Westbrook v. Howell*, 34 Ill. App. 571; *Baker v. Kelly*, 41 Miss. 696. *Contra*, *Buford v. McGetchie*, 60 Iowa 298.

That Admissions Are to Be Taken as True. — That the admissions of the defendant against himself are to be taken as true is a charge on the weight of the evidence. *Grant v. State*, 2 Tex. App. 164. To the same effect see *Ephland v. Missouri Pac. R. Co.*, 57 Mo. App. 147,

on this subject are to be regarded as persuasive rather than as authoritative rules of law.¹

(5) *Miscellaneous.* — It is improper for the court to characterize a statement as a confession,² or admission,³ when it is not; or to assume that the defendant has made an admission when such is not the case;⁴ or to intimate an opinion as to whether an admission was made seriously or not.⁵ The court may properly refuse to give in charge a request for instructions on the subject of confessions which finds no support in the evidence.⁶

On a Trial of Two or More defendants under a joint indictment it is proper,⁷ and, it would seem, even necessary, especially when requested,⁸ to point out to the jury that admissions of one defendant not made in the presence of the other are only evidence against him who made them.⁹

If the Evidence Presents Two Theories, under one of which the confession is admissible and under the other not, a refusal to charge that the confession should be disregarded if the jury believe the theory under which it was inadmissible is erroneous.¹⁰

A Failure to Charge in relation to confessions will not, in general, be ground for reversal.¹¹

where it was held error to instruct that testimony against interest is to be taken as true.

Implying that Silence May Be a "Confession of Guilt." — Evidence of admissions to be implied from silence should always be received with great caution, and should be weighed by the jury very carefully, if not distrustingly; and although the evidence in this case was properly received, a charge instructing the jury that "the fact that the person who is charged with the commission of a crime says nothing, but remains silent, is a circumstance to which the jury may look as a confession of guilt," was calculated to mislead them, and is a reversible error. *Campbell v. State*, 55 Ala. 80.

Covered by Instructions Already Given. — Where the court has instructed as to the declarations of the accused as a part of the *res gestæ*, and no objection is made, the court may properly refuse to give in charge the section of the Georgia Code (section 3792) providing that admissions and confessions should be received with caution, and that a conviction cannot be based on an uncorroborated confession. *Artemus v. State*, 79 Ga. 512.

1. See *Harris v. State*, 1 Tex. App. 79.

2. *Hogan v. State*, 46 Miss. 274.

3. *Evans v. State*, (Miss. 1888) 4 So. Rep. 344.

4. *Andrews v. State*, 21 Fla. 598.

5. *People v. Brow*, 90 Hun (N. Y.) 509.

6. *Gentry v. State*, 24 Tex. App. 80.

Instances. — Thus if there is other evidence against a prisoner besides his confessions, the court may properly refuse to charge that uncorroborated confessions will not warrant a conviction. *Com. v. Tarr*, 4 Allen (Mass.) 315; *Com. v. McCann*, 97 Mass. 580; *State v. Walker*, 98 Mo. 95; *Young v. State*, 68 Ala. 570.

7. *State v. Talbott*, 73 Mo. 348.

8. *State v. Oxendine*, 107 N. Car. 783.

9. Statement of Abstract Proposition Insufficient. — It has been held that a mere general statement of this rule will not suffice; that the court must direct the attention of the jury to the specific statement or admission, and caution them against giving it any weight when determining the guilt or innocence of the defendant, who is not bound by it. *State v. Oxendine*, 107 N. Car. 783.

10. *Sparks v. State*, 34 Tex. Crim. Rep. 86.

11. *Bernhardt v. State*, 82 Wis. 23. In this case a failure to instruct as to the effect of a confession was held not erroneous where the confession was undisputed and there was no request for special instructions.

State v. Brooks, 92 Mo. 542, where it was held that a failure to instruct that

h. INSTRUCTIONS ON THE MAXIM "FALSUS IN UNO, FALSUS IN OMNIBUS" — (1) *Propriety of Instructing as to This Maxim.* — It is competent for the court to give instructions as to the maxim *falsus in uno, falsus in omnibus*, as applied to the testimony of a witness who has wilfully and knowingly sworn falsely.

(2) *Instructing that Jury "May" Disregard Evidence Proper.* — Thus it is always proper to instruct that if the jury find that any witness has knowingly and wilfully testified falsely as to any material fact in controversy on the trial they are at liberty to reject all or any part of his testimony,¹ but that they are not bound to do so, but may give it such weight as they think it is entitled to.² In giving this instruction the court should not single out any particular witness and tell the jury to disregard his testimony if they think he has testified falsely in one particular.³ The maxim is not a conclusive presumption of law, but only an advisory suggestion which warns the jury to receive the testimony of such witness with caution, and warrants them in rejecting it altogether.⁴

a conviction could not be based upon an extrajudicial confession alone, but that the jury must look for corroboration as to the *corpus delicti* in the other evidence, was not erroneous; but in *Paris v. State*, 35 Tex. Crim. Rep. 82, it was held that a failure to charge the jury to disregard a confession if they believed that it was not voluntary, was erroneous, the defendant having testified that it was not voluntary.

1. *California.* — *People v. Strong*, 30 Cal. 151.

Colorado. — *Minich v. People*, 8 Colo. 452.

Illinois. — *East St. Louis Connecting R. Co. v. Allen*, 54 Ill. App. 32; *Dean v. Blackwell*, 18 Ill. 336.

Michigan. — *Fraser v. Haggerty*, 86 Mich. 521.

Missouri. — *Seligman v. Rogers*, 113 Mo. 642; *Paulette v. Brown*, 40 Mo. 53; *State v. Vansant*, 80 Mo. 71; *Britton v. St. Louis*, 120 Mo. 437; *State v. Mounce*, 106 Mo. 226; *State v. Hickam*, 95 Mo. 332; *State v. Thomas*, 78 Mo. 341; *Kelly v. U. S. Express Co.*, 45 Mo. 428; *Gerdes v. Christopher, etc., Architectural Iron, etc., Co.*, (Mo. 1894) 27 S. W. Rep. 615; *McFadin v. Catron*, 120 Mo. 252; *Londener v. Lichtenheim*, 11 Mo. App. 385; *State v. Gee*, 85 Mo. 647; *State v. Duncan*, 116 Mo. 288; *State v. Meagher*, 49 Mo. App. 589; *Millar v. Madison Car Co.*, 130 Mo. 517; *State v. Stout*, 31 Mo. 406; *Cameron v. Hart*, 57 Mo. App. 142; *Gillett v. Wimer*, 23 Mo. 77.

Nebraska. — *Atkins v. Gladwish*, 27 Neb. 841.

New York. — *Barrelle v. Pennsylvania R. Co.*, (Supreme Ct.) 4 N. Y. Supp. 127; *Reilly v. Third Ave. R. Co.*, 16 Misc. Rep. (N. Y. Supreme Ct.) 11.

Ohio. — *Mead v. McGraw*, 19 Ohio St. 61.

West Virginia. — *State v. Thompson*, 21 W. Va. 746; *State v. Perry*, 41 W. Va. 641.

Violation of Rule, When Harmless. — An instruction that "the rule of law is that where a witness is false in one particular, he is false in all," when limited by the preceding statement that the jury should compare the witnesses one with the other, to see if there were any contradictions and to see if the witness was unreliable, in which event his testimony should have no weight, was held harmless error. *State v. Littlejohn*, 33 S. Car. 599, 11 S. E. Rep. 638.

2. *State v. Meagher*, 49 Mo. App. 589; *State v. Thompson*, 21 W. Va. 746; *State v. Shelledy*, 8 Iowa 489.

3. *State v. Stout*, 31 Mo. 406; *State v. Cushing*, 29 Mo. 215; *State v. Kellerman*, 14 Kan. 135.

4. *Finley v. Hunt*, 56 Miss. 221.

The maxim is, in a common-law trial, to be applied by the jury according to their own judgment for the ascertainment of the truth, and is not a rule of law in virtue of which the judge may withdraw the evidence from their consideration, or direct them to disregard

(3) *Instructing that Jury "Should" Disregard Evidence Improper.* — Although there are some decisions to the contrary (most of which have been expressly overruled),¹ it is now well settled that it is erroneous to instruct the jury that if a witness has wilfully and knowingly sworn falsely to any material fact in controversy, they "should" disregard all his testimony.²

it altogether. *State v. Williams*, 2 Jones L. (N. Car.) 257.

The credibility of the witness who has knowingly and wilfully testified falsely is exclusively for the jury, and there is no rule of law which prevents their giving credit to such a witness if they, in fact, do believe him. *Fisher v. People*, 20 Mich. 135.

1. *Campbell v. State*, 3 Kan. 488; *Hale v. Rawallie*, 8 Kan. 136; *State v. Kellerman*, 14 Kan. 135; *Gannon v. Stevens*, 13 Kan. 461; *State v. Horne*, 9 Kan. 131; *Dunlop v. Patterson*, 5 Cow. (N. Y.) 243; *Hargraves v. Miller*, 16 Ohio 338; *Stoffer v. State*, 15 Ohio St. 47; *State v. Jim*, 1 Dev. L. (N. Car.) 508; *Day v. Crawford*, 13 Ga. 513.

See following note for decisions overruling the decisions here cited.

2. *Alabama.* — *Lowe v. State*, 88 Ala. 8.

California. — *People v. Strong*, 30 Cal. 156; *People v. Sprague*, 53 Cal. 404; *People v. Treadwell*, 69 Cal. 226; *People v. Oldham*, 111 Cal. 648.

Illinois. — *Crabtree v. Hagenbaugh*, 25 Ill. 233; *Blanchard v. Pratt*, 37 Ill. 243; *Meixsell v. Williamson*, 35 Ill. 529; *Reynolds v. Greenbaum*, 80 Ill. 416.

Iowa. — *McCraney v. Crandall*, 1 Iowa 117.

Kansas. — *State v. Potter*, 16 Kan. 80; *Garvin v. Jennerson*, 20 Kan. 372; *Greer v. Higgins*, 20 Kan. 425; *Shellabarger v. Nafus*, 15 Kan. 547 (*overruling* earlier Kansas decisions to the contrary); *Atchison, etc., R. Co. v. Retford*, 18 Kan. 245; *Higbee v. McMillan*, 18 Kan. 133.

Kentucky. — *Letton v. Young*, 2 Metc. (Ky.) 558; *Hall v. Renfro*, 3 Metc. (Ky.) 51.

Maine. — *Lewis v. Hodgdon*, 17 Me. 273.

Michigan. — *Knowles v. People*, 15 Mich. 408; *Fisher v. People*, 20 Mich. 135.

Mississippi. — *Finley v. Hunt*, 56 Miss. 221.

Missouri. — *State v. Cushing*, 29 Mo. 215; *State v. Stout*, 31 Mo. 406.

New Hampshire. — *Senter v. Carr*, 15 N. H. 351.

New York. — *Dunn v. People*, 29 N. Y. 523.

Ohio. — *Mead v. McGraw*, 19 Ohio St. 61, *overruling Stoffer v. State*, 15 Ohio St. 47.

Wisconsin. — *Mercer v. Wright*, 3 Wis. 645.

"It is true, as a general rule, that when a witness deliberately and knowingly swears falsely in regard to one material fact, the jury are not bound to believe him in any of his statements, unless he is corroborated. But it is wrong to say that the jury are not at liberty to believe him. The maxim *falsus in uno, falsus in omnibus*, does not operate to preclude the jury from believing the witness if they choose to do so. The jury may believe any competent witness, though in many instances they ought not. A jury ought not to convict upon the testimony of an accomplice uncorroborated, but all now agree that they may do so. It would have been correct for the court to give the jury general rules by which the credibility of the witnesses is to be judged, but it was not correct to tell them that they were not at liberty to believe the witness." *Mercer v. Wright*, 3 Wis. 645.

Reason for Rule. — Whether the jury should disregard the whole of the testimony of a witness in such a case is a matter resting entirely with them. They are the exclusive judges of the credibility of the witnesses, and the weight of their testimony. They may wholly disregard the testimony of any witness if, from the evidence before them, they consider such witness as wholly unworthy of credit. Or they may disregard a portion of the testimony of any witness, and give to every other portion full faith, credit, and consideration. Or they may give to one portion of the testimony of any witness greater weight and credit than they give to some other portion of such testimony. The jury ought to be allowed to weigh every portion of the testimony of every witness, and to give each portion of the testimony just such consideration as it is entitled to, considering

(4) *Instructing that Jury "May" or "Should" Disregard Evidence unless Corroborated.* — According to some authorities it is not error for the court to charge that if a witness has wilfully sworn falsely to any material fact, they "should" give no weight to such testimony unless corroborated.¹ According to other decisions such an instruction is erroneous,² and on principle these decisions are clearly correct. So, in some jurisdictions, it has been held proper to instruct that the jury "may" disregard the testimony of a witness who has knowingly sworn falsely to a material matter, unless his testimony be corroborated;³ and an

all the facts and circumstances of the case. It is within the common experience of all men that the different portions of the testimony of the same witness may differ vastly in value. A witness may, under great temptations, and in some isolated case, swear falsely, and yet, where the temptation is removed, where there is nothing to operate on his hopes and fears, his passions and prejudices, where he has no interest in the matter except to tell the truth, his testimony may be of great value. And this being so, no inflexible rule of law should be interposed between the witness and the jury, commanding the jury to take all, or to exclude all, of his testimony. *Shellabarger v. Nafus*, 15 Kan. 547.

Effect of Failure to Object. — Although it is error to instruct that "if any witness has wilfully testified falsely as to any material fact in the case, then the jury should disregard all the testimony of such witness," still, if the defendant does not object or except to the giving of such instruction he thereby waives any error committed by the court in giving it. *State v. Potter*, 16 Kan. 99.

Instances of Instructions Held Erroneous. — It is error to instruct the jury that "if they believe any witness has sworn falsely and knowingly as to any material fact, they are bound to disregard his testimony altogether." *Letton v. Young*, 2 Metc. (Ky.) 559. So it is erroneous to instruct that "if you believe from the evidence that any witness has knowingly and wilfully testified falsely to any material fact, you should totally disregard all the testimony of any such witness." *Higbee v. McMillan*, 18 Kan. 133. So, also, an instruction that the jury may disregard the evidence of a witness entirely if they believe he has wilfully testified falsely to any material fact, that it is a matter resting entirely in their discre-

tion, but that it is the jurors' duty, as a matter of law, to reject such testimony, is error. *People v. Oldham*, 111 Cal. 648.

Instance of Instructions Held Not Erroneous Under This Rule. — It has been held not erroneous to charge that if the jury believe that the witness has knowingly sworn falsely to any fact, he is not entitled to be believed in reference to any other fact testified to by him. In sustaining this instruction the reviewing court said: "If this instruction were to be understood as forbidding the jury to give credit to any statements of the witness, although they might be satisfied of the truthfulness of some part of them, I should be inclined to doubt its correctness. * * * If the witness had committed perjury in his testimony, he was certainly not 'entitled to be believed' upon any doubtful question, and the instruction on this subject should be construed in connection with the previous expression that 'the jury were the judges of the credibility of the witnesses.'" *Roth v. Wells*, 29 N. Y. 492.

This instruction seems to be in direct violation of the rule. It is hard to see how it could be understood any other way than as forbidding the jury to give credit to any statements of the witness if they believed he had knowingly sworn falsely in reference to any fact.

1. *State v. McCartey*, 17 Minn. 76; *Ivey v. State*, 23 Ga. 576; *Fishel v. Lockard*, 52 Ga. 632; *Pierce v. State*, 53 Ga. 368; *Machette v. Wanless*, 2 Colo. 169; *Robertson v. Monroe*, 7 Ind. App. 470; *Bunce v. McMahon*, (Wyoming 1895) 42 Pac. Rep. 23.

2. *Senter v. Carr*, 15 N. H. 351; *Mercer v. Wright*, 3 Wis. 645; *Knowles v. People*, 15 Mich. 408. See also *F. Dohmen Co. v. Niagara F. Ins. Co.*, (Wis. 1897) 71 N. W. Rep. 69.

3. *Rider v. People*, 110 Ill. 13; *Beve-*

instruction that the jury may disregard the testimony of a witness who has wilfully sworn falsely to a material matter has been held erroneous for want of the qualifying words "unless corroborated."¹ But other decisions deny the correctness of this rule, and on the soundest reasons.² Such an instruction is no more than an explicit direction to disregard the testimony of the witness, and has been sanctioned by no authorities, ancient or modern.

(5) *Omitting Words "Knowingly" and "Wilfully" in Charging.* — As the false testimony of the witness must have been given knowingly and wilfully, and with intent to deceive, it is erroneous in instructing to omit the words "knowingly" or "wilfully."³

lot *v. Lestrade*, 153 Ill. 632; *Faulkner v. Territory*, 6 N. Mex. 464; *Walker v. Haggerty*, 30 Neb. 120. See also *Howard v. McDonald*, 46 Ill. 123, in which it was held that if there is no evidence in a case tending to corroborate a witness, it is not error for the court to instruct that if the jury believe that the witness has sworn falsely upon any material point, they have a right to disregard his entire testimony.

1. *Peak v. People*, 76 Ill. 289; *Meixsell v. Williamson*, 35 Ill. 529; *Crabtree v. Hagenbaugh*, 25 Ill. 233.

2. *Brown v. Hannibal, etc., R. Co.*, 66 Mo. 600; *Minich v. People*, 8 Colo. 452; *Wastl v. Montana Union R. Co.*, 17 Mont. 213.

The reasoning of the *Missouri* Supreme Court in support of this rule is as follows: "Is the jury not at liberty to disregard the testimony of one who has committed perjury in their presence, as to some fact testified to by him, because as to that or some other fact testified to by him he is corroborated? If the corroborative evidence establish the fact, they may find the fact on the corroborative evidence, but if the corroborative evidence is insufficient of itself to prove the fact, but in connection with the evidence of the false witness does prove it, is the jury bound to believe the evidence of the witness, and, because corroborated, find the fact as he testifies? This is not the law; the jury may or may not believe him; that is a matter for their determination, and we hold that it is true, as a legal proposition, that if a witness has wilfully sworn falsely as to a material fact, the jury are at liberty to disregard his entire testimony, notwithstanding he may have been corroborated as to that or any other fact to which he testified." *Brown v. Hannibal, etc., R. Co.*, 66 Mo. 599.

3. *Alabama*. — *Childs v. State*, 76 Ala. 93; *Grimes v. State*, 63 Ala. 166.

California. — *People v. Strong*, 30 Cal. 156.

Colorado. — *Gottlieb v. Hartman*, 3 Colo. 53; *Last Chance Min., etc., Co. v. Ames*, 23 Colo. 167.

Georgia. — *Skipper v. State*, 59 Ga. 63; *McLean v. Clark*, 47 Ga. 25.

Mississippi. — *White v. State*, 52 Miss. 216.

Missouri. — *State v. Elkins*, 63 Mo. 166; *Paulette v. Brown*, 40 Mo. 52; *Blitt v. Heinrich*, 33 Mo. App. 243; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *State v. Lett*, 85 Mo. 52; *State v. Brown*, 64 Mo. 367; *Fath v. Hake*, 16 Mo. App. 537; *Smith v. Wabash, etc., R. Co.*, 19 Mo. App. 120; *Evans v. St. Louis, etc., R. Co.*, 16 Mo. App. 522.

Nebraska. — *Kay v. Noll*, 20 Neb. 388.

New York. — *Jennings v. Kosmak*, 20 Misc. Rep. (N. Y. Supreme Ct.) 300.

But see *People v. Righetti*, 66 Cal. 185, where the court instructed that "if any witness has, in your judgment, sworn falsely in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted and acted upon without great caution." It was objected that the court should have used the words "wilfully false;" the reviewing court, however, held that the word "wilfully" did not change the effect of the language; that the word "false" is not the equivalent of "mistake," and therefore, "if a witness be believed to have sworn 'falsely,' he is believed to have sworn so wilfully." See also *People v. Sprague*, 53 Cal. 494. In this case the court modified a requested instruction by inserting the word "wilfully" before the word "false," and the reviewing court held that this was not error, taking the view that the word "wil-

The charge should not overlook the distinction between testimony which is false and testimony which is knowingly false.¹

(6) *Omitting Word "Material" in Charging.*—Nor is the maxim applicable unless the matters falsely sworn to are material. It is therefore error in instructing to omit the word "material."²

(7) *Necessity of Instructing as to This Maxim.*—According to some decisions it is within the sound discretion of the trial judge whether he shall instruct as to the maxim *falsus in uno, falsus in omnibus*,³ and the propriety of giving such instruction in any particular case must be left largely to the discretion and judgment of the trial court. But authorities are not wanting to the effect that it is reversible error to refuse such an instruction when it is warranted by the circumstances of the case.⁴

2. As to Conflict in Evidence.—Where the testimony of witnesses is irreconcilably conflicting, the court may properly explain to the jury the rules by which it should be weighed.⁵ It may caution

fully" did not change the effect of the instruction.

Instructing to Disbelieve if Witness Was Mistaken.—An instruction that if the jury believe that any of the witnesses swore falsely, or were mistaken, they are at liberty to disregard the whole or any part of such witness's testimony is erroneous. *State v. Elkins*, 63 Mo. 159.

1. *Skipper v. State*, 59 Ga. 63.

The jury has no right to disregard the entire testimony of a witness because he has innocently made a mistake upon any material point. *People v. Strong*, 30 Cal. 156.

Correcting Misstatements of Fact.—Where a witness on the stand misstates a fact, and afterwards, before finally leaving the stand, desires to make a correction of it and state the fact as he then remembers or understands it, he will always be allowed to do so, and in such case the maxim *falsus in uno, falsus in omnibus*, is not applicable. It applies only to cases where the facts indicate that the false statement is made deliberately and is adhered to by the witness. *Kay v. Noll*, 20 Neb. 388.

2. *Moresi v. Swift*, 15 Nev. 215; *Pierce v. State*, 53 Ga. 365; *McLean v. Clark*, 47 Ga. 25; *White v. State*, 52 Miss. 216; *Peak v. People*, 76 Ill. 289; *Coggins v. Chicago, etc., R. Co.*, 18 Ill. App. 620; *White v. Lowenberg*, 55 Mo. App. 69. Compare *People v. Ah Sing*, 95 Cal. 654, where it was held that an instruction to the effect that any witness whom the jury believed to have sworn falsely "as to any fact" was not vicious as failing

to restrict its effect to false testimony relating to material matter.

Instruction Held Not in Violation of Rule.—An instruction to the jury declared that if they believed any witness had wilfully sworn falsely as to any of the facts mentioned in the other instructions as bearing upon the claim sued on or the defenses thereto, they were at liberty to disregard entirely the testimony of such witness. It was held that the instruction authorized the jury to discredit only witnesses who had wilfully sworn falsely to material facts, and was proper. *Hart v. Hopson*, 52 Mo. App. 177.

3. *James v. Mickey*, 26 S. Car. 270; *State v. Banks*, 40 La. Ann. 736; *McCormick v. Monroe*, 64 Mo. App. 197; *Paddock v. Simes*, 51 Mo. App. 320. See also *State v. Hickam*, 95 Mo. 322, in which it was said that an instruction that if the jury believe from the evidence that any witness has knowingly testified falsely to any material fact, they may disregard the whole of his testimony, is not one which should be given as a matter of course in any case.

4. *Gillett v. Wimer*, 23 Mo. 77; *State v. Dwire*, 25 Mo. 553. See also *Ingalls v. State*, 48 Wis. 647.

No Evidence on Which to Predicate Charge.—Of course where there is no evidence on which such a charge could be predicated, it would be proper to refuse it, *State v. McDevitt*, 69 Iowa 552; *State v. Palmer*, 88 Mo. 568; and error to give it. *Kay v. Noll*, 20 Neb. 380; *White v. Maxcy*, 64 Mo. 552.

5. *Farley v. Ranck*, 3 W. & S. (Pa.)

the jury concerning the care to be used in considering the testimony,¹ and may properly instruct that if there is a conflict in the testimony the jury must reconcile it if possible, but if not, they may believe or disbelieve any witness or witnesses according as they may or may not think them entitled to credit.²

3. As to Number of Witnesses. — The court may charge that in summing up the testimony upon any given question the jury should not alone count witnesses; that this is not always the most satisfactory, nor is it the most certain method of reaching the truth.³ The preponderance of the evidence is not determined, in any case, solely by the number of witnesses, however credible they may be. Therefore it is error to instruct that the preponderance of the evidence is to be determined by the comparative number of witnesses of each party, if they are all of equal credibility.⁴ The vice in this instruction is that it ignores every condition except that of credibility, whereas there are other conditions

554; *Young v. State*, 2 Yerg. (Tenn.) 292; *McGhee v. Smith*, 6 Heisk. (Tenn.) 316.

Instructions on This Subject Held Improper. — In case of a conflict of evidence it is error to tell the jury that one of the witnesses has committed perjury. *State v. Thomas*, 7 Ired. L. (N. Car.) 381. But see *Critcher v. Hodges*, 68 N. Car. 22. Or to suggest that the case turns solely on the veracity of a particular witness. *Fullam v. Rose*, 160 Pa. St. 47. Or to assume that credit must be given to the witness thus supported by corroborating evidence. *Comstock v. Whitworth*, 75 Ind. 129. Or that the jury must take the testimony of a particular witness to be true. *State v. Parker*, 66 N. Car. 624. Or to instruct that where one witness testifies to a certain fact and is contradicted by another witness of equal credibility and means of knowledge, there is no preponderance of evidence. *De Land v. Dixon Nat. Bank*, 111 Ill. 323. Or that it is the duty of the jury to endeavor to reconcile the evidence with the defendant's innocence. *People v. Madden*, 76 Cal. 521.

1. *Johnson v. McKee*, 27 Mich. 471; *Blizzard v. Applegate*, 77 Ind. 516.

2. *Liverpool, etc., Ins. Co. v. Ende*, 65 Tex. 118. See also *Rideus v. State*, 41 Tex. 200, where the following instruction was approved: "Where there is an apparent conflict between the statements of different witnesses, the jury should, if they possibly can, reconcile the apparently conflicting statements; * * * but when the conflicting

statements cannot be reconciled, and they cannot stand together as the truth, the jury must decide who of the witnesses is entitled to the greater credibility."

3. *State v. Bohan*, 19 Kan. 35.

4. *Wastl v. Montana Union R. Co.*, 17 Mont. 213; *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 213; *Ely v. Tesch*, 17 Wis. 202; *Childs v. State*, 76 Ala. 93; *Salter v. Glenn*, 42 Ga. 64; *Amis v. Cameron*, 55 Ga. 449; *Christman v. Ray*, 42 Ill. App. 111.

Reason for Rule. — Such an instruction makes no difference between the relative weight of positive and negative testimony, and it takes no account of the possible fact that some of the witnesses may have had better facilities for knowing the facts than others, or remembered them more distinctly, *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 213; *State v. Bohan*, 19 Kan. 35. So, also, the jury should consider whether the witnesses were positive or uncertain and equivocating; their appearance and demeanor on the stand and their bias or interest in the suit. *State v. Bohan*, 19 Kan. 35.

Instances of Erroneous Instruction under This Rule. — A charge that if three named witnesses in a certain case "are of equal credibility and weight, and the two latter conflict with the former on the facts of the case, you may disregard the evidence of" the former, is properly refused. *Childs v. State*, 76 Ala. 93. So it is proper to refuse a charge in the following language: "If one witness swears to the

to be considered in framing a rule on that subject.¹ It has been held, however, that an instruction that, "other things being equal," the greater number of witnesses would carry greater weight is proper.²

4. As to Variance in Testimony of Witnesses. — It is erroneous to instruct the jury not to regard "mere slight variances" between the testimony of witnesses as affecting their credit.³

existence of a fact, and another witness, of equal credibility, swears that the fact is not true, then the fact is not proved unless there is other satisfactory proof of the fact." *Dorgan v. State*, 72 Ala. 174; and an instruction in a criminal case that the accused should be acquitted because there are the same number of witnesses on each side who are equally credible is erroneous and properly refused. *Armstrong v. State*, 83 Ala. 49.

Instance of Proper Instruction under This Rule. — A charge that in determining the preponderance of the evidence the jury shall, in connection with the number of the witnesses upon any proposition, "take into consideration their opportunity for seeing or knowing the things about which they testify, the probability or improbability of the truth of their several statements in view of all the other evidence, facts, and circumstances proved on the trial, and from all these considerations determine on which side is the weight or preponderance of the evidence," was held proper. *Robertson v. Monroe*, 7 Ind. App. 470.

Charge that in Case of Conflicting Testimony Plaintiff Must Fail. — Where the testimony of parties to a suit, each of whom is a witness in his own behalf, is conflicting, and neither is supported by other evidence, the jury must determine which is entitled to the greater credit; hence an instruction that "so far as that testimony so conflicts, the plaintiff must fail," is properly refused. *Kuehn v. Wilson*, 13 Wis. 104.

Similar Instructions Held Vicious. — The following instructions have also been held erroneous: The evidence is in equilibrium where the testimony of two witnesses is directly conflicting, unless the testimony of one or the other is corroborated. *Sickle v. Wolf*, 91 Wis. 396. Where two witnesses are equally entitled to belief, and their testimony is conflicting, the verdict must be for defendant. *Thomas v. Paul*, 87 Wis. 607; *Kelley v. Louisville, etc., R. Co.*,

49 Ill. App. 304; *Johnson v. People*, 140 Ill. 350, affirming 40 Ill. App. 382, and overruling *McFarland v. People*, 72 Ill. 368.

1. *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 213.

2. *Spensley v. Lancashire Ins. Co.*, 62 Wis. 453. In this case the court said: "By 'other things being equal' we understand the court to mean all things being equal in respect to each of such witnesses so testifying. This not only included the credibility of the respective witnesses, but their opportunities, capacities, attention, memory, and every other fact and circumstance in any way going to make up the weight of their testimony. It may be difficult to see just how all such things could be equal as to each of several witnesses; but what was said about giving the greater weight to the greater number is predicated wholly upon such equality in all things, and whether it did or did not exist was, after all, left to the jury."

Calling Attention to Number of Witnesses. — In case of a conflict in the evidence the court is not bound to call attention to the fact that the number of witnesses testifying to a fact is greater than the number of witnesses testifying to the contrary. *McIntosh v. McIntosh*, 79 Mich. 198.

3. *State v. Swayze*, 11 Oregon 360.

Such variances may, in many instances, be sufficient to enable the jury to determine the degree of credit to which each is entitled, and may answer the purpose equally as well as contradictions of a graver character. *State v. Swayze*, 11 Oregon 360.

Proper Form of Instruction as to Variances. — That partial variances in the testimony of different witnesses, on minute and collateral points, are of little importance unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention, or defect of memory; that it rarely happens that witnesses of the same transaction perfectly and entirely agree

5. As to Positive and Negative Testimony. — It is a rule of evidence that the testimony of a witness who speaks positively to a fact is entitled to more consideration than that of several witnesses whose statements are merely negative.¹ The propriety of instructing on this subject is, to say the least, questionable, and the weight of authority is probably against it, the view being taken that such instructions violate the rule against charging on the weight of the evidence (which undoubtedly they do, and an instruction stating this rule is, perhaps, open to the further objection that it is argumentative).² The cases clearly sustain the proposition that this is not a proper matter upon which to instruct the jury.³ Authority is not wanting, however, for the position that the court may properly give a cautionary instruction on this

on all points connected with it; that an entire and complete coincidence, in every particular, so far from strengthening their credit not unfrequently engenders a suspicion of practice and concert; and that upon determining upon the credence to be given by the jury to testimony, the real question must always be whether the points of variance and discrepancy be of so strong and decisive a nature as to render it impossible, or at least difficult, to attribute them to ordinary sources of such variances, viz., inattention or want of memory. *State v. Shelledy*, 8 Iowa 488.

1. 3 Greenleaf's Ev., § 375; *Kennedy v. Kennedy*, 2 Ala. 616; *State v. Chevallier*, 36 La. Ann. 83.

2. *Arkansas*. — *Keith v. State*, 49 Ark. 439.

Illinois. — *Louisville, etc., R. Co. v. Shires*, 108 Ill. 617; *Preston v. Moline Wagon Co.*, 44 Ill. App. 342; *Chicago, etc., R. Co. v. Dunleavy*, 129 Ill. 132, *affirming* 27 Ill. App. 438; *Atchison, etc., R. Co. v. Feehan*, 149 Ill. 202, *affirming* 47 Ill. App. 66; *Rockwood v. Poundstone*, 38 Ill. 201; *Chicago, etc., R. Co. v. Robinson*, 106 Ill. 145.

Indiana. — *Louisville, etc., R. Co. v. Stommel*, 126 Ind. 35; *Ohio, etc., R. Co. v. Buck*, 130 Ind. 300.

Missouri. — *Chubbuck v. Hannibal*, etc., R. Co., 77 Mo. 591.

Texas. — *Haskew v. State*, 7 Tex. App. 107; *Sparks v. Dawson*, 47 Tex. 139.

In *Haskew v. State*, 7 Tex. App. 107, it was held ground for reversal to charge that "the testimony of a witness who swears positively to a fact is to be taken in preference to the testimony

of one who cannot so testify, though having the same opportunity of knowing." In *Sparks v. Dawson*, 47 Tex. 139, it was held erroneous to charge that "the witness who states positively that a certain state of facts is true is entitled to more weight than half a dozen others who cannot swear positively, but who testify that they do not believe them to be true." In *Preston v. Moline Wagon Co.*, 44 Ill. App. 342, it was held reversible error to charge that the jury are further instructed that when witnesses are otherwise equally credible, and their testimony otherwise entitled to great weight, that greater weight and credit should be given to those who swear affirmatively to a fact rather than to those who swear negatively or to want of knowledge or want of recollection. In *Atchison, etc., R. Co. v. Feehan*, 149 Ill. 202, it was held proper to refuse an instruction that "the affirmative testimony of witnesses that the bell was rung and whistle sounded at a given time and place is of greater force and weight than the negative testimony of witnesses of no greater credibility, and who had no better opportunity of hearing, that the bell was not rung or the whistle sounded, or that they did not hear them;" and in *Louisville, etc., R. Co. v. Stommel*, 126 Ind. 35, it was held proper to refuse an instruction that the positive testimony given by one witness is, under some circumstances, entitled to more weight than negative testimony given by another.

3. *Ohio, etc., R. Co. v. Buck*, 130 Ind. 300. See also cases cited in preceding note.

subject.¹ So the ground is taken by one decision that although an instruction stating the rule correctly may properly be given, it may, with equal propriety, be refused;² and in some cases, without deciding whether the giving of a cautionary instruction on this subject would be proper, instructions given have been condemned, and instructions refused held properly refused as stating the rule of evidence incorrectly.³

1. *Hinton v. Cream City R. Co.*, 65 Wis. 337, where the giving of the following instruction was approved: "The rule of law is that the positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses equally credible who testify negatively, or to collateral circumstances merely persuasive in their character, from which a negative may be inferred." *Atlanta, etc., R. Co. v. Newton*, 85 Ga. 517, where it was held proper to charge that, "everything else being equal, * * * positive testimony is rather to be believed than negative testimony." See also *Olsen v. Oregon Short Line, etc., R. Co.*, 9 Utah 129, in which it is said: "The request [which embodied a statement of the rule governing positive and negative evidence] could have been given without impropriety." *Knight v. Thomas*, (Me. 1887) 7 Atl. Rep. 538, in which the reviewing court said: "The presiding justice, after properly explaining to the jury the distinction between positive and negative testimony, said to them: 'Now the statements of the Wymans are not positive testimony. They state that they did not know of any intercourse between the complainant and the defendant, still it might have occurred. Whether it did or not is a question for you, gentlemen;' thus limiting the negative character of the depositions to the subject of known intercourse between the parties. In this we perceive no error." *Rhodes v. U. S.*, 79 Fed. Rep. 741, where it was held not erroneous to charge that it was for the jury to determine how much certain testimony of a negative character was worth as against positive testimony; and that "ordinarily, the evidence of a witness who swears positively to a thing, or emphatically says that he saw something, is more valuable than that of witnesses who say they did not see." *Neill v. State*, 79 Ga. 779, in which it was held that where only one witness was sworn for the state and one for the accused,

and the testimony of the defendant's witness was positive in part and negative in part, the court might properly charge the rule applicable to positive and negative testimony as to the negative part of such witness's testimony.

2. *Olsen v. Oregon Short Line, etc., R. Co.*, 9 Utah 129. See also *Denver, etc., R. Co. v. Lorentzen*, 79 Fed. Rep. 291, where it was said that the "giving of an instruction of that nature is a matter which rests largely in the discretion of the trial judge," and where it was held that such an instruction was properly refused where witnesses testified as positively on one side that a thing did not occur, as witnesses on the other side testified that it did.

3. *Sibley v. Ratliffe*, 50 Ark. 477, in which it was held proper to refuse the following instruction: "The positive testimony of a witness who says he heard the whistle blow is entitled to more weight than the negative testimony of a witness who says that he did not hear it." The reviewing court, in commenting on this instruction, says: "The request falls short of stating the full proposition." *Kelley v. Schupp*, 60 Wis. 86, where it was held that the following request for an instruction was erroneous: "It is sometimes said that affirmative testimony is of more value than negative testimony. But I charge you that where one man affirms a fact and another positively denies it, the denial is not negative testimony within the rule just stated." The reviewing court said: "Very clearly it is negative testimony." *Smith v. Milwaukee Builders', etc., Exch.*, 91 Wis. 360, where an instruction was held erroneous which stated that negative testimony was "confined to that of a witness who, though present at a transaction, says that he did not see or did not hear. This is too limited a rule. Testimony which is positive in form may amount merely to negative testimony." *Louisville, etc., R. Co. v. Miller*, 109 Ala. 500, where the following instruction was held properly re-

6. As to Character — *a.* **INTRODUCTORY STATEMENT.** — The great weight of authority seems to be that evidence of good character of a defendant in a criminal case is always to be considered by the jury in making up their verdict as to the guilt or innocence of the accused.¹ The defendant is entitled to have this evidence go to the jury,² who are to give it such weight as they may think proper.³

b. **WHAT INSTRUCTIONS PROPER** — **That Good Character May Create Reasonable Doubt.** — According to some authorities it is proper to instruct that good character can only be considered when a reasonable doubt arises on the evidence as to the guilt of the defendant;⁴ but the rule of these decisions has been overturned and the overwhelming weight of authority is to the contrary,⁵ the

fused: "If you find from the evidence that Henry Ellis testified that the engine was emitting sparks, and that Judge West and the witness Ayer testified that said engine was not emitting sparks at the place where said injury occurred, and that each of said witnesses are equally creditable and worthy of belief, then the fact that said engine was emitting sparks at said place is not established by that measure of proof which the law requires." This instruction was held faulty for failure to hypothesize equal means of knowledge on the part of the witnesses whose evidence the court was asked to compare.

1. *State v. McNamara*, 100 Mo. 107; *State v. McMurphy*, 52 Mo. 251; *State v. Alexander*, 66 Mo. 148; *State v. Underwood*, 76 Mo. 630; *State v. McNally*, 87 Mo. 654; *Remsen v. People*, 57 Barb. (N. Y.) 324; *People v. Mead*, 50 Mich. 228; *Williams v. State*, 52 Ala. 411; *Kistler v. State*, 54 Ind. 400; *Holland v. State*, 131 Ind. 572; *State v. Henry*, 5 Jones L. (N. Car.) 65. See Am. and Eng. Encyc. of Law (2d ed.), tit. *Character in Evidence*.

"The weight of modern authority seems to be overwhelmingly in favor of the rule that proof of good character constitutes an ingredient to be considered by the jury, in all criminal cases, without reference to the apparently conclusive or inconclusive character of the other evidence." *Kistler v. State*, 54 Ind. 400.

2. *Remsen v. People*, 57 Barb. (N. Y.) 324.

3. *State v. Vansant*, 80 Mo. 70; *People v. Garbutt*, 17 Mich. 9.

An instruction with reference to good character that "such evidence is to be

considered and applied by the jury in the case in this way: as a circumstance tending to throw some light upon the principal question involved. Did or did not the defendant fire this shot? Did or did not he commit this offense?" — is correct. *People v. De La Cour Soto*, 63 Cal. 165.

An instruction that a good character is of importance to a person charged with crime, and that the jury had a right to consider whether a person with a good character would be less liable to be guilty of crime than a person of bad habits and character, was proper. *People v. Harrison*, 93 Mich. 597.

4. *Com. v. Webster*, 5 Cush. (Mass.) 325.

5. *Alabama*. — *Felix v. State*, 18 Ala. 725; *Carson v. State*, 50 Ala. 134.

California. — *People v. Bell*, 49 Cal. 489; *People v. Ashe*, 44 Cal. 288.

Georgia. — *Epps v. State*, 19 Ga. 102.

Illinois. — *Jupitz v. People*, 34 Ill. 516.

Indiana. — *Holland v. State*, 131 Ind. 568.

Iowa. — *State v. Kinley*, 43 Iowa 296; *State v. Northrup*, 48 Iowa 585.

Massachusetts. — *Com. v. Leonard*, 140 Mass. 473.

Minnesota. — *State v. Sauer*, 38 Minn. 438.

New York. — *People v. Friedland*, 2 N. Y. App. Div. 332; *Remsen v. People*, 43 N. Y. 6; *Ryan v. People*, 19 Abb. Pr. (N. Y. Supreme Ct.) 232; *Cancemi v. People*, 16 N. Y. 501.

North Carolina. — *State v. Henry*, 5 Jones L. (N. Car.) 65.

Ohio. — *Stewart v. State*, 22 Ohio St. 478.

Pennsylvania. — *Com. v. Carey*, 2 Brews. (Pa.) 406; *Heine v. Com.*, 91 Pa. St. 145.

view being that proof of good character will of itself sometimes create a doubt when without it none would exist.¹ Accordingly it has been held proper to charge that such evidence may be sufficient to create in the minds of the jury a reasonable doubt as to the guilt of the accused,² and error to refuse such a charge.³

Effect of Good Character Where Crime Is Atrocious. — Though there is one

United States. — *Wayne v. Winter*, 6 McLean (U. S.) 344.

Argument in Support of Prevailing Rule. — "To hold that a man's general good character is only evidence in cases where there is doubt, is equivalent to holding that he shall derive no benefit from it as evidence in a criminal case; for if the jury entertain a reasonable doubt as to his guilt, they will give him the benefit of such doubt and acquit, aside from proof of his good character; so that according to the doctrine of the charge, which, we concede, seems to be supported by many and respectable authorities, a person accused could only avail himself of the benefit of his good character in cases in which he would be acquitted had such proof not been offered. We think the rule in such cases correctly laid down in 2 Russ. by Greaves, 786, and in *Roscoe's Cr. Ev.* (ed. of 1846) 97, where it is said that 'the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be not in any case to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual whose character was previously unblemished has or has not committed the particular crime for which he is called upon to answer.'" *Felix v. State*, 18 Ala. 725.

Instructions Held Erroneous Under This Rule. — The following instructions have been held erroneous: "In a plain case a good character would not help a prisoner; but in a doubtful case he has a right to have it cast into the scales and weighed in his behalf." *State v. Henry*, 5 Jones L. (N. Car.) 65.

That evidence of character can only be considered by the jury where the other evidence is doubtful, and that it

is not of the slightest consequence where the evidence is strong, and the guilt of the defendant is impressed on the minds of the jury. *Com. v. Leonard*, 140 Mass. 473.

That good character may have its weight in a doubtful case, and may have its weight in any case to this extent; that if there is a question of doubt it may determine the matter in defendant's favor. *State v. Sauer*, 38 Minn. 438.

Instructions Approved Under This Rule.

— The following instruction has been approved: "If the jury are satisfied from the evidence that the defendant has established a good character, then such good character of itself is sufficient to raise a doubt as to the prisoner's guilt." *Com. v. Carey*, 2 Brewst. (Pa.) 406.

1. *Remsen v. People*, 43 N. Y. 6.

An instruction that the defendant had a right to put his good reputation before the jury for their consideration, "as a kind of makeweight in his favor, if there is a pinch in the case," is erroneous. *State v. Daley*, 53 Vt. 442.

2. *Stephens v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 396; *Lowenberg v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 414; *Felix v. State*, 18 Ala. 725.

3. *People v. Doggett*, 62 Cal. 27; *People v. Bell*, 49 Cal. 485. In this case it was held that an instruction that the good character of the defendant is a circumstance for the consideration of the jurors was insufficient, as being only equivalent to the admission of the testimony as to character. Compare *Briggs v. Com.*, 82 Va. 554. In this case it was held proper to refuse an instruction that "if accused be proved of good character as a man of peace, the law says that such good character may be sufficient to create a reasonable doubt of his guilt, although no such doubt would have existed but for such good character;" and that an instruction that the jury might always consider the character of the accused in favor of or against him was proper.

decision to the contrary,¹ the weight of authority is to the effect that it is erroneous to charge that proof of the prisoner's good character is entitled to less weight where the question is one of great and atrocious criminality than upon offenses of a lower grade.²

Mere Proof of Good Character Not Ground for Acquittal. — It is perfectly proper to charge that if the jury believe the defendant guilty, they should not acquit merely because he has proved previous good character,³ and to refuse an instruction that proof of good character, if believed, "is sufficient to generate a reasonable doubt" of the defendant's guilt.⁴

1. *Com. v. Webster*, 5 Cush. (Mass.) 325.

2. *Harrington v. State*, 19 Ohio St. 264; *Remsen v. People*, 43 N. Y. 9; *Cancemi v. People*, 16 N. Y. 501.

While the presumption of innocence which it raises varies in force with the circumstance, it cannot vary with the grade of the crime charged. *Harrington v. State*, 19 Ohio St. 264.

Good character is to be considered by the jury, upon the question of credibility of direct evidence of the defendant's guilt, the same as upon proof of circumstances tending to show it, or the inferences to be drawn from such circumstances. *Stover v. People*, 56 N. Y. 315.

3. *State v. Vansant*, 80 Mo. 70; *State v. McMurphy*, 52 Mo. 251; *People v. Samsels*, 66 Cal. 99; *People v. Smith*, 59 Cal. 601; *Edmonds v. State*, 34 Ark. 720; *People v. Hammill*, 2 Park. Cr. Rep. (N. Y. Oyer & T. Ct.) 223; *People v. Sweeney*, 133 N. Y. 609, 44 N. Y. St. Rep. 867; *People v. Mead*, 50 Mich. 232; *McQueen v. State*, 82 Ind. 74; *Wesley v. State*, 37 Miss. 327; *U. S. v. Smith*, 2 Bond (U. S.) 324.

Instructions Held Proper Under This Rule. — That if the evidence is convincing beyond a reasonable doubt, it is the duty of the jury to convict, notwithstanding proof of good reputation. *People v. Mead*, 50 Mich. 233.

"The good character of a person accused of a crime, when proven, is itself a fact in the case. It is a circumstance tending in a greater or less degree to establish his innocence. It must be considered in connection with all the other facts and circumstances of the case. But if, after a full consideration of all the evidence adduced, the jury believe the defendant to be guilty of any degree of crime, they should so find, notwithstanding proof of good

character." *People v. Smith*, 59 Cal. 601.

"The character of the defendant is also a matter for your consideration. The evidence as to his character should be given such weight in explanation of the transaction between himself and the deceased as to you seems proper. But if you shall conclude from all the evidence that the defendant is guilty, you should not acquit him because you may believe that he has heretofore been a person of good repute." *State v. Vansant*, 80 Mo. 70.

Evidence Entitled to Little Consideration Against Direct Proof. — The following instructions have been approved: "Evidence of good character is, in law, to be considered by the jury, in all doubtful cases, of great weight. Yet if the proof of guilt is direct and clear, it is entitled to little consideration." *Creed v. People*, 81 Ill. 569.

That evidence of good character can have little practical effect against direct and satisfactory evidence as to guilt, and it cannot turn the scale against conclusive evidence. *State v. Spooner*, 41 La. Ann. 780.

That Evidence of Good Character Does Not Re-establish Disproved Facts. — Where it is sought to impeach a witness both by disproving facts testified to by him and also by proof of contradictory statements, and to sustain him by evidence of good character, it is error to limit the effect of such sustaining evidence by charging that "if a fact or facts testified to by a witness be disproved to the satisfaction of the jury, then evidence of general good character should not be treated as re-establishing such disproved facts." *McEwen v. Springfield*, 64 Ga. 159.

4. *Booker v. State*, 76 Ala. 22.

That Proof of Good Character Is Sufficient Upon Which to Find a Verdict of Not

Not a Strong Presumption of Innocence. — So it is proper to refuse an instruction that good character affords a strong presumption of innocence.¹

Where No Proof of Good Character Offered. — The trial court may instruct that the defendant may avail himself of his former good character, if it existed, by proof thereof, and that if he offer no such testimony the prosecution cannot show that his character was not good.² If, however, the defendant offers proof of good character which the prosecution does not attempt to rebut, it is error for the court to instruct that while the law permits him to make such proof, the people are prohibited from showing his bad character.³

c. NECESSITY OF INSTRUCTIONS. — While a person who has given evidence of good character is always entitled to appropriate instructions on request,⁴ a neglect to give such an instruction in the absence of a proper request therefor is not erroneous.⁵ Nor

Guilty. — An instruction in the following language was held properly refused: "If the jury, from all the evidence in this cause, have any doubt of the defendant's guilt, and further believe from the evidence that the defendant has for a long time, and now possesses, a good moral character for peace, sobriety, and honesty, then such fact of good character, coupled with the presumption of innocence which the law invokes, is sufficient upon which to find a verdict of not guilty, and the jury may then acquit the defendant." *State v. McNamara*, 100 Mo. 106.

1. *State v. Tarrant*, 24 S. Car. 593.

2. *State v. Tozier*, 49 Me. 404.

In giving this instruction the court should be careful not to intimate that an inference prejudicial to the defendant should be drawn by the jury from his failure to offer such testimony.

Good Character to Be Proved by Competent Evidence. — The court gave the following requested instruction: That "the good character of the defendant for honesty and integrity is a fact in the case to be considered by you in connection with all the other evidence in the case," and added the following: "But such fact, like all others, must be proven by competent evidence." It was held that this was not error. *People v. Velarde*, 59 Cal. 457.

3. *People v. Marks*, 90 Mich. 555.

Considerations on Which Rule Is Based. — In reaching this conclusion the court reasoned as follows: "The respondent having offered evidence of good reputation, the door was open to the people to introduce evidence in contradiction of it, and to establish the fact, if they

could, that the respondent's reputation for honesty was bad in that community. The people did not avail themselves of this, and presumably because no such proof could be made. The respondent, therefore, had a right to stand before the jury with this proof to be weighed in his favor. * * * When the court, therefore, told the jury that the hands of the people were tied, they might well have understood it as an instruction from the court that, though the respondent might put in proof of his good reputation, the people would not be permitted to rebut or give evidence against the respondent, showing him to be a man of bad reputation."

That Intention Is Not Inferable from Previous Good Character. — Where there is evidence to show the previous good reputation of the defendant as a quiet and peaceable citizen, an instruction that "no inference can be drawn by a jury of the intention which induced the commission of the offense from the previous character of the prisoner. His intention can only be determined by his acts. The law will imply a malicious intention," is erroneous. *People v. Casey*, 53 Cal. 360.

4. *State v. Swain*, 68 Mo. 605.

5. *State v. McNamara*, 100 Mo. 100. In this case it was said that "the law requiring the court to declare the law applicable to the case, whether proper instructions are asked for or not, does not comprehend such merely collateral matters" as good character.

Where Charge Not Sufficiently Specific. — Where the testimony introduced by the defendant related solely to his character and to the impeachment of wit-

is it erroneous to refuse an instruction on good character where it has been substantially given already.¹

7. As to Failure to Testify — *a. IN CRIMINAL CASES* — (1) *Adverse Comments as to Failure to Testify*. — In most jurisdictions, by virtue of statutory provisions, the defendant in a criminal case may testify in his own behalf or not as he sees fit, and, it is apprehended, it is not competent for the court to allude to his failure to testify, and make adverse comments in regard thereto.²

nesses for the state, and the judge called the attention of the jury to such testimony, he thereby called attention to the proof of good character. If a more specific charge upon that point was deemed necessary, the omission should have been called to the attention of the court by counsel for defendant. *Franklin v. State*, 69 Ga. 36.

1. *People v. Johnson*, 61 Cal. 142; *Davidson v. State*, 135 Ind. 254.

Instance. — An instruction that evidence of the defendant's good character must be considered in connection with all the evidence in the case, and if then the jury have a reasonable doubt of the defendant's guilt they must acquit, is correct, and the defendant is not prejudiced by a refusal of the court further to instruct the jury that such evidence "may be sufficient to create in your minds a reasonable doubt of his guilt, although no such doubt would have existed but for such good character." *People v. Bowman*, 81 Cal. 566.

2. *Ruloff v. People*, 45 N. Y. 213; *State v. Carr*, 25 La. Ann. 408.

Certainly Counsel Cannot Allude to It in argument to the jury. See article ARGUMENTS OF COUNSEL, vol. 2, p. 718.

Instance of Sufficient Instructions. — An instruction that the defendant "has a right to go upon the witness stand and testify in his own behalf if he chooses to do so. If he does not choose to do so, the law expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand," and that "the mere fact that this defendant has not availed himself of the privilege which the law gives him should not be permitted by you to prejudice him in any way," sufficiently protects the defendant's rights. *People v. Watson*, (Supreme Ct.) 7 N. Y. Supp. 532.

"The court instructs the jury that the defendant has a right to decline going upon the stand, and that his refusal to testify can in no case be con-

sidered as evidence of his guilt or innocence." This instruction was approved in *May v. People*, 8 Colo. 226.

A charge that the defendant was not bound to go on the stand, and that he could say to the prosecution: "Prove your case against me; it is my judgment that the situation is such that I am not bound to take the witness stand, and the law gives me that right, and the law gives me that privilege. I charge you that the law says there is no presumption to be taken against a defendant by reason of the fact that he does not take the witness stand," is not erroneous as being a covert insinuation that the situation was such that it would be disastrous to the defendant if he took the stand. *People v. Hayes*, 140 N. Y. 496.

Using the Word "Should" Instead of "Shall" in Charging. — In charging the jury as to inferences of guilt from defendant's silence, it is not erroneous to employ the words "no inference of guilt *should* arise in the minds of the jury," instead of the words "no inference of guilt *shall* arise," etc. *State v. Krug*, 12 Wash. 288.

Additional Instruction that Jury May Consider Failure to Testify — Effect. — On the trial of an indictment where the defendant has not testified, it is erroneous for the judge to instruct that nothing is to be presumed against the defendant for not testifying; but that the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the commonwealth, is a proper matter for them to consider. *Com. v. Harlow*, 110 Mass. 411.

Additional Charge that Evidence for State Had Not Been Contradicted — Effect. — The trial judge told the jury that they had no right to consider the fact of the defendant's neglect or refusal to testify against him, and also charged that they had the right to consider that the evidence of the state had not been contradicted. This instruction was ap-

But it has been held that if the defendant takes the stand in his own behalf, and fails to repel or explain accusatory evidence, which he clearly could do if innocent, the court may properly direct the jury that they are at liberty to consider this circumstance in determining the issue of guilt or innocence.¹

(2) *What Instructions Proper or Necessary.* — In some jurisdictions it is made the duty of the court to instruct the jury that no

proved. The reviewing court said: "We do not think the jury could thereby have obtained the impression that they could consider the fact that the respondent had not testified as any evidence against him." *State v. O'Grady*, 65 Vt. 66.

Remark by Court That Judge Could Not Control Thoughts of Jury — Effect. — In place of a requested instruction that the jury were not "to think" of the defendant's failure to testify, the court instructed that they were not "to consider" the defendant's failure to testify against him, at the same time remarking that he could not control the thoughts of the jury. The reviewing court upheld the trial judge, saying: "The remark of the court in reply to this request, that he could not control the thoughts of the jury, was unfortunate, as, unintentionally, it may have given some countenance to the idea suggested by the prosecuting counsel, that whatever the law was, he knew they would consider this omission against the respondent." *State v. Cameron*, 40 Vt. 564.

Error Cured by Subsequent Instructions. — On a criminal trial the presiding judge has no right, in charging the jury, to allude to the fact that the defendant has not availed himself of the statutory privilege of being a witness in his own behalf; but where such allusion was made, and subsequently, upon his attention being called to it, he stated to the jury that there was no law requiring the prisoner to be sworn, and no inference to be drawn against him from the fact of his not being sworn, it was held that the error was thereby cured. *Ruloff v. People*, 45 N. Y. 213.

Rule Under the English Statute. — Under a statute providing that the accused in a criminal case shall be "competent but not compellable" to testify in his own behalf, it is not error for the court to comment on a failure of the accused to testify, and to tell the jury that they might draw an inference adverse to the defendant for his having omitted to

deny on oath certain statements made by the witness, and to explain certain matters which, when unexplained, were suspicious against the defendant. *Kops v. Reg.*, (1894) App. 650.

1. *Stover v. People*, 56 N. Y. 320. In this case the court charged that the jury might consider, as a circumstance, the failure of the accused, while a witness, to give any account as to where the money found upon him had been kept in the interval from the time he claimed to have received it until it was so found. The reasoning of the court in arriving at this conclusion was as follows: "The argument in behalf of the accused is that he cannot be made a witness at all except by his own request, and that his failure to be a witness shall not create any presumption against him; and that if he requests to be a witness, and becomes such, he need give testimony only as to such parts of his case as he may choose; and as to other parts as to which he does not request or desire to give testimony, no presumption can be created against him for his failure to testify. In this construction I cannot concur. True, it is at the option of the accused whether or not to become a witness. When he has exercised this and become a witness he is made competent for all purposes in the case; if by his own testimony he can explain and rebut a fact tending to show his guilt, if innocent, and he fails to do so, the same presumption arises from his failure that would arise from a failure to give the explanation by another witness, if in his power so to give it. The reason for the presumption is alike in both cases. It arises from the known desire of parties to repel or explain accusatory evidence against them, if in their power; and the basis of the presumption is that the case shows that it is in their power, if innocent. Hence a failure tends to show an absence of innocence." See also *Brashears v. State*, 58 Md. 563, in which the above decision is *approved*.

inference of the defendant's guilt is to be drawn from his failure to testify, and it would seem that no request for such an instruction is necessary.¹ In others the giving of such an instruction is proper, but not necessary in the absence of a request therefor.² In some jurisdictions, because of the peculiar wording of the statutes, it has been held erroneous to refuse an instruction that no presumption of guilt should be indulged against the defendant on account of his failure to testify,³ and in others it has been held proper to instruct that such failure raises no presumption against the accused.⁴ On the other hand, the statutes of some states have been so construed as to prohibit the court from charging that a neglect or refusal of the accused to testify does not create any presumption against him.⁵ These courts take the view that the trial judge should say nothing whatever in regard to the matter.⁶

b. IN CIVIL CASES. — In civil cases it has been held that the

1. *Linbeck v. State*, 1 Wash. 336; *State v. Cameron*, 40 Vt. 564.

In *State v. Carr*, 25 La. Ann. 408, it was held error to refuse to charge that the fact that the defendant had offered no evidence was in no way to be taken as an admission of his guilt.

2. *Matthews v. People*, 6 Colo. App. 456; *Metz v. State*, 46 Neb. 547; *People v. Flynn*, 73 Cal. 513; *Foxwell v. State*, 63 Ind. 539; *Grubb v. State*, 117 Ind. 277; *Felton v. State*, 139 Ind. 532.

3. *Farrell v. People*, 133 Ill. 244 (under a statute providing that a defendant in a criminal case shall at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect); *State v. Landry*, 85 Me. 95 (under a statute providing that the fact that the person accused does testify in his own behalf shall not be taken as evidence of his guilt).

Refusal Proper Where Defendant Has Testified. — Where the defendant has testified, it is proper to refuse an instruction that he is under no obligation to do so, and that his failure to testify raises no presumption against him. *Williams v. People*, 166 Ill. 132.

4. *Sullivan v. State*, 9 Ohio Cir. Ct. Rep. 652 (under a statute providing that a neglect or refusal to testify shall not create any presumption against the defendant, and that no reference shall be made to nor any comment be made upon such neglect or refusal; this provision is intended merely to prevent unfavorable comment); *State v. Weems*, 96 Iowa 426 (under a statute

providing that where a defendant does not elect to become a witness, the fact shall not have weight against him on the trial, nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf); *Fulcher v. State*, 28 Tex. App. 465 (under a statute providing that the failure of any defendant to testify in his own behalf "shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause.") See also *People v. Seaman*, (Mich. 1895) 65 N. W. Rep. 203.

5. *State v. Pearce*, 56 Minn. 226 (under a statute providing that a neglect or refusal of the accused to testify shall not create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the court; in this case the court distinguishes *Farrell v. People*, 133 Ill. 244, saying: "Our law * * * goes much further [than the Illinois law], and prohibits not only the prosecuting attorney, but forbids even the trial court, from alluding to or commenting upon the neglect or refusal of the defendant to testify."); *State v. Robinson*, 117 Mo. 663, where it was held not erroneous to refuse an instruction that such failure should not create any presumption against the defendant, the statute providing that failure to testify shall not "be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place."

6. See cases cited in the preceding note.

court may direct the jury's attention to the fact that one of the parties has failed to testify, as a matter that they might consider and give such weight as they think it might deserve.¹ Authority is not wanting, however, for the position that the court should not call the jury's attention to the fact in any way.²

8. As to Failure to Produce Countervailing Evidence. — The authorities are not harmonious as to what instructions are proper on this subject. In the Webster case the court charged in effect that where the evidence in support of the charge is strong, and it is apparent that it is in the power of the accused to produce countervailing evidence, the jury may consider, as a circumstance against him, his failure to do so,³ and an instruction somewhat similar to this has met with approval.⁴ In other decisions instructions have been sustained which are in effect the same as that approved in the Webster case, except that they limit the right to consider the failure of the accused to produce countervailing evidence as a circumstance against him, to cases where he can do so by the testimony of others than himself;⁵

1. *Union Bank v. Stone*, 50 Me. 595; *Miller v. Dayton*, 57 Iowa 424. See also *Nicol v. Crittenden*, 55 Ga. 497.

A charge that the jury are at liberty to draw unfavorable inferences against the defendant for failing to testify as a witness in explanation of material transactions, if they believe them to be within his knowledge, is unobjectionable. *Blackwood v. Brown*, 29 Mich. 483.

Where there was a plea of *non est factum* by an executrix to a note purporting to be signed by the son of the deceased for his father, who was at the time unable to attend to business, and the executrix was present in court at the trial, and was the widow of the deceased, it was erroneous to charge that if the executrix could, by going on the stand as a witness, clear up any doubts that might be in the case, the jury might take her failure thus to be a witness into consideration, and might infer from such failure against her. There was no evidence that the executrix knew the truth of this transaction, and it was altogether an unfair inference which the judge authorized the jury to draw from her failure to testify. *Emory v. Smith*, 54 Ga. 273.

2. *Moore v. Wright*, 90 Ill. 470.

Failure to Call Witness. — It has been held erroneous to give a charge which in effect permits the jury to use against the defendant the fact that he has not called certain witnesses, where it does not appear that the witnesses were under the control of the defendant more

than of the plaintiff. *Flynn v. New York El. R. Co.*, 50 N. Y. Super. Ct. 375. So where it appeared upon the trial that one who had testified upon the former trial of the same case had disclaimed all knowledge of the transaction in controversy, a charge commenting unfavorably upon the failure to call the witness, and instructing the jury that they were at liberty to draw an unfavorable inference from the fact of his not having been called, was ground for a new trial. *Fitzpatrick v. Woodruff*, 47 N. Y. Super. Ct. 437.

3. Charge of Chief Justice Shaw in *Com. v. Webster*, 5 Cush. (Mass.) 316.

4. In *People v. Doyle*, 21 N. Y. 578, the reviewing court said: "The only direct evidence of the prisoner's guilt was given by his accomplice, G. It was a part of his story that, on the night of the arson, he and his confederates were at the house of W.; that they went to bed there at an early hour; that they afterwards got up, went and committed the crime, and then returned to bed in the same house. The defendant produced no evidence to show that he was not at the house of W. on that night, and the judge instructed the jury that they might, if they thought proper, take this omission into consideration as a circumstance which corroborated the evidence of G." This instruction was approved.

5. *State v. Grebe*, 17 Kan. 458; *Com. v. Costley*, 118 Mass. 27. See also *State v. O'Grady*, 65 Vt. 66.

and in another case an instruction was held erroneous mainly because it did not contain this limitation.¹ So it has been held error to instruct that "when all the circumstances proved raise a strong presumption of the guilt of the accused, his failure to offer any explanation, where it is in his power to do so, tends to confirm the presumption of his guilt."² This instruction is clearly erroneous within the rule laid down by the decisions cited in the two preceding paragraphs. But the court in which it was reviewed based its conclusions on a different reason.³

9. As to Presumption of Innocence — a. DUTY TO INSTRUCT ON WHEN REQUESTED. — In all criminal prosecutions the law clothes the defendant with the artificial presumption of innocence, which attends him through every stage of the trial. It is therefore erroneous to refuse the defendant the benefit of a charge upon the presumption of innocence when he requests it,⁴ and error in

1. *Com. v. Harlow*, 110 Mass. 411, in which the jury were instructed that "the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the commonwealth, was a competent and proper matter for them to weigh in considering the question of his guilt." The reviewing court held this instruction erroneous, saying: "They were not told that this last remark did not apply to his own testimony, but merely to his failure to produce other witnesses. Nor was it otherwise qualified."

2. *Doan v. State*, 26 Ind. 498. See also *Clem v. State*, 42 Ind. 420, in which the following instruction was held erroneous: "If you have a reasonable doubt whether the material facts have all been given to you in evidence, and whether other relevant and material facts necessary to a right understanding of the case, or any part thereof, and not in evidence, exist, and whether such facts not in evidence might lead to the just conclusion that the defendant is not guilty, and you should believe that the state could have known and produced such evidence, then you ought to find the defendant not guilty. But if you should believe that such other facts, if exculpatory in their character, could have been proven to you by the defendant, or that, if not guilty, she could have so explained those given in evidence as to show their consistency with her innocence, and has failed to do one or the other, then this failure may be considered in connection with the other circumstances offered to show her guilt."

3. *Doan v. State*, 26 Ind. 498, in which the court reasoned as follows: "If the jury knew that it was in the power of the accused to offer an explanation of circumstances which, unexplained, raised a strong presumption of his guilt, that knowledge of his ability to explain these circumstances destroyed the presumption which would otherwise be indulged against the accused. The defendant was not to be convicted of burglary because he failed to satisfy the curiosity of the jury by giving an explanation of circumstances which created no presumption of guilt against him, because the jury knew that he was able to explain them and thereby destroy any presumption which might have arisen had the jury been uninformed of his ability to make such explanation. It was probably intended to inform the jury that if circumstances which had been introduced in proof created a strong presumption of guilt against the defendant, and those circumstances, if untrue, the jury knew the defendant could disprove, or if true and yet capable of an explanation consistent with his innocence, he could give such explanation — in such a case his failure to make such proof tended to confirm the evidence of the existence of the circumstances; or that his failure to explain added force to the inference drawn from the circumstances proved."

4. *Florida*. — *Houston v. State*, 24 Fla. 356.

Indiana. — *Line v. State*, 51 Ind. 172; *Snell v. State*, 50 Ind. 516; *Castle v. State*, 75 Ind. 146; *Aszman v. State*, 123 Ind. 347; *Farley v. State*, 127 Ind. 419.

refusing to give such a charge is not cured by the giving of a full and accurate charge as to the doctrine of reasonable

Nebraska. — *Long v. State*, 23 Neb. 33.

Texas. — *Coffee v. State*, 5 Tex. App. 545; *Hutto v. State*, 7 Tex. App. 44; *Frye v. State*, 7 Tex. App. 94; *Black v. State*, 1 Tex. App. 368; *Hampton v. State*, 1 Tex. App. 652; *Mace v. State*, 6 Tex. App. 470; *Priesmuth v. State*, 1 Tex. App. 481.

Instructions Erroneously Refused — Instances. — It has been held that the following instructions were properly refused: That "the defendant is presumed to be innocent, * * * and before he can be convicted * * * the state must prove him guilty of the crime beyond a reasonable doubt," *Line v. State*, 51 Ind. 172; that "this legal presumption of innocence is a matter of evidence, to the benefit of which the party is entitled," *Long v. State*, 23 Neb. 33; that "the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence," *Vaughan v. Com.*, 85 Va. 671; that "the accused must be presumed innocent until his guilt is established by legal evidence, and in case of a reasonable doubt as to his guilt, he is entitled to be acquitted," *Mace v. State*, 6 Tex. App. 470.

Instructions Properly Refused — That Defendant Is as Innocent as Though Not Indicted. — It is proper to refuse an instruction that "the defendant, though indicted for perjury, is just as innocent of the crime as though not indicted." The instruction virtually says that the defendant is innocent independently of what the evidence might show on that subject, and of course it is erroneous. *Sanders v. People*, 124 Ill. 218.

Want of Motive a Strong Presumption of Innocence. — The defendant asked the court to instruct that a failure to prove a motive for the commission of the crime would raise a strong presumption that he was innocent. On appeal it was said that there could be no necessity of nor propriety in giving such an instruction. The general presumption of innocence covers it fully. The jury were told that this would be a circumstance for them to consider; to have said more would have been to trench upon the prohibition against

commenting on the facts. *State v. Nordstrom*, 7 Wash. 513.

That Presumption Does Not Obtain After Proof of Guilt. — That the prisoner is presumed innocent until his guilt is established by competent evidence, but that after the guilt of the prisoner is so established such presumption no longer obtains, is incorrect. The law is that "a defendant in a criminal cause is presumed to be innocent until his guilt is established by legal evidence, and in case of reasonable doubt as to his guilt, he is entitled to be acquitted." *Stapp v. State*, 1 Tex. App. 734.

Duty of Jury to Reconcile Evidence with Presumption of Innocence. — There is a conflict of authority as to whether it is proper to instruct that it is the duty of the jury, if possible, to reconcile the evidence with the presumption of innocence. In *Castle v. State*, 75 Ind. 146, it was held erroneous to refuse such an instruction, but in *Barker v. Com.*, 90 Va. 820, an instruction that "the jury should endeavor to reconcile all the evidence with this presumption" was held to have been properly refused, the court saying: "It was the duty of the jury to weigh the evidence carefully, and to pass upon it dispassionately, and to give the prisoner the benefit of any reasonable doubt; but it was no more their duty to endeavor to acquit him than to convict him."

Instructions as to Presumptions of Innocence Held Sufficient. — A charge that the accused is presumed innocent until the contrary is proven beyond a reasonable doubt, and that he is entitled to the benefit of a doubt, if it be substantial, is good law and sufficiently liberal to the accused. *State v. Duck*, 35 La. Ann. 764. So the following is a correct charge on this subject: "The accused is always presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt, and the burden of proof rests always upon the state and does not shift, * * * and if the circumstances as disclosed by the evidence can be explained, in the opinion of the jury, upon any other reasonable hypothesis than that of guilt of the defendant, he should be acquitted." *Templeton v. State*, 5 Tex. App. 398. So the follow-

doubt.¹ Such an instruction cannot be regarded as covering the subject of the presumption of innocence.² Of course if a requested instruction on the subject of the presumption of innocence is covered by instructions already given, the refusal of the request cannot be assigned as error.³

b. WHETHER NECESSARY TO INSTRUCT ON, IN ABSENCE OF REQUEST. — While it would undoubtedly be better for the court to instruct on this presumption in all cases, whether requested or not, the authorities are not harmonious as to whether a failure to give such a charge in the absence of a request will operate to reverse. According to some decisions the mere omission to give this instruction when not requested is not ground for reversal,⁴ while according to others it is, the view being taken that whether requests for charges are made or not, it is the duty of the court to see that the presumptions of law in favor of the accused are clearly and impartially laid before the jury.⁵ It would seem,

ing instruction has been held a sufficient charge as to the presumption of innocence: "If, after you shall have carefully examined the evidence in this case, you shall be able to reconcile it with the innocence of the prisoner, it will be your duty, as no doubt it will be your pleasure, to acquit him." *Garrison v. State*, 6 Neb. 285. And an instruction that the law raises no presumption against the accused, but that every presumption is in favor of his innocence, and that to convict, every material fact necessary to constitute the crime must be proved beyond a reasonable doubt. *Territory v. Burgess*, 8 Mont. 57.

Adverse Comments in Connection with Proper Instruction as to Presumption of Innocence — Effect. — Where the court sufficiently charges as to the presumption of innocence, the fact that it tells the jury that the law should be fearlessly administered, and that if satisfied beyond a reasonable doubt of the defendant's guilt they will fail in their duty if they do not convict, is not prejudicial. *People v. Bowers*, (Cal. 1888) 18 Pac. Rep. 660.

Conflicting Presumptions. — A refusal to instruct that "where there are two presumptions, one in favor of innocence and the other in favor of a criminal course, the one in favor of innocence must prevail," is not error. The only presumption in a criminal case is of the innocence of the defendant until guilt is established beyond a reasonable doubt, and it is sufficient if the court has so charged the jury. *People v. Douglass*, 100 Cal. 1.

1. *McMullen v. State*, 5 Tex. App. 577; *Black v. State*, 1 Tex. App. 388; *Coffin v. U. S.*, 156 U. S. 432; *Cochran v. U. S.*, 157 U. S. 286; *Vaughan v. Com.*, 85 Va. 671. *Contra*, *State v. Heinze*, 2 Mo. App. Rep. 1314, 66 Mo. App. 135.

2. *Coffin v. U. S.*, 156 U. S. 432.

3. *Smith v. State*, 63 Ga. 168; *Wooten v. State*, 24 Fla. 335.

The court having charged: "The defendant began on his trial with the presumption of innocence in his favor, and that presumption remains until removed by sufficient proof," it was not error to decline to add, at the prisoner's written request, that "the defendant is presumed to be innocent, and that presumption remains with and fully protects him until it is removed by the proof." *Smith v. State*, 63 Ga. 170. So it is not error to refuse a charge that the legal presumption of innocence is to be regarded by the jury as a matter of evidence, where they have been charged that the law presumes every man innocent until he has been proven guilty by proper legal evidence, and if they have any reasonable doubt as to the guilt of the defendant arising from the evidence, they should acquit him. *Wooten v. State*, 24 Fla. 335.

4. *Hutto v. State*, 7 Tex. App. 44; *Frye v. State*, 7 Tex. App. 94.

5. *People v. Murray*, 72 Mich. 10; *People v. Macard*, 73 Mich. 15; *People v. Potter*, 89 Mich. 353; *People v. De Fore*, 64 Mich. 701.

Rule Applicable to Misdemeanors Where Intent Is Not an Element. — The rule is

though, that in the absence of a request, and the court's attention not being called thereto, it will not be ground for reversal that the jury is not informed in so many words that the presumption of innocence remains with the accused until he is proved guilty.¹

10. As to Reasonable Doubt. — When requested to instruct on the doctrine of reasonable doubt the trial court should comply with such request, and a failure to do so will usually be ground for reversal,² except in cases where the facts are clearly proved.³ Of course the rule stated does not apply where the court has already given a sufficient charge as to the doctrine of reasonable doubt. In that case no further instruction on the subject is necessary.⁴

In Absence of Request. — Whether a failure to charge as to the doctrine of reasonable doubt, in the absence of a request, will be error depends, it is apprehended, upon the practice in the jurisdiction where the question arises. Except in jurisdictions where the court is required in criminal cases to give instructions fully covering the whole law applicable to the case, it will not be error, it is believed, to fail to instruct as to reasonable doubt — although it would undoubtedly be the more proper course to do so. Under the statute in *Texas* the court is bound to instruct as to the law of reasonable doubt, whether requested or not, in felony cases.⁵

held to apply to statutory misdemeanors where intent is not an element of the offense charged. *People v. Potter*, 89 Mich. 353.

1. *People v. Graney*, 91 Mich. 646; *People v. Smith*, 92 Mich. 10; *People v. Ostrander*, (Mich. 1896) 67 N. W. Rep. 1079.

Thus if the court fully instructs the jury that they must be convinced by the evidence of the guilt of the accused beyond a reasonable doubt, this presumption will be sufficient; it informs the jury, in substance, that the presumption of innocence is with the respondent until the jury find that he is proved guilty beyond a reasonable doubt. *People v. Graney*, 91 Mich. 646; *People v. Ostrander*, (Mich. 1896) 67 N. W. Rep. 1079.

Statutory Requisite. — It has been held that even though the court is required by statute to give a charge on this subject, a failure to do so will not be ground for reversal unless an exception is saved before the jury retire. *Murray v. State*, 26 Ind. 141.

2. *People v. Cohn*, 76 Cal. 386; *People v. Cheong Foon Ark*, 61 Cal. 527; *May v. State*, 6 Tex. App. 191; *Treadway v. State*, 1 Tex. App. 669; *Goode v. State*, 2 Tex. App. 520; *Black v. State*, 1 Tex. App. 369.

Insufficient Request. — Where the de-

fense in a criminal case rests largely on the doctrine of reasonable doubt, and the attention of the court is called to that feature of the case by a request to charge, even though the request as made may not be strictly legal, it is, nevertheless, the duty of the court to charge the law on that branch of the case, and an entire failure so to do will be ground for a new trial. *Madden v. State*, 67 Ga. 151.

3. *Pilkinton v. State*, 19 Tex. 214.

4. *People v. Cowgill*, 93 Cal. 596; *People v. Lenon*, 79 Cal. 625, *Gardiner v. State*, 14 Mo. 97; *Vann v. State*, 83 Ga. 44; *State v. Roberts*, 15 Oregon 187; *State v. Anderson*, 10 Oregon 448.

5. *Hutto v. State*, 7 Tex. App. 44; *Black v. State*, 1 Tex. App. 368; *Priestmuth v. State*, 1 Tex. App. 481; *Treadway v. State*, 1 Tex. App. 669; *Robinson v. State*, 5 Tex. App. 519; *Lindsay v. State*, 1 Tex. App. 327; *Spears v. State*, 2 Tex. App. 244.

The Rule in Iowa. — Under a statute providing that where there is a reasonable doubt of the degree of the crime of which the defendant is guilty, he shall be convicted of the lower offense, it is error to fail to instruct, in a prosecution for larceny of property of more than twenty dollars in value, that if the jury are not satisfied beyond a reasonable doubt that the value of the prop-

Defining Reasonable Doubt. — The failure of the court in its instructions to define the meaning of the words "reasonable doubt" is not erroneous in the absence of a specific request therefor,¹ and even though the court attempts to define it, and the definition is inadequate, this will not be ground for reversal unless a more specific instruction is asked.² The accused in a criminal case is nevertheless entitled to a clear and full instruction as to what is meant by the term "reasonable doubt," and a failure to comply with a request for such a definition is reversible error.³

What Instructions Are Necessary. — The propriety of instructions upon reasonable doubt easily resolves itself into questions of the substantive law of the subject, which is treated of in the American and English Encyclopædia of Law, title *Reasonable Doubt*.⁴

11. As to Circumstantial Evidence. — The force and effect of circumstantial evidence are matters of law rather than of practice, and instructions upon this subject can readily be resolved into their legal elements. The subject will be fully treated in the American and English Encyclopædia of Law (second edition) under the titles *Presumptions* and *Reasonable Doubt*. The investigator should also consult the various criminal titles in that work wherein the application of the rules of circumstantial evidence to the particular crime is considered.

12. As to Defense of Alibi — *a.* **NECESSITY OF INSTRUCTING ON THIS DEFENSE.** — Where there is evidence tending to prove an alibi it is, of course, proper for the court to give an instruction on this defense,⁵ and if a request for such an instruction is made the

erty stolen exceeds that amount, they must find that it was less than that. *State v. McCarty*, 73 Iowa 51; *State v. Wood*, 46 Iowa 116.

1. *People v. Flynn*, 73 Cal. 511; *People v. Christensen*, 85 Cal. 568; *People v. Ahern*, 93 Cal. 518; *Winn v. State*, 82 Wis. 571; *State v. Smith*, 65 Conn. 283; *Butler v. State*, 7 Baxt. (Tenn.) 35; *People v. Waller*, 70 Mich. 237.

2. *State v. Reed*, 62 Me. 129. See also *People v. Sheldon*, 68 Cal. 434.

3. *People v. Lachanais*, 32 Cal. 433.

4. Repetition of Rule without Repeating Qualifications. — It has been held sufficient ground for granting a new trial that the judge, after stating to the jury the law applicable to the case, with proper exceptions and qualifications, afterwards, in commenting upon the evidence, repeated the general rule without again repeating the qualifications. *Belknap v. Wendell*, 36 N. H. 250; *Saltmarsh v. Bow*, 56 N. H. 428.

5. *State v. Johnson*, 40 Kan. 266; *State v. Standley*, 76 Iowa 215.

Prosecution of Several Defendants. — Where several defendants are jointly indicted and prosecuted on the theory of a conspiracy to commit a crime charged, and this theory is supported by evidence, the court may properly refuse to instruct that if the jury find that one of the defendants was not actually present when the crime was committed, they should acquit him. *State v. Johnson*, 40 Kan. 266.

No Evidence on Which to Base Instructions. — There should be no instruction on an alibi where there is no evidence to warrant it. *State v. Jackson*, 95 Mo. 623; *State v. Murray*, 91 Mo. 95; *State v. Seymour*, 94 Iowa 699; *Burger v. State*, 83 Ala. 36. Thus it is not error to refuse an instruction on the subject of alibi where the testimony of the witness as to where the defendant lived at the time of the murder was vague and inconclusive, and was unsupported by the statement of any fact showing that the witness knew when the deceased was killed. *State v. Murray*, 91 Mo. 95.

court should comply therewith, and a failure to do so will be reversible error.¹

Necessity of Request. — There is some diversity of opinion as to whether the court is bound to instruct on this defense in the absence of a request. In one state the rule seems to be settled that where there is evidence tending to establish an alibi the court should usually instruct the jury upon that issue, especially where the defendant relies on that defense alone; but that a failure to charge with reference to alibi is not such error as will ordinarily work a reversal, unless the charge be excepted to because of such omission, or unless special instruction upon that subject be requested and refused.² Some courts take the view that the court need not instruct as to this defense in the absence of a request therefor.³ But in one state the judgment was reversed for failure to give such an instruction although no request therefor had been made.⁴

When Question of Personal Identity and Fact of Alibi Are the Same. — Where the question of personal identity and the fact of alibi are virtually the same defense, the omission of the court to instruct separately on alibi is not error. *Dale v. State*, 88 Ga. 552.

Applying Doctrine "Falsus in Uno, Falsus in Omnibus." — An instruction as to the doctrine *falsus in uno, falsus in omnibus*, where the defense is an alibi, may properly be given where the testimony of the witnesses was conflicting. *State v. Johnson*, 91 Mo. 439.

Defective Charge Cured by Subsequent Instruction. — A charge that if the jury entertain a reasonable belief that, at the time of the killing, the defendant was at his own home and not at the place of the killing, they should acquit, is not a sufficient charge on the subject of alibi, but when followed by a sufficient charge on the doctrine of reasonable doubt, the charges taken together will be sufficient. *Boothe v. State*, 4 Tex. App. 202.

1. *State v. Conway*, 55 Kan. 323; *State v. Johnson*, 40 Kan. 266; *State v. Porter*, 74 Iowa 623; *Jones v. State*, 30 Tex. App. 345; *Anderson v. State*, 34 Tex. Crim. Rep. 546; *Tittle v. State*, 35 Tex. Crim. Rep. 96; *Quintana v. State*, 29 Tex. App. 401; *State v. Kelly*, 16 Mo. App. 213.

2. *Quintana v. State*, 29 Tex. App. 401; *McGrew v. State*, 10 Tex. App. 539; *Ninnon v. State*, 17 Tex. App. 650; *Davis v. State*, 14 Tex. App. 645; *McAfee v. State*, 17 Tex. App. 131; *Clark v. State*, 18 Tex. App. 467; *Ayres v. State*, 21 Tex. App. 399; *Deggs v. State*,

7 Tex. App. 359; *Long v. State*, 11 Tex. App. 381; *Granger v. State*, 11 Tex. App. 454; *Hunnicut v. State*, 18 Tex. App. 498.

Exceptions Saved Sufficient to Work Reversal Though Request Not Made. — A failure of the court to instruct as to the defense of alibi will be reversible error, even though no request for such an instruction has been made, if the defendant saves exceptions to the omission to charge. *Conway v. State*, 33 Tex. Crim. Rep. 327; *Quintana v. State*, 29 Tex. App. 401; *Anderson v. State*, 34 Tex. Crim. Rep. 546; *Bennett v. State*, (Tex. App. 1890) 15 S. W. Rep. 405; *McGrew v. State*, 10 Tex. App. 539.

3. *Com. v. Boschino*, 176 Pa. St. 103; *Goldsby v. U. S.*, 160 U. S. 70; *State v. Peterson*, 38 Kan. 205.

State v. Sutton, 70 Iowa 268, in which the view was taken that the defense does not confess the act charged and seek to excuse it, as in the defense of insanity; and therefore the absence of instructions in reference to evidence of an alibi is not prejudicial to the defendant, and under the general instruction as to reasonable doubt on the facts in the case, the defendant would have the advantage of all the presumption which could arise in his favor by reason of such evidence; *State v. Reed*, 62 Iowa 40, where the court held that alibi is not a defense within any accurate meaning of the word, but a mere fact shown in rebuttal of the state's evidence, and therefore does not demand a specific instruction from the court.

4. *Fletcher v. State*, 85 Ga. 666.

b. INSTRUCTIONS DISPARAGING DEFENSE IMPROPER —

(1) *Statement of Rule.* — According to the weight of authority it is erroneous to disparage the defense of alibi. An instruction which tends to prejudice the minds of the jury against the evidence introduced by the defendant to establish an alibi, or which tends to cast suspicion on such defense, is erroneous.¹

(2) *Instructions Held to Violate Rule.* — Accordingly it has been held error to instruct that the jury need not pay any attention to the evidence of an alibi,² or to assume that such defense is frivolous and unfounded,³ or to state that the defense tends merely to cast a reasonable doubt upon the case made by the prosecution,⁴ or that "the law regards evidence to prove an alibi among the weakest and most unsatisfactory of all kinds of evidence,"⁵ or to charge that this defense is "to be viewed with peculiar suspicion and distrust,"⁶ or that evidence thereof should be weighed with great caution, because it is a defense easily fabricated and often attempted by contrivance or perjury.⁷

1. *Albin v. State*, 63 Ind. 598; *Sater v. State*, 56 Ind. 378; *State v. Jaynes*, 78 N. Car. 504; *Casey v. State*, 49 Neb. 403.

A charge that "an alibi is a species of defense often set up in criminal cases, and one which seems to figure somewhat in this," is erroneous; it is calculated to impress upon the jury that the court regarded such a defense as a pretense. *Walker v. State*, 37 Tex. 366.

It is error to charge that alibi is frequently resorted to by guilty persons as well as by innocent ones, and that it is a defense in which perjury, mistake, and deception are often committed. *State v. Chee Gong*, 16 Oregon 534.

Harmless Error. — The defense of alibi is not one requiring that the evidence in support of it should be scrutinized otherwise or differently from that given in support of any other issue in the cause; but an instruction that the proof to sustain such defense is to be subjected to a rigid scrutiny is not ground of reversal if the remaining portions of the charge are such that when given as a whole an intelligent jury could not have been misled by it. *People v. Lattimore*, 86 Cal. 403. See also *People v. Lee Gam*, 69 Cal. 552.

2. *State v. Sidney*, 74 Mo. 390.

3. *State v. Lewis*, 69 Mo. 92.

4. *Sheehan v. People*, 131 Ill. 22.

5. *Williams v. State*, 47 Ala. 659.

6. *Simmons v. State*, 61 Miss. 243.

To the same effect are: *People v. Kelly*,

35 Hun (N. Y.) 295, where the court charged that "an alibi is a species of defense which the law looks upon generally with great suspicion;" *Spencer v. State*, 50 Ala. 124, where the court charged that the law always looks with suspicion upon the defense of an alibi; *Line v. State*, 51 Ind. 174, where the court charged that evidence of an alibi is evidence of a suspicious character, and should be most rigorously sifted and cautiously confided in, but when it has been subjected to severe scrutiny, and ascertained to have been honestly and truthfully given, it should have equal force with the same weight of evidence on any other subject.

7. *Dawson v. State*, 62 Miss. 241 (*overruling Nelms v. State*, 58 Miss. 362), where it was further held that this error was not corrected by a further charge that such defense, "when established by the evidence, is a good and complete legal defense."

Contra, *State v. Blunt*, 59 Iowa 468; *State v. Rowland*, 72 Iowa 327, where it was held not erroneous to instruct that the defense of alibi is one easily manufactured, and that juries are generally properly advised by the courts to scan the proofs of an alibi with care and caution; *Com. v. Webster*, 5 Cush. (Mass.) 295, where it was held not erroneous to instruct that "this [alibi] is a defense often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny." See also *Provo-*

c. APPLYING DOCTRINE OF REASONABLE DOUBT. — It is well settled that if the evidence of an alibi produces upon the minds of the jury a reasonable doubt concerning the truth of the facts constituting the guilt of the defendant, it will be sufficient to require an acquittal.¹ It is therefore proper to charge the jury to that effect,² and error to refuse such an instruction where there is evidence on which to base it.³ So it is error to charge that if

v. State, 55 Ala. 222, where the following charge was approved: "The jury should consider the evidence of an alibi with great caution; that the law so considered it because it was so easily manufactured, but that an alibi, when once established to the satisfaction of the jury, was as good as any other evidence."

1. *Alabama*. — *Albritton v. State*, 94 Ala. 76; *Pate v. State*, 94 Ala. 18.

Indiana. — *Howard v. State*, 50 Ind. 190.

Iowa. — *State v. Hardin*, 46 Iowa 623.

Missouri. — *State v. Emory*, 12 Mo. App. 593; *State v. Taylor*, 118 Mo. 154; *State v. Kelly*, 16 Mo. App. 213; *State v. Howell*, 100 Mo. 628; *Pollard v. State*, 53 Miss. 421.

Pennsylvania. — *Watson v. Com.*, 95 Pa. St. 421.

Tennessee. — *Chappel v. State*, 7 Coldw. (Tenn.) 92.

Texas. — *Walker v. State*, 42 Tex. 360.

"There is but one question, there can be but one question, in a criminal prosecution: Has the guilt of the defendant been established beyond a reasonable doubt? This is the *experimentum crucis* by which every juror must test the correctness of his verdict. If this question cannot be answered in the affirmative the defendant is entitled to an acquittal, regardless of how the doubt has been engendered, provided only it arises out of all the evidence in the case, considered as a whole." *Pollard v. State*, 53 Miss. 424.

If the evidence of an alibi produced upon the minds of the jury a reasonable doubt concerning the truth of the facts constituting the guilt of the defendant affirmed in the indictment, it would be sufficient to require an acquittal. Such a doubt might arise in their minds from the evidence tending to prove an alibi, and if so, that would be sufficient to render the evidence available to rebut the affirmative evidence for the state, without their minds ever having

arrived at a conviction, to the degree of a moral certainty, as to the truth of the alibi. *Walker v. State*, 42 Tex. 360.

Instruction Held Erroneous as Excluding Benefit of Reasonable Doubt. — The court below charged the jury that "when the defense of an alibi is set up, the jury should look with the greatest degree of strictness, and bear in mind that the proof necessary to establish the alibi must be proven with as much certainty as the state would have to establish the guilt of the accused." It was held that the effect of the charge was to exclude the prisoner from the benefit of any reasonable doubt as to his guilt arising from the proof touching the alibi, in connection with other proof in the cause; and that the prisoner was not bound to prove an alibi beyond a reasonable doubt. *Chappel v. State*, 7 Coldw. (Tenn.) 92.

2. *Walker v. State*, 6 Tex. App. 576; *Caldwell v. State*, 28 Tex. App. 566; *Howard v. State*, 50 Ind. 190; *Binns v. State*, 46 Ind. 312; *McLain v. State*, 18 Neb. 159; *State v. Taylor*, 134 Mo. 109.

3. *State v. Lewis*, 69 Mo. 92; *Wiley v. State*, 5 Baxt. (Tenn.) 662; *Binns v. State*, 46 Ind. 312.

Instances of Instructions Held Proper Under This Rule. — The following instructions have been held proper: "If the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where G. H. was killed (if killed), at the time of such killing, you will find him not guilty." *Walker v. State*, 6 Tex. App. 576. An instruction asked by the defendant which states that "the commission of a crime implies the presence of the defendant at the necessary time and place, and evidence of the absence of defendant is always a defense; and if a reasonable doubt is created by this evidence, it is the duty of the jury to acquit the defendant," and is amended by the court by inserting after the word "always" the words "admitted to establish," as amended states the law

the doubt only arises from the consideration of the evidence tending to prove an alibi, the defendant is not entitled to the benefit of that doubt.¹ So, also, it is error to charge that the defense must be made out beyond a reasonable doubt,² or that such defense must be fully and satisfactorily established to the satisfaction of the jury,³ or that it is essential to the sufficiency of

correctly, and is properly given. *People v. Nelson*, 85 Cal. 421.

An instruction that "although the evidence of an alibi falls short of the weight of moral certainty as to the existence of the alibi, yet if it leaves in the minds of the jury such a doubt or uncertainty that, if taken by itself, they could not find for the alibi or against the alibi, then the jury must carry such doubt into the case of the prosecution and array it there as an element of the reasonable doubt beyond which the prosecution must establish guilt. The defendants are entitled as much to the benefit of such doubt as to any other doubt raised by the evidence; and if its weight alone, or added to that of any other, be sufficient to raise a reasonable doubt as to the defendants' guilt, then the jury must acquit them," is sufficient as to the meaning of the term "alibi" as applied to the facts in evidence. *State v. Taylor*, 134 Mo. 112.

The Doubt Must Be a Reasonable One. — Where the accused asked the court to instruct the jury that "if the evidence of an alibi has introduced into the minds of the jury a doubt as to whether or not the defendant was at or about the place when the alleged robbery is said to have been committed, you will acquit the defendant," is properly refused, as the doubt justifying an acquittal must be a reasonable doubt, and the court below sufficiently charged the jury on that point. *Gibbs v. State*, 1 Tex. App. 12.

1. *State v. Waterman*, 1 Nev. 553.

It is not quite correct to say that when the jury have considered all the evidence offered on the point made as to the alibi, if they have a reasonable doubt as to whether "defendant was in some other place when the offense was committed," they should acquit. A better expression of the law would be that when the jury have considered all the evidence, as well that touching the question of the alibi as the criminating evidence introduced by the prosecution, then, if they have any reasonable doubt of the guilt of the accused, they should

acquit, otherwise not. *Mullins v. People*, 110 Ill. 46.

2. *State v. Watson*, 7 S. Car. 65; *Landis v. State*, 70 Ga. 651; *State v. Taylor*, 118 Mo. 154; *Meyers v. Com.*, 83 Pa. St. 144. See also *People v. Fong Ah Sing*, 64 Cal. 253, where a charge, in effect, that the defendant was not to have the benefit of any doubt in regard to the alleged alibi, unless the jury should find as a fact that he was at another place than the place of the shooting when the shooting occurred, was held error.

3. *Dawson v. State*, 62 Miss. 244; *Binns v. State*, 46 Ind. 312; *State v. Josey*, 64 N. Car. 56; *State v. Henry*, 48 Iowa 403; *Watson v. Com.*, 95 Pa. St. 421. *Contra*, *State v. Drawdy*, 14 Rich. L. (S. Car.) 88. See also *Holley v. State*, 105 Ala. 100, in which it was held that an instruction that the defendant was not required to establish the defense of an alibi which he had set up to the "reasonable satisfaction" of the jury was erroneous and properly refused; *Pellum v. State*, 89 Ala. 28, where the following charge was approved: "It is the duty of the defendant, in proving an alibi, to reasonably satisfy the jury that he was elsewhere at the time of the commission of the offense;" *Simpson v. State*, 78 Ga. 91, in which the following instruction was approved: "To make an alibi available as a defense within itself, it must be so strong as to preclude the idea of the party's being at the place where the crime was committed at the time the crime was committed."

Harmless Error. — In a murder trial the court charged that "if there is in this case a reasonable doubt, it will be your duty to acquit;" and further, "if upon the whole evidence there is not a reasonable doubt, it will be your duty to convict;" and further charged that "an alibi, when established to the satisfaction of the jury, is as conclusive a defense as can possibly be interposed in a criminal case. It need not be established beyond a reasonable doubt, but it should be established to the sat-

such defense that it cover the whole time or so much of the time as to render it impossible that the prisoner could have committed the offense charged.¹ No such strict proof is required, and so to hold would, in most cases, render the defense valueless, no matter how honestly it was made.²

d. INSTRUCTIONS PROPER UNDER RULE THAT BURDEN OF PROVING ALIBI IS ON DEFENDANT. — According to some decisions the burden of proving an alibi rests on the defendant,³ and in order to authorize an acquittal on that ground it must be established by a preponderance of the evidence.⁴ Under these decisions it is proper so to instruct.⁵ When such an instruction is given, it is usual further to instruct that if upon the whole evidence there is a reasonable doubt as to the respondent's guilt, he is entitled to an acquittal,⁶ the view being taken that these instructions are not contradictory.⁷

isfaction of the jury." It was held that taken together the charge was not erroneous. *People v. Stone*, 117 N. Y. 480. See also *Rudy v. Com.*, 128 Pa. St. 500.

1. *McAnally v. State*, 74 Ala. 9; *Beavers v. State*, 103 Ala. 40; *Albritton v. State*, 94 Ala. 76; *Pollard v. State*, 53 Miss. 421; *Stuart v. People*, 42 Mich. 260; *Kaufman v. State*, 49 Ind. 251. See also *Wisdom v. People*, 11 Colo. 170. *Compare West v. State*, 48 Ind. 483.

Harmless Error. — The court charged that it was "essential to the successful proof of an alibi that it should cover the whole time of the transaction in question, and when it fails to do so it is regarded as the most suspicious of evidence; that the witnesses all testified to having retired by ten o'clock, and it was for the jury to say whether the prisoner might have left or did leave his bed, commit the deed, and return before the alarm of fire was given." It was held that though the first portion of the charge was erroneous, it was cured by the subsequent part that "it was for the jury to say whether," etc. *State v. Jaynes*, 78 N. Car. 504.

2. *Stuart v. People*, 42 Mich. 260.

3. *Illinois*. — *Ackerson v. People*, 124 Ill. 563; *Aneals v. People*, 134 Ill. 401.

Iowa. — *State v. Vincent*, 24 Iowa 570; *State v. Hardin*, 46 Iowa 623; *State v. Red*, 53 Iowa 69; *State v. Kline*, 54 Iowa 183; *State v. Northrup*, 48 Iowa 583; *State v. Hamilton*, 57 Iowa 596; *State v. Van Winkle*, 80 Iowa 15; *State v. Johnson*, 72 Iowa 393; *State v. Rowland*, 72 Iowa 327.

Vermont. — *State v. Ward*, 61 Vt. 155.

Virginia. — *Thompson v. Com.*, 88 Va. 45.

See generally, on this subject, Am. and Eng. Encyc. of Law (2d ed.), title *Alibi*.

4. *State v. Hamilton*, 57 Iowa 596; *State v. Reed*, 62 Iowa 40; *State v. Rowland*, 72 Iowa 327; *State v. Kline*, 54 Iowa 185; *State v. Maher*, 74 Iowa 82; *State v. Van Winkle*, 80 Iowa 15; *State v. Hardin*, 46 Iowa 623; *State v. Vincent*, 24 Iowa 570.

5. See cases cited in preceding note.

6. *State v. Ward*, 61 Vt. 155; *State v. Red*, 53 Iowa 71; *State v. Maher*, 74 Iowa 82; *State v. Van Winkle*, 80 Iowa 15; *Thompson v. Com.*, 88 Va. 45.

7. *State v. Red*, 53 Iowa 71; *State v. Maher*, 74 Iowa 82; *State v. Ward*, 61 Vt. 155; *Aneals v. People*, 134 Ill. 401.

"This rule does not abrogate the doctrine of reasonable doubt. A prisoner cannot be convicted upon a preponderance of evidence. There must exist no reasonable doubt of his guilt, based upon the evidence. But there may be a preponderance of evidence against him, and yet a reasonable doubt of his guilt. In such case the jury may acquit. This reasonable doubt may be based upon the whole evidence, or upon the evidence establishing certain essential facts necessary to be established, or upon evidence of facts inconsistent with the prisoner's guilt. The doctrine extends to all the evidence and to each part tending to establish independent facts. If, upon consideration of the whole evidence or any part of it, the reasonable doubt arises as to any

c. INSTRUCTIONS PROPER UNDER RULE THAT BURDEN OF PROVING ALIBI IS NOT ON DEFENDANT. — According to other decisions the burden of proving an alibi is not on the defendant,¹ and under these decisions it is erroneous to charge that the defendant must establish his alibi by a preponderance of the evidence,² or that testimony tending to show an alibi should not be considered unless it establishes the fact by a preponderance of evidence.³ According to these decisions such an instruction is inconsistent with the doctrine of reasonable doubt.⁴

essential fact, the jury must acquit." State v. Red, 53 Iowa 71.

"Fair" Preponderance of Evidence. — On a murder trial the court instructed the jury that if the alibi was supported by a "fair preponderance of the evidence" they should acquit, and it was held that the use of the word "fair" did not vitiate the instruction. State v. Johnson, 72 Iowa 393.

Instances of Instructions Held Proper Under This Rule. — The following instructions have been held proper: That "the burden of proof is on the state to establish beyond a reasonable doubt that the [crime] charged was in fact committed. But if the state has made this proof, then the burden of proof is on the defendant to establish by the weight or preponderance of the evidence his defense of alibi; but if the entire evidence upon the whole case raises a reasonable doubt as to defendant's guilt, then you should acquit him." State v. Van Winkle, 80 Iowa 15. That the evidence to prove an alibi must outweigh the evidence to show the defendant at the place of the crime; that if so established the jury should acquit; and that the alibi evidence was to be considered with all the other evidence in the case, and if upon the whole there was a reasonable doubt as to the respondent's guilt he was entitled to an acquittal. State v. Ward, 61 Vt. 155.

1. Johnson v. State, 21 Tex. App. 368; Walker v. State, 42 Tex. 360; State v. Taylor, 118 Mo. 153; State v. Johnson, 91 Mo. 439; State v. Howell, 100 Mo. 628 [overruling State v. Jennings, 81 Mo. 185]; French v. State, 12 Ind. 670; State v. Starnes, 94 N. Car. 973; State v. Chee Gong, 16 Oregon 534. See also Am. and Eng. Encyc. of Law (2d ed.), title *Alibi*.

2. French v. State, 12 Ind. 670; State v. Taylor, 118 Mo. 170; State v. Howell, 100 Mo. 628 [overruling State v. Jennings, 81 Mo. 185]; State v. Chee

Gong, 16 Oregon 534; Toler v. State, 16 Ohio St. 583; State v. Ardoin, 49 La. Ann. 1145; Casey v. State, 49 Neb. 403; Beck v. State, (Neb. 1897) 70 N. W. Rep. 498.

On a trial for rape the court instructed: "If the jury believe and find from the evidence that the defendant was not present at the place and time the alleged rape is stated to have been committed, by the prosecuting witness, K., but that the defendant, at the time of the alleged rape, was elsewhere, at another and different place than where the alleged rape is stated to have taken place by said K., then you should acquit the defendant." It was held that this instruction was proper and not liable to convey to the jury the impression that the defense should be made out by a preponderance of the evidence. State v. Johnson, 91 Mo. 439.

3. Walters v. State, 39 Ohio St. 215.

4. Johnson v. State, 21 Tex. App. 380, in which the court says: "If the burden of proof is on defendant to establish his alibi by a preponderance of evidence, then the doctrine of reasonable doubt cannot possibly apply. Whenever, in a criminal or civil case, a party is required to prove a fact (and this always means by a preponderance of testimony), the reasonable doubt does not obtain, and cannot be applied to the negative or opposite of such fact. If A. be at Galveston at a given time he is guilty, but if at Houston at that time he is not guilty. The burden is on A. to prove that he was at Houston. If this be so, a doubt that he was at Galveston is not in the proposition, because he must prove that he was at Houston, and this proof must be made by a preponderance of evidence; and a doubt that he was at Galveston does not aid his proof that he was at Houston. On the other hand, his proof that he was at Houston may not be by a preponderance of the evidence, but amply sufficient to raise a reasonable

f. INSTRUCTIONS AS TO FAILURE TO PROVE ALIBI. — While it is stated by text-writers that an unsuccessful attempt to prove an alibi is always a circumstance of great weight against the prisoner, because a resort to that kind of defense implies an admission of the truth and relevancy of the facts alleged and the correctness of the inferences drawn from them if they remain uncontradicted,¹ the decisions are practically unanimous in holding that an instruction embodying such a statement is erroneous.²

doubt that he was at Galveston. Let us view these propositions at work. One of the jurors says: 'I doubt that A. was at Galveston.' To this another replies: 'So do I, but has A. proved by a preponderance of evidence that he was at Houston?' 'No,' says the first, 'but I doubt, from his evidence in support of his being at Houston, that he was at Galveston.' 'But,' replies the other, 'I know that he has not proven by a preponderance of testimony that he was not at Galveston, and we are instructed by the judge that he must do this—that this burden is upon him.' In comes the third juror, and suggests that the only way out of this trouble is to obey all that the judge says upon this subject. To this all agree. 'Now, then,' says he, 'we will hold defendant to the proof that he was at Houston, for we are told by the judge that the burden is on him, and that he must prove by the preponderance of the evidence. Has he discharged this burden?' All say, 'No.' Then he must be convicted. But if he has discharged this burden, then the jury might have a reasonable doubt of his being at Galveston. But the first juror replies: 'The judge charged us that if defendant has shown such facts as raise a reasonable doubt as to whether he was at Galveston or not, we should acquit.' To this all agree; but the second juror says: 'We are also very plainly told by his honor that the burden is on him to prove that he was not at Galveston, and this must be done by the preponderance of evidence, and we have all agreed that it has not been done by him.'"

What Instructions Proper on this Point.

—It is said that the following instruction would be proper: "That even if they [the jury] believed the witnesses supporting the alibi, they could not on that account acquit the accused unless it had been proved that the period during which he was shown to have been absent from the scene of the

murder covered the time of its commission, or so nearly did it as to raise in their minds a reasonable doubt as to his having passed from one point to the other, and that in determining this question they must look to all the testimony in the case, giving to the witnesses on either side such credit as they thought them entitled to." *Polard v. State*, 53 Miss. 424.

Harmless Error. — Where there is evidence tending to prove an alibi, a general statement in the charge that the defendant may establish any fact essential to his defense by a mere preponderance of evidence, though objectionable in itself, is not prejudicially erroneous as applied to the defense of alibi, where the court specifically charged that if, from the whole case, the evidence was sufficient to create a reasonable doubt as to whether the defendant was present at the time and place of the murder, he should be acquitted. *People v. Tarm Pol*, 86 Cal. 225; *People v. Chun Heong*, 86 Cal. 330.

1. Wills on Circumstantial Evidence, 83.

2. *Albritton v. State*, 94 Ala. 76; *State v. Josey*, 64 N. Car. 59; *People v. Malaspina*, 57 Cal. 628; *Miller v. People*, 39 Ill. 465; *State v. Collins*, 20 Iowa 85. Compare *Pilger v. Com.*, 112 Pa. St. 220, in which it was held that where a corrupt attempt to manufacture an alibi failed, the court properly instructed that such failure might be regarded as indicative of the defendant's guilt [*distinguishing Turner v. Com.*, 86 Pa. St. 54]; *Com. v. McMahon*, 145 Pa. St. 413, where it was held that the defense of alibi being set up, it was not improper for the court to instruct that if it "was false, and manufactured by the defense, it should go for nothing, and should have some weight against the defendant."

Evidence of Alibi for Jury. — Evidence of an alibi, whether sufficient to render the guilt of the defendant impossible.

In speaking of the statement made by text-writers it is said that "this is stated as a fact which we all know to be true, and not as a rule of law to be charged by a court."¹ So it has been held erroneous to charge that a failure to prove an alibi ought to raise a strong presumption against the *bona fides* of the defense,² or is a circumstance unfavorable to the defendant,³ or that the presumption is that the evidence of the prosecution is true.⁴

13. As to Evidence to Establish Identity. — In instructing as to the strength of evidence necessary to identify the accused as the person who committed the offense, it is error to charge that "all that is necessary in order to justify the jury in finding the defendant guilty is that they shall be satisfied from the evidence of the defendant's guilt, to a moral certainty and beyond a reasonable doubt, although they may not be entirely satisfied from the evidence that the defendant and no other person committed the alleged offense."⁵ On the other hand, the court may properly refuse an instruction that the jury must have "an abiding confidence and full faith" that the witnesses were not mistaken in the fact of such identification by a personal recognition,⁶ or that if

or only improbable, is proper for the jury, and he is entitled to the benefit of any reasonable doubt the jury may entertain on this point. Where a defendant attempts to prove an alibi and fails to do so, it should have no greater weight to convince a jury of his guilt than a failure to prove any other important item of defense, and should not, generally speaking, operate to his prejudice. *Miller v. People*, 39 Ill. 458.

Circumstance to Be Weighed Against Defendant. — In *Kilgore v. State*, 74 Ala. 5, the following instruction was approved: "An unsuccessful attempt to prove an alibi, in a criminal case, is a circumstance to be weighed against the defendant." This decision hardly seems to be in line with the rule above stated.

1. *State v. Josey*, 64 N. Car. 59.

It cannot be said that an unsuccessful attempt to prove an alibi is a circumstance of great weight against the prisoner. *People v. Malaspina*, 57 Cal. 628.

2. *Com. v. Fisher*, 15 Phila. (Pa.) 386. See also *Turner v. Com.*, 86 Pa. St. 54, where it was held erroneous to charge that an alibi, if proved, "constitutes a complete defense; if not proved, and if you think it has not, the attempt to manufacture evidence is a circumstance which always bears against the person. No innocent person is driven to manufacture evidence."

3. *Adams v. State*, 28 Fla. 511; *White v. State*, 31 Ind. 262. See also *Prince v. State*, 100 Ala. 144, where it was held that the following charge was erroneous: "If the defendant has failed to establish his alibi through the perjury or through the want of recollection of his witnesses, it is a circumstance against him."

4. *Sawyers v. State*, 15 Lea (Tenn.) 694.

The court charged that "the failure of either of the defendants to account for his whereabouts during all the time within which the offense might have been committed is not of itself a circumstance tending to prove his guilt, but a failure of this character may be properly considered by you in connection with any other evidence in the case tending to prove guilt, if you find that there is such." It was held that that part of the instruction in italics was erroneous. *Parker v. State*, 136 Ind. 284.

5. *People v. Kerrick*, 52 Cal. 446; *People v. Phipps*, 39 Cal. 326; *People v. Padilla*, 42 Cal. 535; *People v. Carrillo*, 70 Cal. 643. See also *People v. Brown*, 56 Cal. 405, in which a similar instruction was held erroneous, the instruction being as follows: "You are not legally bound to acquit him [the defendant] because you may not be entirely satisfied that the defendant and no other person committed the alleged offense."

6. *Hughes v. State*, 75 Ala. 35.

the prosecuting witness "may be mistaken" in the identity of the accused then the jury ought to acquit him.¹

14. As to Arguments of Counsel—*a.* AS TO CONSIDERATION TO BE GIVEN ARGUMENTS. — While it has been held not improper to charge the jury that the attorneys on either side are not supposed to be impartial, and that the jury are to take their statements guardedly,² it will be error to charge that no consideration is to be given to arguments of counsel,³ or that the jury shall not consider any argument of counsel as to the law of the case,⁴ as parties have a right to be heard by counsel, and it is the privilege of counsel to address the jury on the facts.⁵

1. *Booker v. State*, 76 Ala. 22, in which it is said that "a mere possibility of mistake [as to the identity of the accused] is not the equivalent of that insufficiency of proof which, as matter of law, generates a reasonable doubt and demands acquittal."

Establishing Identity of the Accused to an Absolute Moral Certainty. — The refusal of the court to give an instruction to the jury that "the identity of the accused must be established to an absolute moral certainty, and every fact and circumstance must be established to the same degree of certainty as the main fact which these independent circumstances, taken together, tend to establish. If this certainty is not proven, then the jury must acquit the defendant," is not error. *People v. Nelson*, 85 Cal. 421.

Identity of Person from Identity of Name. — On a trial for robbery, where the prosecution offers in evidence the deposition taken on the preliminary examination, which shows that the person charged with the offense has the same name as the defendant and the latter offers no evidence to disprove his identity, the court may instruct the jury that identity of person is presumed from the identity of name, and the failure to instruct that the presumption of evidence is only *prima facie*, is without prejudice. *People v. Riley*, 75 Cal. 98.

2. *State v. Jones*, 29 S. Car. 201.

Directing Jury to Question Raised by Argument. — It is not error for a judge, in charging the jury, after instructing them correctly upon a point presented by counsel, to add that, as a general rule, it is "the fairest and best way" for a jury to decide cases mainly upon the ground taken and discussed by counsel in the argument. *Melvin v. Bullard*, 35 Vt. 268.

3. *Garrison v. Wilcoxson*, 11 Ga. 154. See also *Smith v. State*, 95 Ga. 472.

4. *Reeves v. State*, 34 Tex. Crim. Rep. 483.

5. *Garrison v. Wilcoxson*, 11 Ga. 154.

Instructions Held Not to Violate This Rule. — Where counsel for the accused stated in argument to the jury, in strong language, that the prisoner impressed him, in his statement, as being innocent of the charge, and that he (the counsel) conscientiously did not believe the prisoner was guilty, there was no error in charging that "what counsel said in their argument, and what they believe" was to have no influence whatever with the jury, it clearly appearing from the text that the presiding judge used the words above quoted with reference solely to the statement made by counsel as to his belief in the prisoner's innocence. *Smith v. State*, 95 Ga. 472. So it is not a violation of the rule to charge that "I cannot do anything towards brushing away the sophistries of counsel," where the words quoted occur when the court is stating exactly and fully the restrictions of the law upon a judge endeavoring to comment upon the facts in testimony to the jury, and where there is not the slightest indication of any personal application of the words to any particular counsel. *State v. Way*, 38 S. Car. 347.

Effect of Failure to Except. — The court charged: "What counsel on either side may say, in the course of argument, as to their personal belief in the guilt or innocence of the defendant, is not in any degree evidence, and as such will be entirely disregarded by you, and you will try the defendant wholly by the law as given you in this charge, and by the testimony admitted to go before you, and allow nothing else to influence you in finding your verdict." In

b. CORRECTING IMPROPER ARGUMENTS BY INSTRUCTIONS. — Counsel, in arguing the cause to the jury, are justified in referring to the evidence and in making from it such deductions as they think are justified by the evidence.¹ But where the legitimate limit of argument is transcended and prejudice is likely to result, the trial judge should, especially when requested, correct the tendency of the argument to mislead. In jurisdictions where the argument precedes the charge it is in a measure discretionary whether this should be done by stopping and reproving counsel at the time, or by setting the matter right in the charge,² and in a number of decisions it has been held sufficient to correct the error in the charge,³ the statement being made in one of them that it is perhaps the most appropriate time to make the correction when charging the jury.⁴ But it has been held that where counsel grossly abuses his privilege, to the manifest prejudice of the opposite party, it is the duty of the judge to stop him then and there, and that a failure to do so is good ground for a new trial.⁵

commenting on this charge the reviewing court said: "A very nice and most serious question would have been presented in the case we are considering had this portion of the charge [the italicized portion] been specially excepted to. This, however, was not done, and the question is, was it calculated, under the facts and circumstances of the case, to injure the rights of defendant? In view of the explanation made by the learned judge, we think not. He says: 'As to denying the right to be heard by counsel, I allowed four counsel to speak for the defense—all that they asked; and gave them unlimited time, the four aggregating seven hours.'" *Roe v. State*, 25 Tex. App. 33.

1. *People v. Hite*, 8 Utah 461, where the following charge was refused: "The jury are further instructed that whatever may have been said or claimed by counsel on either side during the introduction of the testimony, and the examination of the witnesses, or in their arguments to the court, should have no influence whatever with the jury in determining the facts in the case, except so far as the testimony when considered altogether may show the statement to have been true. The jury should not be influenced by anything but the testimony in the cause, with whatever light may have been reflected thereon by the arguments and analysis of counsel and the law as it has been given you in charge by the

court, and from these alone endeavor to arrive at the very truth regardless of results." The reviewing court considered this charge improper as tending to limit the effect of legitimate argument.

2. *Jenkins v. North Carolina Ore Dressing Co.*, 65 N. Car. 564.

Correcting Misrepresentations of Law. — It is the duty of the court, in the trial of both civil and criminal cases, to correct any misrepresentations of law made to the jury, although admitted to be law by the parties or their counsel. *State v. Johnson*, 1 Ired. L. (N. Car.) 354.

3. *Fry v. Bennett*, 3 Bosw. (N. Y.) 200; *State v. O'Neal*, 7 Ired. L. (N. Car.) 251; *Melvin v. Easley*, 1 Jones L. (N. Car.) 386.

4. *State v. O'Neal*, 7 Ired. L. (N. Car.) 252.

5. *Jenkins v. North Carolina Ore Dressing Co.*, 65 N. Car. 564. See generally article ARGUMENTS OF COUNSEL, vol. 2, p. 750.

Correcting Error After Disagreement of Jury. — On a trial for larceny the prosecuting officer said that if the judge had believed that the defendant had made out a fair claim to the property, he would have directed a verdict of acquittal without their leaving the box; but as he had not done so, the judge must not have believed that a fair claim to the property had been shown by the defendant. This passed unnoticed by the judge then, and in his charge, but

15. Limiting Effect of Evidence — *a. PROPRIETY OF SUCH INSTRUCTIONS.* — It happens not infrequently that evidence is admitted for some special purpose and can be properly considered for no other. When this is the case it is, of course, proper so to instruct the jury.¹

b. NECESSITY OF GIVING SUCH INSTRUCTIONS — (1) *In Criminal Cases.* — In criminal cases, at least, the rule is well settled that whenever extraneous matter is admitted in evidence for a specific purpose incidental to, but which is not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise an improper influence upon the jury as to the main issue, injurious and prejudicial to the rights of a party, it is the duty of the court in charging to limit the effect of the evidence to the purpose for which it was admitted,² and that, too,

when the jury returned with a verdict of guilty, and on being polled three of them did not concur, the judge informed them that he had no opinion of his own, and that it was improper for the counsel so to have represented him. It was held that this was erroneous; that the remarks of counsel were improper; and that the attempted correction of them by the court came too late. *State v. Caveness*, 78 N. Car. 484.

1. *Harrington v. State*, 19 Ohio St. 264; *Giddings v. Baker*, 80 Tex. 308; *Engers v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 987; *Farwell v. Warren*, 51 Ill. 467; *Schlicker v. Gordon*, 19 Mo. App. 479.

Instance. — Evidence which binds one of several codefendants alone may be properly admitted, and its effect as to the other defendants may properly be limited by an instruction. *Schlicker v. Gordon*, 19 Mo. App. 479.

2. *Illinois.* — *Farwell v. Warren*, 51 Ill. 467.

Iowa. — *State v. Lavin*, 80 Iowa 555.

Kansas. — *State v. Marshall*, 2 Kan. App. 792.

Maine. — *State v. Lull*, 37 Me. 246.

Pennsylvania. — *Com. v. Tadrack*, 1 Pa. Super. Ct. Rep. 555.

Texas. — *Rogers v. State*, 26 Tex. App. 404; *Long v. State*, 11 Tex. App. 381; *Reno v. State*, 25 Tex. App. 110; *Barnes v. State*, 28 Tex. App. 30; *Carter v. State*, 23 Tex. App. 512; *Mayfield v. State*, 23 Tex. App. 649; *Alexander v. State*, 21 Tex. App. 410; *Holmes v. State*, 20 Tex. App. 518; *Kelley v. State*, 18 Tex. App. 269; *House v. State*, 16 Tex. App. 32; *Barton v. State*, 28 Tex. App. 484; *Wash-*

ington v. State, 23 Tex. App. 338; *Maines v. State*, 23 Tex. App. 576; *Davidson v. State*, 22 Tex. App. 372; *Higgenbotham v. State*, 24 Tex. App. 505; *Martin v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 976; *Burks v. State*, 24 Tex. App. 326; *Thornley v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 982; *Proctor v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 172; *Paris v. State*, 35 Tex. Crim. Rep. 82; *Short v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 1072; *Mask v. State*, 34 Tex. Crim. Rep. 136; *McCall v. State*, 14 Tex. App. 353; *Jenkins v. State*, 1 Tex. App. 346; *Francis v. State*, 7 Tex. App. 501; *Taylor v. State*, 22 Tex. App. 545; *Wheeler v. State*, 23 Tex. App. 598; *Davis v. State*, 23 Tex. App. 210; *Thompson v. State*, 29 Tex. App. 208; *Hutton v. State*, (Tex. Crim. App. 1896) 33 S. W. Rep. 969; *Sexton v. State*, 33 Tex. Crim. Rep. 416; *Matkins v. State*, 33 Tex. Crim. Rep. 605; *Mahoney v. State*, 33 Tex. Crim. Rep. 388; *Shackelford v. State*, (Tex. Crim. App. 1894) 27 S. W. Rep. 8; *Barron v. State*, 23 Tex. App. 462; *Coker v. State*, 35 Tex. Crim. Rep. 57; *Dickey v. State*, (Tex. Crim. App. 1894) 27 S. W. Rep. 140; *Oliver v. State*, 33 Tex. Crim. Rep. 541; *Hargrove v. State*, 33 Tex. Crim. Rep. 431; *Warren v. State*, 33 Tex. Crim. Rep. 502; *Nelson v. State*, 33 Tex. Crim. Rep. 379; *Owens v. State*, 35 Tex. Crim. Rep. 345.

Utah. — *Marks v. Culmer*, 6 Utah 419.

Wisconsin. — *Kollock v. State*, 88 Wis. 663; *Fossdahl v. State*, 89 Wis. 482.

Evidence of Extraneous Crime to Show Intent or Motive. — Where evidence of an extraneous crime is admitted for the

whether such an instruction has been requested or not.¹ And it has been held in one state that nondirection in this regard is reversible error even in the absence of exceptions.² Of course if the jury could not possibly have concluded that the evidence was admitted for any other purpose than that for which it was admitted, no cautionary instruction is necessary.³

(2) *In Civil Cases.* — In civil cases the authorities are conflicting as to whether an omission to give an instruction specially limiting the effect of evidence admitted to a particular purpose, when no request has been made therefor, is erroneous.⁴

purpose of showing the intent or motive of the defendant in the commission of the act alleged against him, it is the duty of the trial court, in charging the jury, to explain the purpose for which it was admitted, and to limit the effect of the evidence to this purpose alone. *McCall v. State*, 14 Tex. App. 353.

On a trial for arson, where evidence of admissions by the defendant that he had poisoned the horses of the man whose house was burned was admitted, it was the duty of the court to charge that such evidence could only be considered as tending to show malice, and not to prove the commission of the crime charged. *Kollock v. State*, 88 Wis. 663.

When evidence of collateral facts or of a distinct offense is admitted as proof of the guilty knowledge or intent of the accused, the charge should apprise the jury of the legitimate scope and purpose of such evidence, and thus guard them against treating it as proof of the *corpus delicti*. *Francis v. State*, 7 Tex. App. 501.

Impeaching Evidence. — If evidence of prior convictions is admitted in order to discredit the defendant's testimony, it is erroneous to refuse a charge that it should be considered for no other purpose. *Fossdahl v. State*, 89 Wis. 482.

If a defendant on cross-examination admits that he has been charged with other crimes, it is reversible error not to instruct that such evidence can only be considered as affecting his credibility. *Oliver v. State*, 33 Tex. Crim. Rep. 541. So where evidence of a former conviction has been admitted, it is reversible error not to instruct that this evidence can only be considered as affecting the defendant's credibility. *Hutton v. State*, (Tex. Crim. App. 1896) 33 S. W. Rep. 969.

1. *Martin v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 976; *Davidson v.*

State, 22 Tex. App. 372; *Thornley v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 982; *Rogers v. State*, 26 Tex. App. 404; *Owens v. State*, 35 Tex. Crim. Rep. 345; *Barton v. State*, 28 Tex. App. 483. *Contra*, *People v. Gray*, 66 Cal. 271.

Exception — Misdemeanor Cases. — It has been held that upon a prosecution for a misdemeanor it is not necessary for the court, unless requested, to give an instruction limiting the effect of the evidence to the purpose for which it was admitted. *Duke v. State*, 35 Tex. Crim. Rep. 283.

2. *Martin v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 976; *Paris v. State*, 35 Tex. Crim. Rep. 82; *Davidson v. State*, 22 Tex. App. 372; *Thornley v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 982; *Burks v. State*, 24 Tex. App. 326.

3. *Holly v. Com.*, (Ky. 1896) 36 S. W. Rep. 532. See also *State v. Gaston*, 96 Iowa 505, where it was held that if the purpose of admitting the testimony objected to was clearly apparent, it was not prejudicial error to fail to give a charge limiting the effect of the evidence.

In Giving These Instructions They Should Be So Framed as neither to withdraw the evidence from the consideration of the jury, nor to restrain them from giving to it, in connection with the other evidence in the case, such weight in respect to the matter which it proves, in the light of reason and good sense, as they may, as thus advised, believe it to deserve. *Harrington v. State*, 19 Ohio St. 264.

4. In *McDermott v. Hannibal*, etc., R. Co., 87 Mo. 285, it was held that evidence admissible for one purpose, but inadmissible for another, should, when admitted, be so controlled by an instruction, and the judgment was reversed because this was not done.

16. Cautioning Against Sympathy or Prejudice. — It will, in general, be proper for the trial court to caution the jury against sympathy for or prejudice against one of the parties.¹ Of course

In *Worthing v. Worthing*, 64 Me. 335, it was held that when evidence is admissible for a special purpose only, the jury should be instructed to limit its use to that purpose, and a general instruction permitting its use for all purposes is erroneous.

In *Weir v. McGee*, 25 Tex. Supp. 20, it was held that where evidence tending to impeach the credibility of the witness, but inadmissible therefor, is offered for another purpose, it should be carefully restricted to such other purpose by another instruction.

In *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, it was held that when evidence is admitted for a specific purpose which is not competent under the main issue involved, the court should by instruction confine its consideration to the specific matter to which it is relevant, but that a failure thus to limit the application in the main charge will not constitute cause for reversal when no special charge is asked having that object in view.

In *Lipprant v. Lipprant*, 52 Ind. 276, it was held that a failure to instruct as to the proper purpose for which evidence was introduced should not be assigned as error, unless requests for instructions of that nature were made and exceptions saved to a ruling refusing them.

In *Anson v. Evans*, 19 Colo. 274, the court said in effect that where evidence is admitted for a special purpose, it should be limited to that purpose by an instruction; but as the cause was reversed on other grounds, the court said that it did not consider it necessary to determine whether this was reversible error.

1. *Alabama*. — *Lunsford v. Walker*, 93 Ala. 36.

California. — *People v. Young*, 65 Cal. 225.

Connecticut. — *Davis v. Kingsley*, 13 Conn. 299.

Georgia. — *McTyier v. State*, 91 Ga. 254.

Illinois. — *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329.

Indiana. — *Blizzard v. Applegate*, 77 Ind. 516.

Minnesota. — *Bingham v. Bernard*, 36 Minn. 114.

Mississippi. — *Wood v. State*, 64 Miss. 776.

Missouri. — *State v. Talbott*, 73 Mo. 347.

Nebraska. — *Smith v. State*, 4 Neb. 278.
South Carolina. — *State v. Petsch*, 43 S. Car. 132.

Instructions Held Proper Under This Head — *In General*. — An instruction is not objectionable because it contains the words: "You will allow no false sympathy to sway you from a proper discharge of your duty." *Smith v. State*, 4 Neb. 288. Nor is it objectionable to charge that the jury have no right to permit their feelings of sympathy to interfere with their duty, whatever that may be under the law and the evidence, nor, on the other hand, to allow any considerations of public policy or over-anxiety to enforce the law to influence them in the fair consideration and decision of the case, otherwise than in strict accordance with the evidence in the cause. *State v. Talbott*, 73 Mo. 347. Nor is it objectionable to charge that the jury, in reaching a verdict, must not be controlled by any fear of what the punishment may be. *Coyle v. Com.*, 100 Pa. St. 579; *Brantley v. State*, 87 Ga. 149; *Wilson v. State*, 69 Ga. 240.

Race Prejudice. — In an action by a negro against a white man, to recover for assault and battery, the court may properly charge the jury to consider the case "without regard to the difference in race or color of the parties." *Lunsford v. Walker*, 93 Ala. 36.

Public Opinion. — So the jury may properly be cautioned not to be influenced by public opinion, whether for or against the defendant, and be told that they are not to concern themselves with the pleasure or displeasure of the public. *McTyier v. State*, 91 Ga. 254.

Sympathy on Account of Sex. — In an action for assault the court may properly caution the jury not to "lose their heads," and find for the plaintiff on general principles because of her sex. *Bingham v. Bernard*, 36 Minn. 114.

Instruction Held Improper. — Instructions which characterize the people in attendance at a trial as a lobby, who have packed the court-room with intent to influence the jury to decide the

if the attendant circumstances do not warrant it, a request for such an instruction is properly refused,¹ and it has been said that the giving of such instructions is necessarily very much within the discretion of the court, and that refusal to give them cannot ordinarily be assigned as error.² On the other hand, cases might readily be supposed in which such an instruction would not only be proper but necessary.³

XIX. WITHDRAWING OR MODIFYING INSTRUCTIONS. — The court has the power at any time during the trial to modify its instructions to the jury, or to revoke them entirely, if, upon reflection, it is considered that they have been erroneously given.⁴ This it

case without regard to evidence, are properly refused. *Lynch v. Bates*, 139 Ind. 206.

Improper Remarks in Cautioning Against Prejudice. — To remark, in cautioning a jury against prejudice, that the defendant is charged with a "dastardly crime," is not ground for a new trial. *State v. McCarter*, 98 N. Car. 637.

1. *Central Branch Union Pac. R. Co. v. Andrews*, 41 Kan. 371, in which it was held not erroneous to refuse an instruction that a railroad corporation is entitled to the same protection under the law as individual litigants, where it does not appear that there was any reason to distrust the integrity of the jury, or to impute partiality or prejudice to them.

2. *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, in which an instruction cautioning the jury against prejudice and favoritism was held properly refused.

3. *Blizzard v. Applegate*, 77 Ind. 516, in which case it was said: "If, in the case in hand, an effort had been made in argument to array prejudice against either party on account of his profession or employment, it was the right of the court to caution the jury to discard such considerations. It is the duty of the trial court to keep the scales of justice evenly balanced, and to rebuke any attempt to carry a case before a jury by exciting class prejudices, or invoking distinctions of race, religion, politics, or otherwise, between the litigating parties." See also *Quinby v. Railway Co.*, 2 Del. Co. Rep. (Pa.) 285, in which it was said that where the court discovers prejudice, it is necessary to state the law so clearly and unequivocally as to leave the jury no avenue of escape from their sworn duty.

Doyle v. Dobson, 74 Mich. 567. In this case it was said: "If such an in-

struction is asked it ought to be given, in most cases, as such an instruction ought not to do any harm or be of undue advantage to either party. A careful examination, however, of the record in this case, convinces us that the verdict was a just one, and not brought about by any undue sympathy or prejudice in favor of the plaintiff. We shall, therefore, not disturb it because of the failure of the court to give or to refer to the subject-matter of this seventh request."

In answer to a request to charge that the jury had no right to be governed by nor act upon their sympathies, it was held not erroneous to charge: "You have no right to act upon your sympathies without any proof; but if the proof happened to concur with your sympathies, you are not to disregard the proof because of that fact; you are to be governed by the proof in the case." *Sheahan v. Barry*, 27 Mich. 217.

4. *Sittig v. Birkestack*, 38 Md. 158; *Goldsborough v. Cradle*, 28 Md. 477; *Hall v. State*, 8 Ind. 439.

"It would be strange if such a power did not exist; and stranger still if a party, after excepting to an instruction as erroneous, should be heard to complain because it was afterwards revoked and withdrawn from the jury." *Sittig v. Birkestack*, 38 Md. 158.

After Retirement of Jury. — Erroneous instructions may be withdrawn after the jury have retired by causing them to be returned into open court, and, in the presence of the objecting party, withdrawing the obnoxious charge and giving a correct one. *Buntin v. State*, 68 Ind. 38.

Withdrawing Declarations of Law. — A party who has presented propositions of law may be allowed to withdraw them where the other party submits no

may do either with or without request.¹ It is well settled that where a judge in his charge lays down erroneous propositions, but subsequently corrects the misdirection and lays down the correct rule, no error is presented for review.² If an erroneous instruction is thus withdrawn, it will be presumed that the jury accepted and acted upon the correction.³ In order to obviate an erroneous instruction the withdrawal must be absolute,⁴ and in such explicit terms as to preclude the inference that the jury might have been influenced thereby.⁵ Where an erroneous instruction has been given, the error is not cured by the giving of instructions explanatory of or contradictory to those first given.⁶

propositions. *Smith v. Mayfield*, 60 Ill. App. 266.

1. *Sittig v. Birkestack*, 38 Md. 158; *Carlock v. Spencer*, 7 Ark. 12; *Hall v. State*, 8 Ind. 439; *Smith v. Maxwell*, 1 Stew. & P. (Ala.) 221.

2. *Greenfield v. People*, 85 N. Y. 91; *Eggler v. People*, 56 N. Y. 642; *Meyer v. Clark*, 45 N. Y. 285; *Sittig v. Birkestack*, 38 Md. 158; *Com. v. Clifford*, 145 Mass. 97.

3. *Goodsell v. Taylor*, 41 Minn. 207.

4. *Indiana*. — *Lower v. Franks*, 115 Ind. 334; *Wenning v. Teeple*, 144 Ind. 189; *Buntin v. State*, 68 Ind. 38.

Massachusetts. — *Eldridge v. Hawley*, 115 Mass. 410.

Missouri. — *Jones v. Talbot*, 4 Mo. 279; *New Albany Woolen Mills v. Meyers*, 43 Mo. App. 124.

New York. — *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Leonard v. Collins*, 70 N. Y. 90; *Cannfield v. Baltimore, etc.*, R. Co., 46 N. Y. Super. Ct. 238; *Driggs v. Phillips*, 103 N. Y. 77; *Greenfield v. People*, 85 N. Y. 91.

What Is a Sufficient Withdrawal. — Where the court recites certain statements in its charge to which exceptions have been taken, and remarks: "I withdraw what I said upon those points, as there was no evidence to that effect," the error is thereby cured. *Sergeant v. Martin*, 25 W. N. C. (Pa.) 565.

What Is Not a Sufficient Withdrawal. — Where an erroneous instruction was excepted to by the defendant and waived by the plaintiff, and the presiding judge said: "If the party declines to receive it, I will leave the matter as it stands before the jury," it was held that the jury were not instructed with sufficient distinctness to disregard the instruction given, and that a new trial should be granted. *Eldridge v. Hawley*, 115 Mass. 410.

An instruction materially affecting the case was given, and withdrawn, about the close of the argument, by the court stepping to the counsel-table, and, in the sight of counsel and jury, removing the instruction and making it "refused," and returning it to the plaintiff's counsel in full view of all present, the jury's attention not being specially called to the change in the instructions as read to them by the court, except by the removing of the same. The jury on retiring took all the instructions except the one so removed, and returned a verdict for the full amount of the plaintiff's claim. It was held that this was not a sufficient withdrawal, and a new trial was granted. *New Albany Woolen Mills v. Meyers*, 43 Mo. App. 124.

Withdrawal Beneficial to Defendant. — Where the court, in an action for false imprisonment, gave the jury an instruction permitting them to award exemplary or punitive damages to the plaintiff upon testimony justifying such damages; and subsequently recalled the jury and withdrew from them that instruction, making no other modification in the charge, and denied the application of the defendants to address the jury further after the instruction had been withdrawn; it was held that the ruling of the court in withdrawing the instruction, although erroneous, was beneficial to the interests of the defendants, and there could be no reversal unless the erroneous ruling were injurious to the party complaining. *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350.

5. *Chapman v. Erie R. Co.*, 55 N. Y. 579.

6. *Jones v. Talbot*, 4 Mo. 279; *McCrary v. Anderson*, 103 Ind. 12.

Verbal Withdrawal. — It has been held that an erroneous instruction may be

XX. APPELLATE REVIEW OF INSTRUCTIONS. — See articles APPEALS, vol. 2, p. 477; ASSIGNMENTS OF ERROR, vol. 2, p. 948; BILLS OF EXCEPTIONS, vol. 3, pp. 402, 440; CASE MADE ON APPEAL, vol. 3, p. 891; EXCEPTIONS AND OBJECTIONS, vol. 8, p. 253.

verbally withdrawn. *Yoakum v. Mettasch*, (Tex. Civ. App. 1894) 26 S. W. Rep. 129.

Presumptions on Appeal. — The withdrawal will not be presumed, but must be affirmatively shown. *Lower v. Franks*, 115 Ind. 334, wherein the court said: "It is true, as claimed, that this court has frequently held that where the court below has refused to give an instruction which stated the law correctly and was applicable to the facts of the case, but where the record disclosed nothing as to whether any instructions were given, we will presume that the court below did its duty, and

gave general instructions covering all the matters in controversy, and will not reverse the judgment upon the ground that the instruction may have been refused because the subject matter of it had already been given to the jury. That rule of practice has, however, no application to the case before us, where a series of general instructions was given, and one of the series is adjudged to be erroneous. The giving of a fatally erroneous instruction can only be cured by a plain withdrawal of the instruction, and the withdrawal of such an instruction will not be presumed, but must be affirmatively shown."

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I. NATURE AND CHARACTER OF ACTION — 1. Action at Law — In General. — The ordinary remedy upon policies of insurance of all kinds is an action at law.¹

Form of Action. — Debt and covenant are the appropriate form of common-law actions upon policies under seal.² Assumpsit will not lie in such cases unless there is a new consideration,³ or unless permitted by statute.⁴ Debt or covenant will lie on a policy under seal, renewed in accordance with its terms, by an indorsement or receipt not under seal.⁵ But assumpsit may be brought upon certificates of renewal or indorsements of renewal made upon payments of a premium where these constitute a new contract.⁶ Assumpsit is also the appropriate

1. *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463.

2. **Contract of Indemnity Against Unliquidated Damages.** — Covenant and not debt should be brought upon a policy under seal in which the insurer covenants to pay the loss or repair or rebuild at his election. *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506. See also articles COVENANT, vol. 5, p. 344; DEBT, vol. 5, p. 909.

3. *Franklin F. Ins. Co. v. Massey*, 33 Pa. St. 221; *People's Ins. Co. v. Spencer*, 53 Pa. St. 353, 91 Am. Dec. 217; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466; *Marine Ins. Co. v. Young*, 1 Cranch (U. S.) 332; *Foster v. Allanson*, 2 T. R. 479; *Pelly v. Royal Exch. Assur. Co.*, 1 Burr. 341.

4. *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88, where the court, after quot-

ing a section of the *Illinois Practice Act*, says: "It then follows, although the policy was under seal, an action of assumpsit can be maintained upon it under this statute. Had the policy not been under seal assumpsit would have unquestionably been the proper action, and this section has abolished the distinction between sealed and unsealed instruments, as to the form of action."

5. *Franklin F. Ins. Co. v. Massey*, 33 Pa. St. 221; *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 1 Am. St. Rep. 398; *Baltimore F. Ins. Co. v. McGowan*, 16 Md. 47; *Mutual F. Ins. Co. v. Deale*, 18 Md. 52, 79 Am. Dec. 673; *Shertzer v. Mutual F. Ins. Co.*, 46 Md. 510; *Herron v. Peoria M. & F. Ins. Co.*, 28 Ill. 235.

6. *Firemen's Ins. Co. v. Floss*, 67

remedy upon policies not under seal and parol agreements to insure.¹ Where a policy issued in pursuance of a contract to insure is not delivered, trover will lie for its value.²

2. Suits in Equity — *a. SPECIFIC PERFORMANCE* — REFORMATION OR CANCELLATION OF POLICY — *Specific Performance.* — Where there is an agreement to insure, and loss occurs before the policy is written, the remedy is in equity. Courts of equity decree specific performance of the contract to insure by directing the issuance of a policy as of the date of the contract, and directing payment of the loss.³ So chancery has jurisdiction of a suit for the specific performance of a contract of life insurance on the co-operative or assessment plan.⁴ Under the code practice which obtains in many states, suit is brought directly on the agreement to insure.⁵

Reformation of Policy. — Where, by reason of mutual mistake, or of mistake of one party coupled with fraud or inequitable conduct on the part of the other, the policy as it stands contains provisions or descriptions or representations which preclude a recovery thereon, or omits provisions which it should contain, remedy on the policy must be sought in equity by suit for reformation.

Md. 403; *Mutual F. Ins. Co. v. Deale*, 18 Md. 52; *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506; *Luciani v. American F. Ins. Co.*, 2 Whart. (Pa.) 167; *Peoria M. & F. Ins. Co. v. Hervey*, 34 Ill. 46; *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213.

Where a policy under seal contains a covenant for extension from year to year on payment of premiums, extension as a specialty is held to be intended, and assumpsit is not maintainable. But where there is no such covenant in the policy, which expressly terminates at a specified time, a renewal receipt constitutes a distinct parol contract referring to and incorporating the terms of the policy upon which assumpsit may be brought. *Firemen's Ins. Co. v. Floss*, 67 Md. 403.

1. See the next note but one.

2. *Kohne v. Insurance Co. of North America*, 1 Wash. (U. S.) 93; *Franklin Ins. Co. v. Colt*, 20 Wall. (U. S.) 571.

3. *Taylor v. Merchants' F. Ins. Co.*, How. (U. S.) 390; *Franklin Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; *Eames v. Home Ins. Co.*, 94 U. S. 621; *Schultz v. Phenix Ins. Co.*, 77 Fed. Rep. 375; *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch. (N. Y.) 408; *Neville v. Merchants', etc., Mut. Ins. Co.*, 19 Ohio 452; *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. (Va.) 362, 31 Am. Rep. 732; *Haden v. Farmers', etc., F. Assoc.*, 80 Va. 683.

Actions at Law may also be main-

tained on the agreement in such cases. *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; *Franklin Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; *M'Culloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 280; *Baker v. Commercial Union Assur. Co.*, 162 Mass. 358; *Scannell v. China Mut. Ins. Co.*, 164 Mass. 341; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 342; *Peoria M. & F. Ins. Co. v. Walser*, 22 Ind. 73; *Mobile Marine Dock, etc., Ins. Co. v. McMillan*, 31 Ala. 711.

And if the policy was written but not delivered, or was withheld, the insured may sue on the policy at law. *Sheldon v. Connecticut Mut. L. Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565; *Fried v. Royal Ins. Co.*, 47 Barb. (N. Y.) 127; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Bragdon v. Appleton Mut. F. Ins. Co.*, 42 Me. 259; *Michigan Pipe Co. v. North British, etc., Ins. Co.*, 97 Mich. 493; *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482.

4. *Swan v. Mutual Reserve Fund L. Assoc.*, 20 N. Y. App. Div. 255, reversing 17 Misc. Rep. (N. Y.) 722.

5. *Hardwick v. State Ins. Co.*, 20 Oregon 547; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171; *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind.

536.

Courts of equity will reform the policy, and, after loss, enforce payment.¹ In jurisdictions where the code practice obtains,

1. *Connecticut*. — Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co., 31 Conn. 517; Palmer v. Hartford F. Ins. Co., 54 Conn. 488.

Illinois. — Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; Keith v. Globe Ins. Co., 52 Ill. 518; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121; German F. Ins. Co. v. Gueck, 130 Ill. 345.

Maine. — National Traders' Bank v. Ocean Ins. Co., 62 Me. 519.

Maryland. — Ben Franklin Ins. Co. v. Gillett, 54 Md. 212; National F. Ins. Co. v. Crane, 16 Md. 260.

Mississippi. — Phoenix F. Ins. Co. v. Hoffheimer, 46 Miss. 645.

Ohio. — Graham v. Firemen's Ins. Co., 2 Disney (Ohio) 255; Globe Ins. Co. v. Boyle, 21 Ohio St. 119.

Texas. — Home Ins., etc., Co. v. Lewis, 48 Tex. 622.

Wisconsin. — Hammel v. Queen Ins. Co., 50 Wis. 240.

United States. — Thompson v. Phenix Ins. Co., 136 U. S. 287; Hearn v. Equitable Safety Ins. Co., 4 Cliff. (U. S.) 192; Dean v. Equitable F. Ins. Co. 4 Cliff. (U. S.) 575; Brugger v. State Invest. Ins. Co., 5 Sawy. (U. S.) 304; Williams v. North German Ins. Co., 24 Fed. Rep. 625.

England. — Mackenzie v. Coulson, L. R. 8 Eq. 368.

Reformation as a Prerequisite. — Where a description, provision of the policy, or statement in an application made a part of the policy, is claimed to have been inserted or omitted by mutual mistake, and such description, provision, or statement would preclude a recovery on the policy as it stands, reformation is a prerequisite to recovery. Collins v. St. Paul F. & M. Ins. Co., 44 Minn. 440; Phenix Ins. Co. v. Rogers, 11 Ind. App. 72.

If the error in description is not such as to avoid the policy for uncertainty, and the true description appears sufficiently from extrinsic evidence, it has been held unnecessary to have reformation. State Ins. Co. v. Schreck, 27 Neb. 527; Phenix Ins. Co. v. Gebhart, 32 Neb. 144; Eggleston v. Council Bluffs Ins. Co., 65 Iowa 308.

And if the policy by accident, mistake, or design is made payable to a person by a wrong name, as where

insurance applied for by the "estate of J. B." was made to "J. B.," reformation is not necessary, but the mistake may be shown in an action at law on the policy. Lumberman's Mut. Ins. Co. v. Bell, 166 Ill. 400. Compare Lawrence v. Sebor, 2 Cai. (N. Y.) 203; Deitz v. Providence Washington Ins. Co., 31 W. Va. 851; Holladay v. Phenix Ins. Co., 7 U. S. App. 325; Ruan v. Gardner, 1 Wash. (U. S.) 145.

Reformation Is Required where there is a mutual mistake, or a mistake of the draftsman whereby something is written other than what the parties intended. Where the insurer or his agent falsely records answers in the application, or writes them in without authority, no advantage can be taken of this fraud by the insurer, and if the contract may be recovered upon with such answer or statements removed, reformation is unnecessary.

Connecticut. — Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co., 31 Conn. 517; Peck v. New London County Mut. Ins. Co., 22 Conn. 575; Bebee v. Hartford County Mut. F. Ins. Co., 25 Conn. 51.

Indiana. — Germania L. Ins. Co. v. Lunkenheimer, 127 Ind. 536; Phenix Ins. Co. v. Stark, 120 Ind. 444; Phenix Ins. Co. v. Allen, 109 Ind. 273; Phenix Ins. Co. v. Pickel, 119 Ind. 155; Phenix Ins. Co. v. Lorenz, 7 Ind. App. 266.

Iowa. — Carey v. Home Ins. Co., (Iowa 1896) 66 N. W. Rep. 920; McArthur v. Home L. Assoc., 73 Iowa 336.

Kansas. — American Cent. Ins. Co. v. McLanathan, 11 Kan. 553; Continental Ins. Co. v. Pearce, 39 Kan. 396.

Kentucky. — Western Assur. Co. v. Rector, 85 Ky. 294.

Mississippi. — Planters' Ins. Co. v. Myers, 55 Miss. 479.

Missouri. — Combs v. Hannibal Sav., etc., Ins. Co., 43 Mo. 148; Franklin v. Atlantic F. Ins. Co., 42 Mo. 456.

New York. — Miller v. Phenix Mut. L. Ins. Co., 107 N. Y. 292; Bennett v. Agricultural Ins. Co., 106 N. Y. 243; Rowley v. Empire Ins. Co., 36 N. Y. 550; Plumb v. Cattaraugus County Mut. Ins. Co., 18 N. Y. 392; Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624.

Pennsylvania. — Manhattan Ins. Co. v. Webster, 59 Pa. St. 227.

action is brought in such cases on the policy, and reformation is sought therein.¹ All the facts necessary to authorize reformation must be clearly established.²

Cancellation of a Policy fraudulently obtained may be had in equity, at least where the policy itself contains no provision for cancellation by the insurer.³

b. REINSTATEMENT. — Suits may be brought to reinstate a member of a benefit association where membership has been forfeited for nonpayment of assessments.⁴

c. MUTUAL INSURANCE COMPANIES. — A suit in equity against a mutual insurance company is not maintainable on the theory of a trust relation between the company and its policy holders.⁵

d. ACCOUNTING⁶ — TONTINE INSURANCE. — The courts of *New York* have refused an accounting to the tontine policy holder, on the ground that he is a mere general creditor of the company.⁷

Tennessee. — *Planters' Ins. Co. v. Sorrels*, 1 Baxt. (Tenn.) 352.

Virginia. — *Lynchburg F. Ins. Co. v. West*, 76 Va. 575.

West Virginia. — *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851.

Wisconsin. — *Dunbar v. Phenix Ins. Co.*, 72 Wis. 492; *Beal v. Park F. Ins. Co.*, 16 Wis. 241.

United States. — *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *American Mut. L. Ins. Co. v. Mahone*, 21 Wall. (U. S.) 152; *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 614.

1. *Barnes v. Hekla F. Ins. Co.*, 75 Iowa 11, 9 Am. St. Rep. 450; *Pacific Mut. L. Ins. Co. v. Frank*, 44 Neb. 320; *Home F. Ins. Co. v. Wood*, 50 Neb. 381; *Slobodisky v. Phenix Ins. Co.*, (Neb. 1897) 72 N. W. Rep. 483; *Mead v. Westchester F. Ins. Co.*, 64 N. Y. 453; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Miaghan v. Hartford F. Ins. Co.*, 12 Hun (N. Y.) 321; *Knox v. Lycoming F. Ins. Co.*, 50 Wis. 671.

2. *Slobodisky v. Phenix Ins. Co.*, (Neb. 1897) 72 N. W. Rep. 483.

3. *McEvers v. Lawrence*, Hoffm. Ch. (N. Y.) 172; *Globe Mut. L. Ins. Co. v. Reals*, 48 How. Pr. (N. Y. Supreme Ct.) 502, reviewing the authorities.

4. *Van Bokkelen v. Massachusetts Ben. Assoc.*, 90 Hun (N. Y.) 330.

5. *Taylor v. Charter Oak L. Ins. Co.*, 59 How. Pr. (N. Y. C. Pl.) 468.

6. See also article ACCOUNTS AND ACCOUNTING, vol. I, p. 83.

7. *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421, *distinguishing* and *overruling* the dictum in *Bogardus v. New*

York L. Ins. Co., 101 N. Y. 328. In the case first cited the court said: "We think the payment of a premium by the policy holders of this class of policies is much more like that of a deposit in a bank by a depositor, as to which it is conceded there is no such relation of trustee and *cestui que trust*. See *Foley v. Hill*, 2 H. L. Cas. 32. By the very terms of this policy the amount of the fund is necessarily uncertain. What it may be depends not only upon the number of policies taken out during the period, but upon the number of policies in the class which may lapse or become forfeited, and upon the amount of the proper expenses of the company which shall justly become chargeable to this fund, so that the dividend which may come to the plaintiff or any other policy holder depends upon numerous contingencies, and in relation to all these matters the parties have agreed, in specific terms contained in the policy itself, that this surplus or fund, derived as already stated, 'shall be apportioned equitably among such policies of the same class as shall complete their ten-year dividend period.' Here is the extent of the obligation of the defendant — that it shall equitably apportion this sum. As has been said, there is no title in the plaintiff to any specific moneys. There is in reality no specific or separate fund, as it is made up simply by a system of debits and credits contained in the books of the company, which debits and credits are made during the running of the tontine period. There is no separation of the fund belonging to this system,

So in the *United States* courts,¹ and in the province of *Ontario*,² the division of the tontine fund is viewed as a matter which rests largely in the discretion of the company's managers, and with which the courts will not interfere by compelling an accounting. On the other hand, it is held in *Massachusetts* that the holder of such a policy is entitled to an accounting, not on the ground that he is a *cestui que trust* and the insurer a technical fiduciary,³ but by virtue of the general jurisdiction over accounts conferred on courts of equity by the statutes of that state.⁴ It is noticeable, however, that the *United States* court, in accordance with the rule above indicated, though sitting in *Massachusetts* and construing the same statute, refuses to allow an accounting.⁵ In *Illinois*, the Supreme Court, while not passing specifically upon the right to an accounting, holds that the officers of the company are trustees of the tontine fund,⁶ and this doctrine would seem to include the right of the insured to compel them to account for its administration.

3. Mutual Benefit Insurance. — The proper remedy on a contract or certificate of mutual benefit insurance is an action at law.⁷

and no legal necessity for such separation from any other fund or property belonging to the defendant. The situation of the parties is that of debtor and creditor simply, the amount of such debt being determinable by this equitable apportionment, which, taking the language of the policy into consideration, necessarily means that the apportionment is to be made by the corporation through its officers."

1. *Hunton v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661; *Fuller v. Knapp*, 24 Fed. Rep. 100; *Everson v. Equitable L. Assur. Co.*, 68 Fed. Rep. 258, 24 Ins. L. J. 401.

2. *Bain v. Aetna L. Ins. Co.*, 20 Ont. Rep. 6.

3. *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56, where the court, *per* Dewey, J., observes: "It is said that the plaintiff has a sufficient remedy at common law; that he can bring his action at law, and that upon proper interrogatories addressed to the defendant all the information necessary for the proper adjustment of the account may be obtained. But even if an action at law could be maintained where an account is complicated so that a full examination and settlement of previous accounts, transactions, or methods of business are necessary, and where the whole matter is entirely within the knowledge of the defendant, it cannot so conveniently or accurately be investigated at common law as in equity. * * * That the accounts

are singularly complicated, and that the method by which the value of the share of the plaintiff, which he has obtained by full payment of his premiums and completion of his tontine period, is ascertained is one of much complexity and difficulty in its application, appear from the evidence reported. A court of equity is the appropriate tribunal for dealing with such an account, and the defendant is fairly bound to produce an account, from the data in its possession, which shall show that it has complied with its promise equitably to apportion to the plaintiff his share in the accumulations made through the operation of the tontine provisions in his policy."

4. Mass. Pub. Stat. (1882), c. 151, § 2, subd. 10, which confers such jurisdiction "when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law."

5. *Hunton v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661.

6. *Chicago Mut. L. Indemnity Assoc. v. Hunt*, 127 Ill. 257.

7. *Colorado*. — *Great Western Mut. Aid Assoc. v. Colmar*, 7 Colo. App. 275.

Connecticut. — *Lawler v. Murphy*, 58 Conn. 294.

Indiana. — *Supreme Lodge, etc., v. Knight*, 117 Ind. 489; *Elkhart Mut. Aid, etc., Assoc. v. Houghton*, 103 Ind. 286; *Supreme Lodge, etc., v. Abbott*, 82 Ind. 1; *Excelsior Mut. Aid Assoc. v. Riddle*, 91 Ind. 84.

But suit may also be brought in equity to compel specific performance of the contract to levy an assessment and pay over the proceeds,¹ and in some jurisdictions this is the sole remedy, nominal damages only being recoverable at law,² unless the promise is to pay a definite amount, in no way dependent on or limited by an assessment.³

4. **Suit in Equity by Assignee.** — See *infra*, III. 1. *i. Assignees.*

5. **In Admiralty — Marine Insurance.** — The contract of marine

Iowa. — *Follis v. U. S. Mutual Acc. Assoc.*, 94 Iowa 435.

Kansas. — *Kansas Protective Union v. Gardner*, 41 Kan. 397; *Kansas Protective Union v. Whitt*, 36 Kan. 760; *Kaw L. Assoc. v. Lemke*, 40 Kan. 142.

Ohio. — *Hall v. Citizens' Mut. Livestock Assoc.*, 25 Ohio L. J. 79.

Wisconsin. — *Jackson v. Northwestern Mut. Relief Assoc.*, 73 Wis. 507.

United States. — *U. S. Mutual Acc. Assoc. v. Barry*, 131 U. S. 100; *Lueders v. Hartford L., etc., Ins. Co.*, 4 McCrary (U. S.) 149; *In re Protection L. Ins. Co.*, 9 Biss. (U. S.) 198.

See also *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 192, holding that an action on a mutual policy which is payable only out of certain funds may be maintained without a demand that such funds be applied to pay the loss, and without proof that the company has such funds.

Mandamus will not be granted to compel a mutual benefit insurance company to levy an assessment to pay a loss. *Great Western Mut. Aid Assoc. v. Colmar*, 7 Colo. App. 275; *Bates v. Detroit Mut. Ben. Assoc.*, 47 Mich. 646; *Miner v. Michigan Mut. Ben. Assoc.*, 65 Mich. 85; *People v. Masonic Guild, etc., Assoc.*, 126 N. Y. 615.

But as to mandamus after procuring a judgment in an action at law, see *People v. Masonic Guild, etc.*, 58 Hun (N. Y.) 395.

And an amendment asking for mandamus to compel an assessment was held proper in an action on a mutual insurance contract in *Harl v. Pottawattamie County Mut. F. Ins. Co.*, 74 Iowa 39.

1. *Curtis v. Mutual Ben. L. Co.*, 48 Conn. 98; *Covenant Mut. Ben. Assoc. v. Sears*, 114 Ill. 108; *Lindsey v. Western Mut. Aid Soc.*, 84 Iowa 734; *Prader v. National Masonic Acc. Assoc.*, 95 Iowa 149; *O'Brien v. Home Ben. Soc.*, 117 N. Y. 310; *Smith v. Covenant Mut. Ben. Assoc.*, 24 Fed. Rep. 685.

2. *Newman v. Covenant Mut. Ben. Assoc.*, 72 Iowa 242; *Tobin v. Western Mut. Aid. Soc.*, 72 Iowa 261; *Rainsbarger v. Union Mut. Aid Assoc.*, 72 Iowa 191; *Bailey v. Mutual Ben. Assoc.*, 71 Iowa 689; *Eggleston v. Centennial Mut. L. Assoc.*, 5 McCrary (U. S.) 484, 18 Fed. Rep. 14; *Eggleston v. Centennial Mut. L. Assoc.*, 19 Fed. Rep. 201; *Smith v. Covenant Mut. Ben. Assoc.*, 24 Fed. Rep. 685.

3. *Follis v. U. S. Mutual Acc. Assoc.*, 94 Iowa 435; *Neskern v. Northwestern Endowment, etc., Assoc.*, 30 Minn. 406.

In jurisdictions where the usual remedy is sought in equity by suit to compel an assessment, if the company has on hand, as the proceeds of former excessive assessments, an amount sufficient to meet the plaintiff's claim, an action at law is allowed. *Covenant Mut. Ben. Assoc. v. Baldwin*, 49 Ill. App. 203.

So where the company was required by statute to make its assessments sufficient to pay certificates in full, and the certificates provided for the payment of a fixed sum on condition that it should be realized from the assessments. *National Acc. Soc. v. Taylor*, 42 Ill. App. 97.

Where the contract was absolute to pay a fixed sum, to be determined by the number of members, it was held that an action at law might be maintained. *Neskern v. Northwestern Endowment, etc., Assoc.*, 30 Minn. 406.

Remedy Prescribed by Contract. — In *Eggleston v. Centennial Mut. L. Assoc.*, 5 McCrary (U. S.) 484, 18 Fed. Rep. 14, the contract provided that no other action than one to compel the levy of an assessment should be maintainable thereon, and this provision was held valid.

Fraud as Ground for Suit in Equity. — A suit in equity cannot be maintained on a policy on allegations of fraud in the absence of other grounds for equitable relief. *Charleston Ins. Co. v. Potter*, 3 Desaus. (S. Car.) 6.

insurance is a maritime contract, and is within the admiralty jurisdiction of the federal courts.¹

II. VENUE AND FORUM — 1. Locus — a. IN GENERAL. — An Action on a Policy of Insurance Is Transitory, and may be brought wherever the insurer may be found, without regard to the *situs* of the property or subject of the insurance, or to the place where the contract was made.² Hence it follows that an insurance company may be sued at its principal place of business, or wherever it maintains an agency of such character as to make the service binding under the laws of the jurisdiction in question.

Action Against Foreign Insurance Company. — The venue of actions on policies issued by foreign insurance companies is generally regulated by the statutes, which require such corporations to designate agents upon whom service of process may be made. A corporation which has designated such an agent is "found" in the district where such agent does business, within the meaning of the federal judiciary acts.³ Such statutes are variously construed as to their scope in permitting suit by service on such agents where the parties are nonresidents or when the subject of insurance is without the state. It is well established that the object is to give an additional remedy to citizens of the state, and that the means provided for service are not exclusive, but are cumulative.⁴ It is generally held that these statutes apply only to contracts made in the state, or by an insurer or insured in the state, not to insurance effected by a nonresident with a foreign corporation on property outside of the state.⁵ In such cases, under the general rule, suit may still be brought in such state if jurisdiction may be obtained by reason of debts or property within the state or of

1. See the title *Marine Insurance*, Am. and Eng. Encyc. of Law.

2. **Action Transitory. —** Rippstein v. St. Louis Mut. L. Ins. Co., 57 Mo. 87; Insurance Co. of North America v. McLimans, 28 Neb. 653; Handy v. Insurance Co., 37 Ohio St. 366; Mohr, etc., Distilling Co. v. Insurance Companies, 12 Fed. Rep. 474; Osborne v. Shawmut Ins. Co., 51 Vt. 282, where the court said: "The defendant having consented to be sued or found here, by entering into the contract in question subjected itself to the jurisdiction of the courts of this state, so far, at least, as said contract is concerned, it having been made in this state concerning property within the same."

3. Mohr, etc., Distilling Co. v. Insurance Companies, 12 Fed. Rep. 474; Mooney v. Buford, etc., Mfg. Co., 34 U. S. App. 581.

4. Insurance Co. of North America v. McLimans, 28 Neb. 653; Handy v.

Insurance Co., 37 Ohio St. 366; Carson v. Phoenix Ins. Co., 41 W. Va. 136; Mohr, etc., Distilling Co. v. Insurance Companies, 12 Fed. Rep. 476. *Contra*, Rehm v. German Ins., etc., Inst., 125 Ind. 135.

5. Aetna Ins. Co. v. Black, 80 Ind. 513; Finch v. Travellers' Ins. Co., 87 Ind. 302. But see Mooney v. Buford, etc. Mfg. Co., 34 U. S. App. 581; Universal L. Ins. Co. v. Bachus, 51 Md. 28; Myer v. Liverpool, etc., Ins. Co., 40 Md. 595; Smith v. Mutual L. Ins. Co., 14 Allen (Mass.) 336; Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. L. 15; Sawyer v. North American L. Ins. Co., 46 Vt. 697.

Where a policy was taken out in Louisiana, and the insured removed to Kentucky, and paid renewal premiums there, it was held that such payments did not make a new contract in Kentucky, and that suit on the policy could not be maintained in the latter state by

sufficient service other than under the statutes in question.¹ But where the subject of the insurance is within the state, the statute may generally be availed of, though the parties are nonresidents,² or where the insured is a resident, though the subject of the insurance is in another state.³ The contract sued on must be of such a nature as to fall within the provisions of the statute, or the statutory mode of service may not be employed.⁴

Insurance Policy as Assets of Decedent. — An insurance policy is regarded as a debt at the place where it is payable or where the insurer resides, so that administration may be founded upon it and the administrator may sue in that jurisdiction.⁵ But the policy itself constitutes assets on which administration may be had and suit founded in the jurisdiction where the deceased died possessed of it,⁶ or at his domicile, if he died elsewhere, though the policy may have been on his person when he died,⁷ unless perhaps by its terms, it is payable at a particular place not in such jurisdiction.⁸

b. COUNTY. — Where statutes provide that an insurance company may be sued within the county in which the cause of action or some part of it arose, it is generally held that an action on a policy of life insurance is maintainable in the county where the insured resided and died.⁹ But in *South Carolina* it is held that the cause of action arises only where the policy is payable.¹⁰

service under its statute. *Morrell v. Knickerbocker L. Ins. Co.*, (Ky. Sup. Ct.) 12 Ins. L. J. 466.

1. *Universal L. Ins. Co. v. Bachus*, 51 Md. 28; *Sawyer v. North American L. Ins. Co.*, 46 Vt. 697.

2. *Fidelity Mut. L. Assoc. v. Ficklin*, 74 Md. 172; *Osborne v. Shawmut Ins. Co.*, 51 Vt. 278.

3. *Insurance Co. of North America v. McLimans*, 28 Neb. 653.

4. *Rehm v. German Ins., etc., Inst.*, 125 Ind. 135, holding that a contract of agency was not of that description.

5. *Merrill v. New England Mut. L. Ins. Co.*, 103 Mass. 247; *Sulz v. Mutual Reserve Fund L. Assoc.*, 145 N. Y. 563; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138.

6. *New York L. Ins. Co. v. Smith*, 29 U. S. App. 220, 67 Fed. Rep. 694; *Sulz v. Mutual Reserve Fund L. Assoc.*, 145 N. Y. 563; *Morrisson v. Mutual L. Ins. Co.*, 57 Hun (N. Y.) 97; *Holyoke v. Union Mut. L. Ins. Co.*, 22 Hun (N. Y.) 75; *Gurney v. Rawlins*, 2 M. & W. 87.

7. *Sulz v. Mutual Reserve Fund L. Assoc.*, 145 N. Y. 563.

8. *Moise v. Mutual Reserve Fund L. Assoc.*, 45 La. Ann. 736; *Pritchard v. Standard L. Assur. Co.*, 7 Ont. Rep. 188.

In such a case, where the policy, though dated in one jurisdiction, was in fact issued in the other, administration and suit in the latter were upheld. *O'Malley v. Scottish Commercial Ins. Co.*, 4 Quebec L. Rep. 226.

9. *Bankers' L. Ins. Co. v. Robbins*, (Neb. 1897) 73 N. W. Rep. 269; *Rippstein v. St. Louis Mut. L. Ins. Co.*, 57 Mo. 86; *Union Cent. L. Ins. Co. v. Pyers*, 36 Ohio St. 544; *Quinn v. Fidelity Beneficial Assoc.*, 100 Pa. St. 383; *Biwill v. Northwestern Mut. Relief Assoc.*, 72 Wis. 430.

In *Griesa v. Massachusetts Ben. Assoc.*, 60 Hun (N. Y.) 581, 39 N. Y. St. Rep. 1, it was held that the cause of action on a policy of life insurance issued by a foreign corporation to a resident of New York arose within that state.

10. *Rodgers v. Mutual Endowment Assessment Assoc.*, 17 S. Car. 406, making a distinction between the cause of action and the subject of the action; *Curnow v. Phoenix Ins. Co.*, 37 S. Car. 411.

Failure to pay a loss on a policy of accident insurance issued by a non-resident corporation creates a cause of action within the state if the policy is

Under statutes authorizing suits in the county where the insurer has its principal place of business, where the contract was made, or where the loss occurred, suit may be brought in the county in which the loss occurred, without regard to where the insurer may have its place of business.¹ And such a statute governs an action in which the policy is sought to be reformed.²

payable therein. *Carpenter v. American Acc. Co.*, 46 S. Car. 541.

1. *Hunt v. Farmers' Ins. Co.*, 67 Iowa 742; *State Ins. Co. v. Granger*, 62 Iowa 272.

In **California**, under constitutional provisions, suit on a policy of insurance may be brought in the county where the contract was made or where the principal place of business of the company is situated. It was held that where the policy issued differs from that applied for, the contract is made and the suit may be brought in the county where the applicant accepted it. *Yore v. Bankers', etc., Mut. L. Assoc.*, 88 Cal. 609.

In **Georgia** suit may be brought in any county where the insurance company has an agency or place of business which was located at the time the cause of action accrued. *Merritt v. Cotton States L. Ins. Co.*, 55 Ga. 103. But not in a county where it has no place of business at the time action is brought, and where the subject of the insurance is not situated, even though it may have had an agency there when the cause of action accrued. *Empire State Ins. Co. v. Collins*, 54 Ga. 376; *Atlanta Home Ins. Co. v. Tullis*, 99 Ga. 225.

In **Indiana** suit may be brought in the county in which the insurance was contracted for and the loss occurred. *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205.

In **Iowa** action may be brought in the county where the insurance company has its principal place of business, or where the contract was made, or where the loss occurred. *Hunt v. Farmers' Ins. Co.*, 67 Iowa 742; *State Ins. Co. v. Granger*, 62 Iowa 272; *Prader v. National Masonic Acc. Assoc.*, 95 Iowa 149.

In **Kentucky** an action may be brought in the county in which the company has its principal place of business, or where the contract was made or to be performed, or in the county in which the company has an office within the state. *Owen v. Howard Ins. Co.*, 87 Ky. 571. See also *Howard v. Kentucky*,

etc., *Mut. Ins. Co.*, 13 B. Mon. (Ky.) 282.

In **Massachusetts**. — See *Allen v. Pacific Ins. Co.*, 21 Pick. (Mass.) 257.

In **Michigan** the action may be brought in any county in which the plaintiff resides and the insurance company "shall issue policies or take risks." *Miner v. Michigan Mut. Ben. Assoc.*, 63 Mich. 338.

In **Missouri** the action may be brought in any county in the state. *Stone v. Travelers' Ins. Co.*, 78 Mo. 655.

In **Pennsylvania** suit may be brought in the county where the insured resides or the property insured is situated. *Eberman v. American F. Ins. Co.*, 164 Pa. St. 515; *Beech v. Farmers', etc., Mut. Live-stock Ins. Assoc.*, 137 Pa. St. 617; *Coyle v. Metropolitan L. Ins. Co.*, 8 Kulp (Pa.) 169.

In a suit on a policy of life insurance where service is made on a foreign corporation out of the county, there must be proof that the insured resided at the time of his death in the county where the action was brought. *Metropolitan L. Ins. Co. v. Dillon*, 16 Pa. Co. Ct. Rep. 126.

The statutes authorizing the action to be brought in any county of the state apply only to actions on contracts of insurance. Actions on contracts for service or garnishment proceedings are not within the purview of the statutes. *Greevy v. People's Mut. Acc. Assoc.*, 2 Pa. Dist. Rep. 542, 12 Pa. Co. Ct. Rep. 285; *Shipton v. Fees*, 10 Pa. Co. Ct. Rep. 583.

In **Virginia** the action may be brought in any county where the subject of insurance was situated or the person insured resided. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629.

In **West Virginia** suit may be brought in any county where a nonresident company does business, or in which it has property or debts due it, or in which the cause of action or part thereof arises. *Carson v. Phoenix Ins. Co.*, 41 W. Va. 136; *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272.

2. *Benesh v. Mill-Owners' Mut. F. Ins. Co.*, (Iowa 1897) 72 N. W. Rep. 674.

c. ACCIDENT INSURANCE ACTIONS. — Accident insurance companies are regarded as insurance companies within the meaning of statutes mentioned in the preceding section; ¹ likewise plate-glass insurance companies. ²

d. MARINE INSURANCE ACTIONS. — Where suit is brought on a contract of marine insurance in admiralty, the provisions of the federal judiciary acts, restricting civil suits to the district in which the defendant may be found or of which he may be a resident, do not apply. A libel in admiralty may be maintained wherever the defendant may be found, or personal property or credits may be attached. And service on an agent appointed by a foreign corporation under state statutes will be held sufficient. ³

e. PROVISIONS IN CHARTER, BY-LAWS, OR POLICY. — Provisions in the by-laws or policies of mutual insurance companies requiring suit to be brought in a particular county are generally invalid, ⁴ and like provisions in the charter and by-laws of a foreign mutual insurance company have been held to be of no effect. ⁵ Stipulations in policies of life insurance by which the insured waives the right to sue elsewhere than in the state where the company is incorporated, or requiring suit to be brought in a certain county, are invalid. ⁶

1. *Prader v. National Masonic Acc. Assoc.*, 95 Iowa 149; *Bolton v. Bolton*, 73 Me. 299; *Com. v. Wetherbee*, 105 Mass. 149; *Miner v. Michigan Mut. Ben. Assoc.*, 63 Mich. 338; *Carmichael v. Northwestern Mut. Ben. Assoc.*, 51 Mich. 494; *Daniher v. Grand Lodge*, etc., 10 Utah 110.

Under an Illinois Statute it was held that accident insurance companies were not "insurance companies" within the intent of the statute, and hence might only be sued where they had their principal office and place of business. *Union Mut. Acc. Assoc. v. Riel*, 38 Ill. App. 414. But see *Railway Pass.*, etc., *Mut. Aid*, etc., *Assoc. v. Robinson*, 147 Ill. 138.

2. *People v. McCann*, 67 N. Y. 506.

3. *In re Louisville Underwriters*, 134 U. S. 488; *New England Mut. Ins. Co. v. Detroit*, etc., *Steam Nav. Co.*, 18 Wall. (U. S.) 307, note; *Atkins v. Fibre Disintegrating Co.*, 18 Wall. (U. S.) 272.

4. *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174; *Hall v. People's Mut. F. Ins. Co.*, 6 Gray (Mass.) 185; *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.) 596.

But provisions of the charter and by-laws of a mutual company requiring suit in a particular county were upheld in *Portage County Mut. Ins. Co. v.*

Stukey, 18 Ohio 455; *Portage County Mut. F. Ins. Co. v. West*, 6 Ohio St. 599.

5. *Bartlett v. Union Mut. F. Ins. Co.*, 46 Me. 500.

6. *Matt v. Iowa Mut. Aid Assoc.*, 81 Iowa 135, 25 Am. St. Rep. 483; *Reichard v. Manhattan L. Ins. Co.*, 31 Mo. 518, where the court, after quoting the *Missouri* statute, adds: "The object of this enactment is very apparent. Prior to its passage our courts had no control over these foreign companies, who felt licensed to defraud our citizens out of their just dues whenever they felt so disposed. In many instances the owners of property insured submitted to ruinous compromises rather than undergo the vexation, expense, and uncertainty of litigating with a powerful corporation in the courts of a distant state. The legislature, therefore, very wisely determined that they should not do business in this state unless under certain restrictions imposed for the public good. The right of claiming to sue in our courts is one of the concessions made by these companies for the privilege of being permitted to establish agencies here. The agreement of the parties, then, in this case, is not only to divest our courts of their jurisdiction, but to relieve the defendant of an obligation not imposed by the insured but by a law of the state. We are clearly

f. INSOLVENT COMPANY. — Where a foreign life insurance company licensed to do business in Missouri became insolvent and was being wound up in the state where it was incorporated, pursuant to the terms of its charter, it was held that neither policy holders nor beneficiaries of death claims could maintain suit in Missouri by attachment of property of the corporation in that state.¹

2. Curia. (As to suits in admiralty, see *supra*, I. 1. *Action at Law*.)

— *a. FEDERAL COURTS — REMOVAL.* — A corporation is a citizen and resident of the jurisdiction wherein it was created and by which it was chartered, and compliance with the laws of other jurisdictions requiring the designation of an agent upon whom process may be served, and doing business in such jurisdictions, do not change the residence of the corporation.² Notwithstanding such compliance with the laws of other states, and appointment of agents therein, a foreign insurance company may sue in the federal courts as a citizen of the state wherein it was incorporated, or may, on the basis of such citizenship, remove causes to the federal court.³ And an insurance company incorporated in and a citizen of another state than that wherein it is sued may remove causes to the United States Circuit Court, notwithstanding as a condition of doing business in the latter state, in pursuance of statutory requirements, it has stipulated in advance to abstain in all cases from resorting to the federal courts.⁴ But state statutes making

of opinion that such an agreement is null and void."

Provisions in the charter or by-laws of a mutual insurance company, requiring suit to be brought at the next term of court of a certain county, after an award by the directors, do not apply where the company does not proceed to determine the loss within the time prescribed or reject the claim. *Indiana Mut. F. Ins. Co. v. Routledge*, 7 Ind. 25; *Boynton v. Middlesex Mut. F. Ins. Co.*, 4 Met. (Mass.) 212; *Nevins v. Rockingham Mut. F. Ins. Co.*, 25 N. H. 22; *Arnet v. Milwaukee Mechanics' Mut. Ins. Co.*, 22 Wis. 516. *Contra*, *Portage County Mut. Ins. Co. v. Stukeley*, 18 Ohio 455; *Portage County Mut. F. Ins. Co. v. West*, 6 Ohio St. 599; *Williams v. Vermont Mut. F. Ins. Co.*, 20 Vt. 222.

Where, subsequent to enacting a charter of an insurance company, which provided that suits should be brought in a particular court, named therein, the legislature enacted that suits against insurance companies might be maintained in any county where the company sued maintained an agency, if the transaction involved was had

with an agent, it was held that suit might be brought at the place authorized by the latter act. *Howard v. Kentucky, etc., Mut. Ins. Co.*, 13 B. Mon. (Ky.) 282.

1. *Fry v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 197; *Weingartner v. Charter Oak L. Ins. Co.*, 32 Fed. Rep. 314.

2. *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 63 Hun (N. Y.) 393; *Plimpton v. Bigelow*, 93 N. Y. 592; *Southern Pac. Co. v. Denton*, 146 U. S. 202; *Baltimore, etc., R. Co. v. Koontz*, 104 U. S. 5; *Reimers v. Seatco Mfg. Co.*, 37 U. S. App. 426.

3. *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417; *Morton v. Mutual L. Ins. Co.*, 105 Mass. 141; *Stevens v. Phenix Ins. Co.*, 41 N. Y. 149; *Knorr v. Home Ins. Co.*, 25 Wis. 143; *Baltimore, etc., R. Co. v. Koontz*, 104 U. S. 5.

4. *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 450, where the court said: "Should a citizen of New York enter into an agreement with the state of Wisconsin, upon whatever consideration, that he would in no case, when called into the courts of that state or the federal tribunals within it, demand

licenses granted to foreign insurance companies revocable in case such companies remove causes to the federal courts are valid to that extent, though ineffectual in so far as they require the companies to abstain from removal.¹

b. TRIBUNALS OF SOCIETY OR ORDER. — Where the rules or by-laws of fraternal or insurance societies provide that claims for benefits shall be submitted to the tribunals of the society or order, it is generally required that such provisions be complied with before resort to the courts.² In some jurisdictions it is held that the decision of the organization or its tribunals as to the right of a member to benefits is final, in the absence of fraud, and that no resort to the courts may be had thereafter.³ But in most jurisdictions such remedies are held cumulative only, and in the absence of an express and unequivocal provision that the decision of the tribunal of the order shall be final, the courts refuse to give it such effect.⁴ Most of the courts taking this

a jury to determine any rights of property that might be called in question, but that such rights should in all such cases be submitted to arbitration or to the decision of a single judge, the authorities are clear that he would not thereby be debarred from resorting to the ordinary legal tribunals of the state. There is no sound principle upon which such agreements can be specifically enforced. We see no difference in principle between the cases supposed and the case before us. Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom or his substantial rights. In a criminal case he cannot, as was held in *Cancemi v. People*, 18 N. Y. 128, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented. That the agreement of the insurance company is invalid upon the principles men-

tioned, numerous cases may be cited to prove. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void." *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Barron v. Burnside*, 121 U. S. 186.

1. *State v. Doyle*, 40 Wis. 175; *Doyle v. Continental Ins. Co.*, 94 U. S. 535. But see the doctrine of this case modified in *Barron v. Burnside*, 121 U. S. 186.

2. *Fillmore v. Great Camp, etc.*, (Mich. 1896) 66 N. W. Rep. 675; *Supreme Lodge, etc. v. Raymond*, 57 Kan. 647.

3. *Osceola Tribe No. 11 v. Schmidt*, 57 Md. 98; *Anacosta Tribe No. 12 v. Murbach*, 13 Md. 94; *Fillmore v. Great Camp, etc.*, (Mich. 1896) 66 N. W. Rep. 675; *Fillmore v. Great Camp, etc.*, 103 Mich. 437; *Hembeau v. Great Camp, etc.*, 101 Mich. 161; *Canfield v. Great Camp, etc.*, 87 Mich. 628; *Van Poucke v. Netherland St. Vincent de Paul Soc.*, 63 Mich. 378; *McAlees v. Supreme Sitting, etc.*, (Pa. 1888) 13 Atl. Rep. 755; *Toram v. Howard Beneficial Assoc.*, 4 Pa. St. 519; *Black and White Smiths' Soc. v. Vandyke*, 2 Whart. (Pa.) 312; *Rood v. Railway Pass., etc.*, Mut. Ben. Assoc., 31 Fed. Rep. 63.

4. *California*. — *Kumle v. Grand Lodge, etc.*, 110 Cal. 204.

Illinois. — *Railway Pass., etc.*, Mut. Aid, etc., Assoc. *v. Robinson*, 147 Ill. 159; *Railway Pass., etc.*, Mut. Aid, etc., Assoc. *v. Tucker*, 157 Ill. 194. See *Grand Cent. Lodge, etc. v. Grogan*, 44 Ill. App. 111.

Indiana. — *Supreme Council, etc.*, *v.*

view either hold or imply that such society or organization cannot oust the jurisdiction of the courts by providing that its own decisions or the decisions of its tribunal shall be final,¹ and that provisions to that effect are void.

III. PARTIES — 1. Who May Sue — a. THE INSURED. — At common law an action on a policy of insurance under seal must be brought in the name of the covenantee, who may recover for the benefit of the interest insured, whether that of owner or mortgagee.² A contract of insurance is not assignable at com-

Forsinger, 125 Ind. 52; Supreme Council, etc., *v. Garrigus*, 104 Ind. 133; Bauer *v. Samson Lodge*, 102 Ind. 262.

Iowa. — Prader *v. National Masonic Acc. Assoc.*, 95 Iowa 149.

Kansas. — Supreme Lodge, etc., *v. Raymond*, 57 Kan. 647.

Maine. — Stephenson *v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55.

Minnesota. — Whitney *v. National Masonic Acc. Assoc.*, 52 Minn. 378.

Missouri. — McMahon *v. Supreme Council, etc.*, 54 Mo. App. 468, holding that a member must first exhaust the remedies in the association before appealing to the courts, but that where an appeal is provided for in the order, and the appellate tribunal passes on and rejects the claim of its own motion, the requirements of the order as to the appeal are waived.

Nebraska. — Burlington Voluntary Relief Dept. *v. White*, 41 Neb. 547.

Utah. — Daniher *v. Grand Lodge, etc.*, 10 Utah 110.

1. Kumle *v. Grand Lodge, etc.*, 110 Cal. 204; Railway Pass., etc., *Mut. Aid, etc., Assoc. v. Robinson*, 147 Ill. 159; Railway Pass., etc., *Mut. Aid, etc., Assoc. v. Tucker*, 157 Ill. 194; Supreme Council, etc. *v. Forsinger*, 125 Ind. 52; Voluntary Relief Dept., etc. *v. Spencer*, (Ind. App. 1897) 46 N. E. Rep. 477; Prader *v. National Masonic Acc. Assoc.*, 95 Iowa 149; Supreme Lodge, etc., *v. Raymond*, 57 Kan. 647; Whitney *v. National Masonic Acc. Assoc.*, 52 Minn. 378; Daniher *v. Grand Lodge, etc.*, 10 Utah 110.

Where the remedy by appeal in the tribunals of the organization is held cumulative only, suit may be brought without resort to that remedy. In such jurisdictions such parts of the rules as require submission of claims to an officer or committee or board as a condition precedent to suit are upheld, but such parts as allow an appeal, unless the appeal is expressly and unequivocally

enjoined, are held to give an additional remedy which need not be pursued before bringing suit. Supreme Council, etc. *v. Forsinger*, 125 Ind. 52; Voluntary Relief Dept., etc. *v. Spencer*, (Ind. App. 1897) 46 N. E. Rep. 477; Bauer *v. Samson Lodge*, 102 Ind. 262; Supreme Lodge, etc. *v. Raymond*, 57 Kan. 647.

If the organization denies the membership of the deceased, or if claim is made by a beneficiary who is not a member, provisions requiring "members" to resort to tribunals of the organization or allowing appeals or other remedies to members are inapplicable. Kumle *v. Grand Lodge, etc.*, 110 Cal. 204; Railway Pass., etc., *Mut. Aid, etc., Assoc. v. Loomis*, 43 Ill. App. 599 [reversed on appeal, but on another point, 142 Ill. 560]; Burlington Voluntary Relief Dept. *v. White*, 41 Neb. 547; Bukofzer *v. U. S. Grand Lodge, etc.*, 61 Hun (N. Y.) 625, 40 N. Y. St. Rep. 653; Strasser *v. Staats*, 59 Hun (N. Y.) 143; Dobson *v. Hall*, 11 Pa. Co. Ct. Rep. 532.

Some courts hold that the provisions regulating submission to a board or committee are merely a revocable agreement to arbitrate, and do not even constitute a condition precedent to suit so far as they attempt to give tribunals of the society power to pass upon the whole matter in controversy, though valid where or in so far as they provide for the ascertainment of particular facts. Prader *v. National Masonic Acc. Assoc.*, 95 Iowa 149; Whitney *v. National Masonic Acc. Assoc.*, 52 Minn. 378; Daniher *v. Grand Lodge, etc.*, 10 Utah 110; Railway Pass., etc., *Mut. Aid, etc., Assoc. v. Robinson*, 147 Ill. 159.

2. American Ins. Co. *v. Insley*, 7 Pa. St. 223, 47 Am. Dec. 509; Folsom *v. Orient F. Ins. Co.*, 59 N. H. 54; Perry *v. Dwelling House Ins. Co.*, (N. H. 1892) 33 Atl. Rep. 731.

mon law so as to give the assignee an action in his own name,¹ except where the policy is assigned with the consent of the insurer, as provided for in the policy.² Therefore, suit on a policy in a mutual insurance company must be brought by the insured, who is a member of the company,³ unless the assignee has paid the premiums on renewal so as to become a member of the company.⁴

b. PERSONAL REPRESENTATIVES — Administrator. — For reasons similar to those just mentioned, in the absence of statutes or provisions in the codes of procedure requiring actions to be brought in the name of the real party in interest, the administrator of the insured and not the beneficiary is the proper party to sue on a policy of life insurance under seal.⁵ So the administrator may sue on a policy not under seal, the promise having been made to the decedent.⁶ But where the policy was issued on the application of the beneficiary, and the latter paid the premiums, he is held to be the insured and the promisee, so that the administrator of the assured cannot sue.⁷

An Executor to whom life insurance is made payable in trust for a beneficiary may sue to recover it, under the code practice, as a trustee of an express trust.⁸

1. See *infra*, III. 1. *i. Assignees.*

2. In such case consent to the assignment operates as a promise to pay the loss to the assignee. *Kingsley v. New England Mut. F. Ins. Co.*, 8 Cush. (Mass.) 393.

3. *Pollard v. Somerset Mut. F. Ins. Co.*, 42 Me. 221; *Fogg v. Middlesex Mut. F. Ins. Co.*, 10 Cush. (Mass.) 345; *Blanchard v. Atlantic Mut. F. Ins. Co.*, 33 N. H. 9; *Nevins v. Rockingham Mut. F. Ins. Co.*, 25 N. H. 22.

4. *Stimpson v. Monmouth Mut. F. Ins. Co.*, 47 Me. 379; *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506.

5. *Wright v. Vermont L. Ins. Co.*, 164 Mass. 302; *Burns v. Grand Lodge, etc.*, 153 Mass. 173; *Rindge v. New England Mut. Aid. Soc.*, 146 Mass. 286; *Flynn v. North American L. Ins. Co.*, 115 Mass. 449; *Baily v. New England Mut. L. Ins. Co.*, 114 Mass. 177; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Tripp v. Vermont L. Ins. Co.*, 55 Vt. 100.

6. *Martin v. Aetna L. Ins. Co.*, 73 Me. 25; *McCarthy v. Metropolitan L. Ins. Co.*, 162 Mass. 254; *Munroe v. Providence Permanent Firemen's Relief Assoc.*, (R. I. 1896) 34 Atl. Rep. 149.

7. *Brockway v. Connecticut Mut. L. Ins. Co.*, 29 Fed. Rep. 766; *Iowa State Traveling Men's Assoc. v. Moore*, 34 U. S. App. 670.

See *infra*, III. 1. *g. Beneficiaries.*

Construction of Statute. — A statute providing that the beneficiary in policies of life insurance should be entitled to the proceeds as against creditors and representatives of the person taking the policy was held not to permit the beneficiary to sue in his own name. *Wright v. Vermont L. Ins. Co.*, 164 Mass. 302; *McCarthy v. Metropolitan L. Ins. Co.*, 162 Mass. 254.

8. *Grattan v. National L. Ins. Co.*, 15 Hun (N. Y.) 74.

In *Massachusetts*, by statute, the beneficiary may now sue. *Dean v. American Legion of Honor*, 156 Mass. 435; *Wright v. Vermont L. Ins. Co.*, 164 Mass. 302.

The administrator alone may sue on a certificate in a benefit society payable to the legal representatives of the member. *Sulz v. Mutual Reserve Fund L. Assoc.*, 145 N. Y. 563.

Where a plaintiff suing as administratrix is also beneficiary, suit upon a certificate or policy upon which the beneficiary should have sued will be upheld on the ground that the error is harmless. *Enright v. Standard L., etc., Ins. Co.*, 91 Mich. 238; *Peet v. Great Camp, etc.*, 83 Mich. 92. *Contra*, *Iowa State Traveling Men's Assoc. v. Moore*, 34 U. S. App. 670, 73 Fed. Rep. 750.

c. **HEIR — Fire Insurance — Loss After Death of Insured.** — Where real property is insured and a loss occurs after the death of the insured, the insurance money is regarded as real property descending to the heir or devisee,¹ who may, it seems, sue therefor unless debts exist for which the realty would be liable.²

d. **AGENTS, BAILEES, ETC. — In General.** — Agents, bailees, warehousemen, and the like, obtaining insurance in their own names, for the benefit of others, on property in their care or custody or the subject of the agency, or having an insurable interest, may sue in their own names.³

1. *Pfister v. Gerwig*, 122 Ind. 567; *Culbertson v. Cox*, 29 Minn. 309; *Burbank v. Rockingham Mut. F. Ins. Co.*, 24 N. H. 550; *Herkimer v. Rice*, 27 N. Y. 163; *Wyman v. Wyman*, 26 N. Y. 253; *Haxall v. Shippen*, 10 Leigh (Va.) 561; *Parry v. Ashley*, 3 Sim. 97.

2. *Culbertson v. Cox*, 29 Minn. 313, the court saying: "Where the insured dies seized of the property during the life of the policy, and the property descends or passes, by operation of law or will, to his heirs, widow, or devisees, we fail to see on what principle it can be held that the personal representative, who may have no interest whatever in the property, and hence may have sustained no loss, is entitled to recover the proceeds of the policy as a part of the general personal estate of the insured, and that the widow, heirs, or devisees, who have really sustained the loss, have no interest in the fund when recovered. Such a doctrine appears to us both inequitable and illogical." *Burbank v. Rockingham Mut. F. Ins. Co.*, 24 N. H. 550; *Wyman v. Wyman*, 26 N. Y. 253.

But the Administrator May Sue as "trustee of an express trust" in code states, and perhaps as representative of the person with whom the contract was made in other states. *Westchester F. Ins. Co. v. Dodge*, 44 Mich. 420; *Wyman v. Wyman*, 26 N. Y. 253; *Lappin v. Charter Oak F. & M. Ins. Co.*, 58 Barb. (N. Y.) 325.

The administrator may sue on a policy insuring the deceased and his legal representatives. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88.

3. *Lane v. Sun Mut. Ins. Co.*, 35 La. Ann. 224; *Ward v. Wood*, 13 Mass. 539; *Davis v. Boardman*, 12 Mass. 80; *Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 21; *Goodall v. New England Mut. F. Ins. Co.*, 25 N. H. 169; *Murdock v. Franklin F. Ins. Co.*, 33 W. Va. 407;

Deitz v. Providence Washington Ins. Co., 31 W. Va. 851; *Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co.*, 41 Fed. Rep. 271.

Under the Code Procedure, an agent who insures in his own name for the benefit of his principal may sue as "trustee of an express trust." *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

Undisclosed Agency. — Where a policy not under seal is taken by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407; *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851; *Richelieu, etc., Nav. Co. v. Thames, etc., Marine Ins. Co.*, 58 Mich. 132.

Co-trustees. — If one trustee insures trust property the other may ratify his act, and all may sue. *Howard Ins. Co. v. Chase*, 5 Wall. (U. S.) 509.

A Husband Who, as His Wife's Agent, has insured his wife's property in his own name, may bring suit in his name upon the policy. *Trade Ins. Co. v. Barracloffe*, 45 N. J. L. 543, 46 Am. Rep. 792; *Hunt v. Mercantile Ins. Co.*, 22 Fed. Rep. 503.

Insurance Taken Out "for the Owners," payable to the persons taking it, may be recovered in the name of the owners. *Farrow v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 53.

Party Without Interest or Authority. — A person who has no interest in the property insured and who is not the agent of the owner cannot sue upon the policy intentionally taken in his own name, nor can the owner of the property sue upon it. *Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co.*, 29 Conn. 378; *Zimmerman v. Farmers', Ins. Co.*, 76 Iowa 352.

In *Baldwin v. State Ins. Co.*, 60 Iowa 497, a son intentionally took out insurance in his own name upon property

Insurance by Agent or Bailee "for Whom It May Concern." — Marine insurance may be taken out by an agent, factor, bailee, carrier, trustee, consignee, mortgagee, or any other lienholder to the extent of his own interest, and by the clause "on account of whom it may concern" for all others to the extent of their respective interests, when there is previous authority or subsequent ratification.¹ Action may be brought on such a policy in the name of the party taking it out,² or, in case of his death, in the name of his administrator³ or of the party for whom benefit was intended, the latter having authorized it either before or after loss.⁴ If, how-

of his father, paying the premium himself. It was held that the policy could not be reformed so as to allow the father to recover, and that the son could not recover for either himself or his father.

1. *Hooper v. Robinson*, 98 U. S. 528; *Sturm v. Boker*, 150 U. S. 333, the court saying: "It is not material to determine whether the complainant ever indorsed and transferred these four policies to the defendants, or, if so, whether it was done at the time of their delivery or subsequently, for no such assignment or transfer thereof was necessary to have enabled the defendants to recover on the policies for the loss of cargo to the extent of their interest in the same, it being well settled that under a policy running to Sturm 'for account of whom it might concern,' the defendants could show and recover their interest in the event of loss."

2. *Ballard v. Merchants' Ins. Co.*, 9 La. 258, 29 Am. Dec. 444; *Sleeper v. Union Ins. Co.*, 65 Me. 385, 20 Am. Rep. 706; *Hamilton v. Phoenix Ins. Co.*, 106 Mass. 398; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727; *Schooner Samuel T. Keese*, 38 N. Y. Super. Ct. 281; *Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 21; *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553. And so of fire insurance taken "for whom it may concern." *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Snyder v. Farmers' Ins., etc., Co.*, 13 Wend. (N. Y.) 92, 16 Wend. (N. Y.) 481.

Under the Code Practice, where insurance was taken out payable to the plaintiff "for the account of whom it may concern," he was allowed to sue in his own name for the benefit of the other owners. *Walsh v. Washington Marine Ins. Co.*, 3 Robt. (N. Y.) 202.

3. *Sleeper v. Union Ins. Co.*, 65 Me. 394, where it is said: "The administratrix of the party with whom the policy was made had the same right to bring the suit as her intestate. If the party with whom a contract is made can bring an action upon it, his administrator or executor can do the same. No instance can be found where it has not so been held. If the administratrix of Alexander could not do it, it would be the only exceptional case where it could not be done. If Alexander was a mere agent, the suit would have been for the benefit of the *cestui que trust*. The same result would follow if the suit is brought by the administratrix. The court in such case will protect the party interested against the nominal party."

4. *Somes v. Equitable Safety Ins. Co.*, 12 Gray (Mass.) 531; *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 192; *Williams v. Ocean Ins. Co.*, 2 Met. (Mass.) 303; *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Pacific Ins. Co. v. Catlett*, 4 Wend. (N. Y.) 75; *Bridge v. Niagara Ins. Co.*, 1 Hall (N. Y.) 247.

A Policy Issued by a Mutual Insurance Company, for account of whom it may concern, to brokers, and payable to the latter, may be sued on by the owner of the property, although the by-laws of the company provide that only members can be insured therein. *Somes v. Equitable Safety Ins. Co.*, 12 Gray (Mass.) 531.

Parol Evidence of Agency. — Where a company, in order to evade the laws of a state, issued an open policy to its agents to cover risks indorsed upon it, and the agents placed insurance in that state running in their own name, a party actually insured was allowed to sue for a loss in his own name and re-

ever, the policy is under seal, at common law action may be brought by the covenantee only.¹

e. INSURED MORTGAGOR. — See *infra*, III. 1. *h.* Mortgagees.

f. PARTNERS AND CO-OWNERS. — Where a Policy Under Seal Is Made to a Firm which afterwards takes in another partner, the new partnership cannot sue upon the policy,² and if a policy under seal provides for extension by payment of further premiums, it is held that extension as a specialty is intended, so that the taking in of an additional partner before renewal does not enable the new partnership to sue upon a loss after renewal.³ But in case no such covenant is contained in the policy, a renewal receipt, made after the taking in of a new partner, is a new contract to which the new partnership is a party, and suit may be brought upon it accordingly.⁴

A Surviving Partner may maintain an action upon a policy issued to the firm on property owned by the partners as tenants in common.⁵

Under the Code Procedure, where an insured took in a partner after issuance of the policy, and there was no assignment, it was held that he might sue in his own name and recover to the extent of his interest.⁶

g. BENEFICIARIES — Policy Under Seal. — Where a policy of life

cover upon parol evidence of the facts. *Daniels v. Citizens' Ins. Co.*, 10 Biss. (U. S.) 116.

1. *DeBolle v. Pennsylvania Ins. Co.*, 4 Whart. (Pa.) 74, the court saying: "In regard to an action of covenant which is founded upon a deed, the moving or original cause for executing it is not looked to for the purpose of maintaining the action, because the sealing and delivering the deed is a sufficient consideration for that, and renders it binding upon the covenantor to the covenantee alone, though the consideration which actually induced the making of the covenant should appear in the deed to have come from a third person; and whether the covenant or obligation created thereby appears to be for the benefit of the covenantor or a third person, the action must be brought in the name of the covenantee. *Shep. Touch.* 369; *Bro. Obl.* 72."

2. *Firemen's Ins. Co. v. Floss*, 67 Md. 415, 1 Am. St. Rep. 398, the court saying: "The parol contract of insurance sued upon was made with the firm of S. W. Floss & Co., and that partnership name represented all the members of the partnership at the date of the contract; and the defendants must be taken to have contracted with the part-

nership as then constituted. Any other principle would lead to the greatest uncertainty and difficulty in the dealings as between the partnership and third parties. Moreover, by the terms of the original contract, to which the subsequent parol contract is made subject, assignment of that contract, or of an interest therein, was permissible with the consent of the insurance company; and the new parol contract made with the existing partnership, for a continuance of the risk, must be construed as consent given, on the part of the defendants, to accept Cohen, the incoming partner, as one of the assured."

3. *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 1 Am. St. Rep. 398; *Baltimore F. Ins. Co. v. McGowan*, 16 Md. 47.

4. *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 1 Am. St. Rep. 398.

5. *Oakman v. Dorchester Mut. F. Ins. Co.*, 98 Mass. 57.

6. *Blackwell v. Miami Valley Ins. Co.*, 48 Ohio St. 533.

If One of Several Co-owners Insures in His Own Name and there is nothing in the policy to show that any other person was to be insured thereby, an action by all the owners cannot be maintained. *Finney v. Bedford Commercial Ins. Co.*, 8 Met. (Mass.) 348.

insurance, issued to one person for the benefit of another, is under seal, the beneficiary cannot sue.¹ But where the promise was to the beneficiary and not to the insured, as where the application is made and premiums are paid by the beneficiary, the beneficiary may sue on the policy.²

If the Policy is Not Under Seal, suit may be brought by the beneficiary as on a contract for his benefit in jurisdictions where the parties are allowed to sue on such contracts.³

Under the Code Procedure action is brought by the beneficiary, as the "real party in interest."⁴

h. MORTGAGEES — Rules Generally Recognized. — Where insurance in the name of the mortgagor is taken by a mortgagee, who pays the premium, and it is made payable to the latter, he is the insured and may sue on the policy;⁵ and where, pursuant to a covenant

1. *Fairchild v. North-Eastern Mut. L. Assoc.*, 51 Vt. 613. See also *supra*, III. 1, *b. Personal Representatives.*

2. *Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498; *Brockway v. Connecticut Mut. L. Ins. Co.*, 29 Fed. Rep. 766; *Iowa State Traveling Men's Assoc. v. Moore*, 34 U. S. App. 670, 73 Fed. Rep. 750; *Mutual L. Ins. Co. v. Stibbe*, 46 Md. 302.

3. *Munroe v. Providence Permanent Firemen's Relief Assoc.*, (R. I. 1896) 34 Atl. Rep. 149; *Supreme Lodge, etc. v. Portingall*, 167 Ill. 291; *Enright v. Standard L., etc., Ins. Co.*, 91 Mich. 238. Or where the statute creates such a relation between the beneficiary and the company that an action by the former is maintainable. *Dean v. American Legion of Honor*, 156 Mass. 435. Or where a life policy is regarded as a wager policy. *Hillyard v. Mutual Ben. L. Ins. Co.*, 35 N. J. L. 415. It has been suggested also that the designation of a beneficiary operates as an assignment with the consent of the insurer so as to permit the beneficiary to sue. *Prudential Ins. Co. v. Young*, 14 Ind. App. 560.

Surviving Beneficiary. — Where there were three beneficiaries, one of whom died, an action by the survivors without joining the representatives of the deceased beneficiary was held proper. *Supreme Lodge, etc. v. Portingall*, 167 Ill. 291.

When Executor of Insured a Necessary Defendant. — A beneficiary, who claimed only as collateral security to a debt due from the deceased insured, sued and impleaded a legatee under the will of the deceased who claimed under the will. It was held that the suit would

not be determined without making the executor a party. *Shove v. Shove*, 69 Wis. 425.

Husband and Wife. — Where a husband holds a policy in which his wife is beneficiary, and the policy is wrongfully declared forfeited by the insurer, husband and wife cannot maintain a joint action. *Knights Templar, etc., L. Indemnity Co. v. Gravett*, 49 Ill. 252.

4. *Manhattan L. Ins. Co. v. Francisco*, 17 Wall. (U. S.) 672; *Schultz v. Citizen's Mut. L. Ins. Co.*, 59 Minn. 308; *Burlington Voluntary Relief Dept. v. White*, 41 Neb. 547.

In Massachusetts beneficiaries are now permitted to sue by statute. *Dean v. American Legion of Honor*, 156 Mass. 435; *Wright v. Vermont L. Ins. Co.*, 164 Mass. 302.

Contractor's Insurance. — Where a policy was issued on the application and at the expense of a contractor, in the name of the owner of the land upon which a building was erected, with a clause, "With a contractor's insurance for thirty days," the contractor was allowed to sue to recover a loss occurring within the time specified. *German F. Ins. Co. v. Thompson*, 43 Kan. 567.

Guardian. — Insurance payable by the terms of a policy of life insurance to the general guardian of the children of the insured may be recovered in an action in their behalf by a guardian *ad litem*. *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497.

5. *Hopkins Mfg. Co. v. Aurora F. & M. Ins. Co.*, 48 Mich. 148.

Where insurance was procured by A in the name of A and B, loss first payable to A as his interest might appear,

in the mortgage, the insurance is taken by the mortgagor, payable to the mortgagee, and provision is made that no act or default of persons other than the mortgagee shall defeat recovery, it is generally held to be a contract with the latter upon which he may sue.¹ But in some jurisdictions the policy is considered as a contract with the mortgagor who took it out, upon which only he or his representatives may sue.²

Divers Doctrines in Various Jurisdictions. — In those jurisdictions which permit an action by the mortgagee, some of the cases proceed upon the ground that one may sue upon a contract for his benefit, though not a party thereto;³ some of these, as well as others, permit a joint action by mortgagor and mortgagee, unless the mortgage debt exhausts the insurance.⁴ Others, and some of those already enumerated, make a distinction between a policy

and A paid the premium, he was allowed to sue in his own name. *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121.

1. *Palmer Sav. Bank v. Insurance Co. of North America*, 166 Mass. 189; *Westchester F. Ins. Co. v. Coverdale*, 48 Kan. 446; *Chipman v. Carroll*, 53 Kan. 163. An exhaustive list of the adjudicated cases is contained in the opinion of Field, C. J., in *Palmer Sav. Bank v. Insurance Co. of North America*, 166 Mass. 189.

2. *Fire Ins. Companies v. Felrath*, 77 Ala. 194, 54 Am. Rep. 58; *Meriden Sav. Bank v. Home Mut. F. Ins. Co.*, 50 Conn. 397; *Minnock v. Eureka F. & M. Ins. Co.*, 90 Mich. 236; *Westchester F. Ins. Co. v. Dodge*, 44 Mich. 420; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 613; *Williamson v. Michigan F. & M. Ins. Co.*, 86 Wis. 393; *Thatch v. Metropole Ins. Co.*, 3 McCrary (U. S.) 87, 11 Fed. Rep. 29; *Mitchell v. London Assur. Co.*, 15 Ont. App. 262. Some of these decisions proceed, in part at least, upon the point that the mortgagee's interest was less than the amount of the loss, or are to be distinguished on that ground. Such was the case in *Fire Ins. Companies v. Felrath*, 77 Ala. 194. Consequently the question cannot safely be regarded as settled in all the jurisdictions from which cases are cited.

In *Michigan* the courts hold that where the policy does not insure the mortgagee's interest only, and does not run to the mortgagee, suit must be brought by the mortgagor who took out the policy and paid the premium, although taken out in compliance with the covenant in the mortgage. *Min-*

nock v. Eureka F. & M. Ins. Co., 90 Mich. 236.

In *New Jersey* the policy is regarded as a contract with the insured upon which he may sue. *Martin v. Franklin F. Ins. Co.*, 38 N. J. L. 140. But the mortgagee may sue also. See *New Jersey cases cited infra*, p. 397, note 1.

In *Vermont* an action on a fire policy with the subrogation clause should be brought in the name of the insured for the benefit of the mortgagee. *Powers v. New England F. Ins. Co.*, 69 Vt. 494.

3. *Minnesota*. — *Maxcy v. New Hampshire F. Ins. Co.*, 54 Minn. 272. And see note next following.

Oregon. — *Chrisman v. State Ins. Co.*, 16 Oregon 283.

Virginia. — *Tilley v. Connecticut F. Ins. Co.*, 86 Va. 811.

4. *Arkansas*. — *Burlington Ins. Co. v. Lowery*, 61 Ark. 108.

Indiana. — *Home Ins. Co. v. Gilman*, 112 Ind. 7.

Minnesota. — *Ermintrout v. American F. Ins. Co.*, 60 Minn. 418.

New York. — *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185; *Boynton v. Clinton, etc., Mut. Ins. Co.*, 16 Barb. (N. Y.) 254; *Ennis v. Harmony F. Ins. Co.*, 3 Bosw. (N. Y.) 516; *Lasher v. Northwestern Nat. Ins. Co.*, 18 Hun (N. Y.) 101.

The Mortgagee May Sue Alone for his own interest, and as trustee for the mortgagor, for any excess. *Cone v. Niagara F. Ins. Co.*, 60 N. Y. 619; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151; *Georgia Home Ins. Co. v. Leaverton, (Tex. Civ. App. 1895)* 33 S. W. Rep. 579; *Appleton Iron Co. v. British America Assur. Co.*, 46 Wis. 23.

in which the loss is payable to the mortgagee without limitation and one payable to a mortgagee as his interest may appear;¹ in others each may sue according to his interest;² still others allow the mortgagee to sue as the "real party in interest."³ In others, again, the provision making the loss payable to the mortgagee is looked upon as an assignment with the consent of the insured,⁴ or the bringing of a suit by the mortgagee as a ratification of the insurance procured for his benefit.⁵ In many of these jurisdictions the mortgagor may sue, as well, with the consent of the mortgagee;⁶ in others the mortgagee may sue in the name of the mortgagor;⁷ in others the mortgagor may sue as the

1. Arkansas. — Burlington Ins. Co. v. Lowery, 61 Ark. 108, holding that where the loss is made absolutely payable to the mortgagee, the latter alone may sue, though he may join the mortgagor, but that where the loss is made payable to the mortgagee as his interest may appear, and the interest is not greater than the loss, the mortgagor should sue.

Illinois. — St. Paul F. & M. Ins. Co. v. Johnson, 77 Ill. 598, holding that the mortgagor may sue where the loss is made payable to the mortgagee, not unconditionally, but as his interest may appear.

Massachusetts. — "We think the rule in this commonwealth, in cases like the present, is that where the mortgage has been paid before the loss, the mortgagor in his own name recovers the whole amount of the loss to the extent of the insurance; that where the mortgage debt exceeds the loss, the mortgagee can recover the whole in his own name; that where the loss exceeds the mortgage debt, the mortgagor and mortgagee each can sue for his share, unless by the terms of the policy the whole loss is payable to the mortgagee, although it may exceed his interest, in which case, perhaps, the mortgagee may be taken as assignee of the whole; and that in any case the mortgagor may sue for the whole loss if the mortgagee consents." *Per* Field, C. J., in Palmer Sav. Bank v. Insurance Co. of North America, 166 Mass. 189.

New York. — Pitney v. Glens Falls Ins. Co., 65 N. Y. 6; Grosvenor v. Atlantic F. Ins. Co., 17 N. Y. 391.

2. Texas. — Georgia Home Ins. Co. v. Leaverton, (Tex. Civ. App. 1895) 33 S. W. Rep. 579.

3. Iowa. — Bartlett v. Iowa State Ins. Co., 77 Iowa 86; Mershon v. National Ins. Co., 34 Iowa 87.

4. Missouri. — Franklin v. National Ins. Co., 43 Mo. 491.

Tennessee. — Donaldson v. Sun Mut. Ins. Co., 95 Tenn. 280.

Other States. — This view also is taken in some of the jurisdictions considered: Palmer Sav. Bank v. Insurance Co. of North America, 166 Mass. 189; Fogg v. Middlesex Mut. F. Ins. Co., 10 Cush. (Mass.) 346; Pratt v. New York Cent. Ins. Co., 64 Barb. (N. Y.) 589; Burlington Ins. Co. v. Lowery, 61 Ark. 108; Hammel v. Queen Ins. Co., 50 Wis. 240. But see *infra*, the next paragraph of text, *Extent of Interest as a Criterion*.

5. Maine. — Motley v. Manufacturer's Ins. Co., 29 Me. 337.

6. Arkansas. — Burlington Ins. Co. v. Lowery, 61 Ark. 108.

Kansas. — Westchester F. Ins. Co. v. Coverdale, 48 Kan. 446.

Maine. — Patterson v. Triumph Ins. Co., 64 Me. 500.

Maryland. — Coates v. Pennsylvania F. Ins. Co., 58 Md. 172, 42 Am. Rep. 327.

Massachusetts. — Kyte v. Commercial Union Assur. Co., 144 Mass. 43; Turner v. Quincy Mut. F. Ins. Co., 109 Mass. 568; Jackson v. Farmers' Mut. F. Ins. Co., 5 Gray (Mass.) 52.

Minnesota. — Graves v. American Live-Stock Ins. Co., 46 Minn. 130; Maxcy v. New Hampshire F. Ins. Co., 54 Minn. 272.

7. New Hampshire. — Hall v. Philadelphia F. Assoc., 64 N. H. 405, where the court says: "It is not material whether Woodman could or could not maintain an action in her own name against the defendants. If she brings suit in the name of Hall, her interest as the real plaintiff will be as fully protected as if she were the plaintiff of record. Scoby v. Blanchard, 3 N. H. 176; Cameron v. Little, 13, N. H. 23;

party with whom the contract was made, and the mortgagee also, if the policy is not under seal.¹

Extent of Interest as a Criterion. — In many instances a distinction is made between cases wherein the mortgagee's interest is greater than the amount of the loss and those wherein it is less. In jurisdictions where the code practice obtains, or where each may sue for his interest, if the mortgage debt is greater than the loss the mortgagor may not sue unless he has paid the debt.² Where

Webb v. Steele, 13 N. H. 239; Duncklee v. Greenfield Steam Mill Co., 23 N. H. 245; Jordan v. Gillen, 44 N. H. 424; Folsom v. Orient F. Ins. Co., 59 N. H. 54."

1. New Jersey. — Warbasse v. Sussex County Mut. Ins. Co., 42 N. J. L. 203; Martin v. Franklin F. Ins. Co., 38 N. J. L. 140, 20 Am. Rep. 372; State Ins. Co. v. Maackens, 38 N. J. L. 564.

Mississippi also, perhaps. — Georgia Home Ins. Co. v. Stein, 72 Miss. 950; Lowry v. Insurance Co. of North America, (Miss. 1897) 21 So. Rep. 664, in which an action by the mortgagee was upheld, but the court declined to decide whether an action might be maintained by the mortgagor.

Vermont Rule. — In Powers v. New England F. Ins. Co., 69 Vt. 494, the court said: "Can the plaintiff maintain this action? The contract was made with him, the consideration moved from him, the promise was made to him, and the decisions in this state are that a suit to enforce the contract must be brought in the name of the one to whom the promise is made, and from whom the consideration moves. Fugure v. St. Joseph's Mut. Soc., 46 Vt. 362. In Davenport v. North-Eastern Mut. L. Assoc., 47 Vt. 528, it was held that the beneficiaries could maintain the action, the court construing the contract as containing a promise to pay to them. Many cases from other states have been cited, but they are not authority here, and no reason is disclosed in any of them why we should overturn the well-settled practice and decisions of our own state. A policy of insurance is sometimes made payable to the insured and his assigns, and sometimes to the mortgagee of the premises, naming him, and at other times to any one holding a mortgage upon the insured property at the time of the loss, whoever he may be. The effect of the provision is to give a mortgagee a lien upon the insurance money in case of loss, securing

him by substituting the proceeds of the policy in place of the property, provided it burns, thus letting the property go to the substantial owner, if the property is mortgaged, as is often the case, to its full value. But this interest of the mortgagee in the policy is an equitable, not a legal, one and will be protected in a law court. Upton v. Moore, 44 Vt. 552. If a policy is made payable to a mortgagee, the insurer is not at liberty to pay any sum due under the policy to the insured in disregard of the rights of the beneficiary. A policy of insurance is a mere chose in action; it is non-negotiable; it is not assignable at common law so that the assignee can sue in his own name; and though it may be payable to the insured and his assigns, still, if a loss happens an equitable holder of the policy must sue in the name of the original insured. Aldis, J., in Wood v. Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552. Under our system of pleadings — and no better one has as yet been devised — the insurer cannot be subjected legally to any suit save the one in the name of the party to the contract, and the beneficiary can always protect his rights by suit in the name of the insured. This suit is brought, in accord with our system of pleadings, in the name of the party to the contract, for the benefit of the mortgagee, to the extent of its claim. This fact is alleged in the declaration in express terms. The mortgagee has the right to control the judgment, and any execution issued thereon, until his claim under the policy is extinguished, after which the mortgagor (the plaintiff) is the only party in interest and of record. The judgment will be a complete protection to the defendant against any further suit in respect to all claims under the policy."

2. Arkansas. — Burlington Ins. Co. v. Lowery, 61 Ark. 108.

Kansas. — Westchester F. Ins. Co. v. Coverdale, 48 Kan. 446.

it is less the mortgagor is allowed to sue under the code procedure by joining the mortgagee,¹ or even without, for his own interest, and as trustee for the mortgagee,² though in such case it is said to be the better practice to join the mortgagor.³

Summary. — It is believed that the somewhat heterogeneous mass of cases cited sustain the following general conclusions.

(1) In states in which the code procedure obtains, if the mortgage debt exceeds the loss, the mortgagee, to whom the loss is made payable, may sue as the "real party in interest" or as the person for whose benefit the contract was made; if the debt is less than the loss, either the mortgagee or the mortgagor may sue by joining the other, or they may sue jointly as being parties interested in the subject of the action and in the relief sought; and though the mortgagor may sue with the consent of the mortgagee, he cannot otherwise sue alone unless he has paid the mortgage debt, except in *New York*, and in those jurisdictions where a distinction is maintained between those policies payable to the mortgagee without limitation and those payable to him as his

Massachusetts. — *Palmer Sav. Bank v. Insurance Co. of North America*, 166 Mass. 189.

Minnesota. — *Maxcy v. New Hampshire F. Ins. Co.*, 54 Minn. 272; *Graves v. American Live-Stock Ins. Co.*, 46 Minn. 130.

Nebraska. — *Billings v. German Ins. Co.*, 34 Neb. 502.

New York. — *Baltis v. Dobin*, 67 Barb. (N. Y.) 507; *Ennis v. Harmony F. Ins. Co.*, 3 Bosw. (N. Y.) 516.

1. Indiana. — *Home Ins. Co. v. Gilman*, 112 Ind. 7.

New York. — *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185.

2. New York. — *Cone v. Niagara F. Ins. Co.*, 60 N. Y. 619.

3. North Dakota. — *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151.

In Arkansas the mortgagee may sue where the loss is payable to him without limitation, though his interest is less than the loss, but the mortgagor may properly be made a party to protect his interest in the policy. *Burlington Ins. Co. v. Lowery*, 61 Ark. 108.

In Wisconsin the mortgagee cannot sue, unless the debt is greater than the loss, without joining the mortgagor. *Williamson v. Michigan F. & M. Ins. Co.*, 86 Wis. 393; *Carberry v. German Ins. Co.*, 86 Wis. 323. The contract is regarded as one with the mortgagor. *Chandos v. American F. Ins. Co.*, 84 Wis. 184. Conversely, the mortgagor may join the mortgagee, or may make

him a defendant if he refuses to join, but if the mortgagee's interest has ceased the mortgagor may sue alone. *Great Western Compound Co. v. Aetna Ins. Co.*, 40 Wis. 373.

Miscellaneous Distinctions. — Except in the jurisdictions where each may sue for his interest, the mortgagee's right to sue is limited to cases where he is entitled to the whole loss. *Maxcy v. New Hampshire F. Ins. Co.*, 54 Minn. 272; *Donaldson v. Sun Mut. Ins. Co.*, 95 Tenn. 280; *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151.

But it was held that where the mortgage debt exceeded the loss the mortgagor was not a necessary party to a suit in equity by a mortgagee as equitable assignee. *Rogers v. Traders' Ins. Co.*, 6 Paige (N. Y.) 583.

A distinction has also been made between one who holds as collateral security to a liability existing before loss and is regarded as an appointee to receive the amount of a loss, and a mortgagee who by the terms of the policy is confined to a party to the contract. *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 439; *Westchester F. Ins. Co. v. Coverdale*, 48 Kan. 446; *Hastings v. Westchester F. Ins. Co.*, 73 N. Y. 141; *Excelsior F. Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 392. See also *Palmer Sav. Bank v. Insurance Co. of North America*, 166 Mass. 189.

Some courts, however, are less liberal in reading the conclusion that the

interest might appear. In case the mortgagor has paid the debt he should sue as the "real party in interest."¹ Where the debt is less than the amount of the loss the mortgagee cannot sue without joining the mortgagor, except in those jurisdictions where a distinction is made as to losses payable to the mortgagee without limitation.

(2) In states where one not a party to the contract is allowed to sue on a contract for his benefit, a mortgagee whose interest extends to the whole loss may sue.² In some jurisdictions also, each may sue for his interest, or either may sue.³

(3) Where the common-law practice or a modification of it prevails, if the insurance was procured by the mortgagee, or for other reasons is to be regarded as a contract with him, and in those jurisdictions where the mortgage clause is regarded as an assignment of the policy to the mortgagee with the consent of the insured, or if the policy is not under seal and the whole proceeds are payable to him, or each is allowed to sue for his own interest, the mortgagee may sue. Otherwise the mortgagor (insured) should sue, or at least suit should be in his name, unless persons not parties thereto are allowed in the particular jurisdiction to sue upon contracts made for their benefit. In such jurisdictions, where the policy is not under seal the insured may sue also.⁴

The several classes of jurisdictions referred to may be identified by reference to the notes preceding this summary.

2. ASSIGNEES — By Express Assignment Before Loss. — A contract of insurance is not assignable at common law so as to give the assignee an action in his own name.⁵ But where the policy is assigned with the consent of the insurer, the assignee becomes

mortgagee is a party to the contract. *Fire Ins. Companies v. Felrath*, 77 Ala. 194; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 613; *Williamson v. Michigan F. & M. Ins. Co.*, 86 Wis. 393.

Particular Cases. — Where the mortgagee satisfied the mortgage in consideration of the transfer to him of the burned property, the policy being payable to the mortgagee as his interest might appear, it was held that he could sue upon the policy as the real party in interest, though the mortgage was satisfied. *Bartlett v. Iowa State Ins. Co.*, 77 Iowa 86.

A policy having been erroneously issued to "M. & Co.," instead of to the owners in the name in which they did business, and having been indorsed by the insurer, "Payable to C. E. M. and J. M.," it was held that the latter might sue for the benefit of the owners. *Matthews v. Queen City Ins. Co.*, 2 Cinc. Super. Ct. Rep. 109.

1. *Griswold v. American Cent. Ins. Co.*, 1 Mo. App. 97; *Billings v. German Ins. Co.*, 34 Neb. 502.

2. *Tilley v. Connecticut F. Ins. Co.*, 86 Va. 811.

3. *Massachusetts*, perhaps *Texas*, *New Jersey*, and also *Mississippi*. — See the cases cited to the text preceding this summary.

4. *Munroe v. Providence Permanent Firemen's Relief Assoc.*, (R. I. 1896) 34 Atl. Rep. 149.

5. *Simeral v. Dubuque Mut. F. Ins. Co.*, 18 Iowa 319; *Carroll v. Boston Marine Ins. Co.*, 8 Mass. 515; *Folsom v. Belknap County Mut. F. Ins. Co.*, 30 N. H. 231; *Shepherd v. Union Mut. F. Ins. Co.*, 38 N. H. 230; *Bayles v. Hillsborough Ins. Co.*, 27 N. J. L. 163; *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.) 88; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; *Ripley v. Ætna Ins. Co.*, 29 Barb. (N. Y.) 552; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25.

the insured and may sue in his own name, the transaction being regarded as equivalent to surrendering the old policy and taking a new one for the assignee, or to a new promise to the assignee.¹

An Assignment After Loss is an assignment of the debt or chose in action, and suits to recover the loss in such cases are governed by the general rules applicable to suits by assignees of the chose in action.²

By Implied or Equitable Assignment. — One who is equitably entitled to the loss, though not an assignee of the policy, may, after notice to the insurer, sue to recover the loss. The equitable assignee may bring a suit in equity to recover the loss,³ or he

1. *Indiana*. — *Continental Ins. Co. v. Munns*, 120 Ind. 30.

Iowa. — *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa 507.

Maine. — *Stimpson v. Monmouth Mut. F. Ins. Co.*, 47 Me. 379.

Massachusetts. — *Bullman v. North British, etc., Ins. Co.*, 159 Mass. 118; *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24; *Burroughs v. State Mut. L. Assur. Co.*, 97 Mass. 359; *Kingsley v. New England Mut. F. Ins. Co.*, 8 Cush. (Mass.) 393.

New Hampshire. — *Cummings v. Cheshire County Mut. F. Ins. Co.*, 55 N. H. 457; *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297.

New Jersey. — *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506.

New York. — *Shearman v. Niagara F. Ins. Co.*, 46 N. Y. 526; *Hooper v. Hudson River F. Ins. Co.*, 17 N. Y. 424; *Mann v. Herkimer County Mut. Ins. Co.*, 4 Hill (N. Y.) 187.

West Virginia. — *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729.

United States. — *Bates v. Equitable Ins. Co.*, 10 Wall. (U. S.) 33.

The Assignee of Marine Insurance, taken "on account of whom it may concern," may sue to recover a loss. *Duncan v. China Mut. Ins. Co.*, 129 N. Y. 237.

2. *Perry v. Merchants' Ins. Co.*, 25 Ala. 355; *Carter v. Humboldt F. Ins. Co.*, 12 Iowa 287; *Mellen v. Hamilton F. Ins. Co.*, 17 N. Y. 609; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 598.

The rules in force in various jurisdictions as to suits by assignees of choses in action are discussed in the article **EQUITABLE ASSIGNMENTS**, vol. 7, p. 730. For instances of suits of assignees of insurance see *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729;

East Texas F. Ins. Co. v. Coffee, 61 Tex. 287; *Bennett v. Maryland F. Ins. Co.*, 14 Blatchf. (U. S.) 422.

In *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729, the insured assigned before loss with the consent of the insurer, and after loss the assignee assigned. It was held that the legal title was in the assignee, and that he might sue in his own name notwithstanding the assignment.

An order given by the insured after loss, directing the insurer to pay the loss to a creditor, makes the creditor assignee of the cause of action, and the latter may sue in his own name under the code practice as "real party in interest." *Spratley v. Hartford Ins. Co.*, 1 Dill. (U. S.) 392.

Assignee of Several Interests. — Where two persons have several interests insured by one policy, upon which separate actions may be required, the assignee of both may maintain one action. *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423; *Watertown F. Ins. Co. v. Grover, etc.*, *Sewing Mach. Co.*, 41 Mich. 131.

Joinder with Assignee. — The assignee of a policy of life insurance in trust for the wife of the insured need not join the latter nor the representative of the deceased in a suit on the policy. *St. John v. American Mut. L. Ins. Co.*, 2 Duer (N. Y.) 419.

Benefit Societies. — The certificates of a mutual aid society containing a provision that they were to be assignable only with the consent of the society indorsed thereon, an assignee who has not procured such an indorsement cannot sue on a certificate. *National Mut. Aid Soc. v. Lupold*, 101 Pa. St. 111.

3. *Rogers v. Traders' Ins. Co.*, 6 Paige (N. Y.) 583. And see in general article **EQUITABLE ASSIGNMENTS**, vol. 7, p. 730.

may sue at law in the name of the insured at common law,¹ but in his own name under the code practice.²

2. Defendants — Lloyd's Policies. — If a policy provides that action upon it shall be brought only against the agents who issued it as attorneys in fact of the underwriters, an action against such agents is authorized and separate actions on the policy against the underwriters are not maintainable.³ Such provisions, however, do not apply to an action to enforce against the other underwriters a judgment obtained against the persons designated.⁴

Assignees. — An assignee who sues by virtue of an assignment of a policy need not make a third party, who claims under an alleged prior assignment, a party to the action.⁵ Nor need an administrator suing on a policy of life insurance make one who claims under an alleged assignment from the insured in his lifetime a party.⁶

3. Interveners. — Where an assignee of a policy brings suit thereon, one claiming under a prior assignment may intervene.⁷ But if a person who has no insurable interest in property insures in his own name, the owner cannot intervene in an action on the policy by the insured.⁸ In an action by the insured on an employer's liability policy, the party injured, who has obtained a judgment against the insured, may intervene and maintain garnishment proceedings against the insurer.⁹ Intervention need not be perfected before the time fixed by the limitation clause expires.¹⁰

4. Joinder — a. OF PLAINTIFFS. — At Common Law the rule is that if interests are joint although the words are several the action must be joint, and if the interests are several the covenant is

1. *Rousset v. Insurance Co. of North America*, 1 Binn. (Pa.) 429; *Gourdon v. Insurance Co. of North America*, 3 Yeates (Pa.) 327; *Baltimore Ins. Co. v. M'Fadon*, 4 Har. & J. (Md.) 31.

2. *Cromwell v. Brooklyn F. Ins. Co.*, 44 N. Y. 42.

3. *Leiter v. Beecher*, 2 N. Y. App. Div. 577; *Lawrence v. Schaefer*, 19 Misc. Rep. (N. Y. Supreme Ct.) 239. But see *Farjeon v. Fogg*, 16 Misc. Rep. (N. Y. Supreme Ct.) 219.

4. *Lawrence v. Schaefer*, 19 Misc. Rep. (N. Y. Supreme Ct.) 239.

5. *Kelly v. Norwich F. Ins. Co.*, 82 Iowa 137.

6. *New York L. Ins. Co. v. Smith*, 29 U. S. App. 220, 67 Fed. Rep. 694.

7. *Kelly v. Norwich F. Ins. Co.*, 82 Iowa 137; *New York L. Ins. Co. v. Smith*, 29 U. S. App. 220, 67 Fed. Rep. 694.

8. *Farmers' Mut. Ins. Co. v. New*

Holland Turnpike Co., 122 Pa. St. 37, where the court said: "We think it was also error to permit the county of Lancaster to interplead as a claimant. There was no contract of insurance with the county, and after intervening there could be no recovery as for any loss sustained by the county. There was no identity of interest in the bridge as between the turnpike company and the county. If the turnpike company had any interest in it, it was that interest which was represented by the amount of its contribution to the cost of the bridge, but in that contribution the county necessarily could have no interest. The whole of it belonged to the turnpike company, and no part of it, in any contingency, belonged to the county."

9. *Anoka Lumber Co. v. Fidelity, etc., Co.*, 63 Minn. 286.

10. *Stevens v. Citizens' Ins. Co.*, 69 Iowa 658.

several although in terms joint. Therefore, if two or more having joint interest are insured they may sue jointly,¹ and must do so at common law, though one has assigned to the other.² But if the interests are several a joint action cannot be maintained,³ and several actions are proper.⁴

Under the Code Practice, which permits joinder of all persons having an interest in the subject of the action or in obtaining the relief demanded, the insured may join with a creditor to whom the policy is made payable as his interest may appear.⁵ Under the code, also, joint covenantees may join though their interests are several, and the widow and heirs may join to recover insurance on the homestead of a deceased insured.⁶ But parties who have neither joint nor several interests, and whose interests are alternative or antagonistic, may not be joined.⁷

Beneficiaries who have several interests, as where a policy provides

1. *Castner v. Farmers' Mut. F. Ins. Co.*, 46 Mich. 18.

2. *Hobbs v. Memphis Ins. Co.*, 1 Sneed (Tenn.) 444.

3. *Work v. Merchants', etc., Mut. F. Ins. Co.*, 11 Cush. (Mass.) 271; *Keary v. Mutual Reserve Fund L. Assoc.*, 30 Fed. Rep. 359.

4. *Emmeluth v. Home Ben. Assoc.*, 122 N. Y. 130; *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514.

5. *Graves v. Merchants', etc., Ins. Co.*, 82 Iowa 637, where a joint policy was issued to the owner of a building and to the owner of a stock of goods therein. It was held that they could join in an action on the policy.

Husband and Wife.—Where a husband was the sole owner of personal property situated on the land of his wife, and he and his wife made a joint application and secured a joint policy on the representation of the agent of the insurer, who knew the title, that such was the proper course, the husband and wife were allowed to maintain a joint action. *Kausal v. Minnesota Farmers' Mut. F. Ins. Assoc.*, 31 Minn. 17.

6. *Bailey v. Aetna Ins. Co.*, 77 Wis. 336, where the facts are thus stated: "The principal property insured in this case was a dwelling house, which constituted the homestead of the insured. The property was destroyed after the death of the insured and while occupied as a homestead. The children or heirs at law of the insured, together with the widow, who sues as such widow and also in her representative capacity as administratrix of her husband's estate, and certain mortgagees to whom a portion of the loss is

made payable, have been made parties to the action. It is said if this is a legal action the heirs are improper parties plaintiff. But the general rule is that a demurrer does not lie for an excess of parties plaintiff. On the death of the insured the homestead descended to the widow during her widowhood, and to the children on her marriage or death."

7. **Thus the Administrator and the Heir** cannot join in an action on a policy for a loss occurring after the death of the assured, since, if the heirs have the right to recover, the administrator has no cause of action, while if the administrator may sue, the heirs have no cause of action. *Pfister v. Gerwig*, 122 Ind. 567.

Benefit Insurance.—A company agreed in certificates of insurance to pay a sum specific to a beneficiary named and to surviving members of the class to which the insured belonged, share and share alike. It was held that a separate action by one of the members of the class to recover his share was maintainable. *Emmeluth v. Home Ben. Assoc.*, 122 N. Y. 130.

Joinder of Causes of Action. (See also *infra*, III. 2. *Defendants*.)—Two persons were insured in a mutual company, the policy entitling them also to a share in the profits accruing to the company. On the death of one of them his administrator sued for the insurance and for the share of the profits belonging to the deceased. It was held that there was no misjoinder of causes of action. *Vogler v. World Mut. L. Ins. Co.*, 51 How. Pr. (N. Y. Supreme Ct.) 301.

for payment of different sums to different parties, cannot join as plaintiffs.¹

b. OF DEFENDANTS. — Where a building was secured by two distinct policies in different companies, but each policy contained a provision that the insurer might elect to rebuild on giving a stipulated notice, and the insurers joined in giving notice of election to rebuild, it was held that there was a new joint contract to rebuild, so that on failure to rebuild the insurers might be sued jointly.² The insurer cannot be joined in a suit by a mortgagee of insured premises to reform the mortgage.³

IV. ORIGINAL PROCESS — 1. Form and Contents. — Where in an action against an insurance company the writ commands the officer to summon the “agents” of the defendant instead of the defendant himself, a service thereof is insufficient to support a

1. *Keary v. Mutual Reserve Fund L. Assoc.*, 30 Fed. Rep. 359, where Brewer, J., states the case as follows: “All the different parties in interest, beneficiaries in the policy, have joined in one action, and the demurrer is on the ground of improper joinder of causes of action. The petition states the condition under which the policy matured. It states the promise on the part of the insurance company in one instrument to pay different sums of money to different parties. Of course, there may be a unity of interest in the subject-matter of the action, but there is no unity of interest in the relief desired. If, for instance, one of these beneficiaries is paid, the others have no interest in and are not prejudiced by that payment; and he has no interest in the money which is due the other beneficiaries. Each one has a separate interest in the money which by the terms of the policy is payable to him or to her. I think, therefore, under the practice which obtains, and the rule laid down under the state code, the demurrer will have to be sustained. But all the parties plaintiff are in court. The defendant is in court. All the causes of action are stated, and I think it is within the power of the court, and the order will so be made, after sustaining the demurrer, that each plaintiff may file his or her petition upon his or her cause of action, and without other process the defendant will be ruled to answer within thirty days each petition.”

2. *Morrell v. Irving F. Ins. Co.*, 33 N. Y. 429, where the court said: “The two companies were bound to pay the loss ratably, if so stipulated in the poli-

cies; and if not so stipulated, the whole loss should be paid by one, then the other would be liable for contribution. When one of the companies should elect to rebuild, it would come under obligation to the insured to make full indemnity by rebuilding, and if there were a provision in the policy that it should only be liable to pay a ratable proportion of the loss, such provision would be superseded by the agreement to rebuild. If only one of the insurers should elect to rebuild, and should perform the building contract, it would be entitled to contribution from the other company, not a proportion of the amount expended in building, but a ratable proportion in money of the actual loss. So, also, if the party undertaking to rebuild should fail to perform the contract, and the insured should recover and collect damages for the breach of the agreement, such party could recover of the other insurer a ratable proportion of the loss. Such insurer would, by the payment of the damages recovered by the insured, have satisfied the demand for the loss. The insured would be fully indemnified, and the insurer who paid nothing and did nothing would be liable for contribution. In my opinion the insured, in a case like the present, may have his action against both insurers jointly, or against either separately, and recover his full damages for the breach of the building contract, and leave the two insurers to an adjustment of their rights between themselves, according to well-settled rules of law applicable to different insurers of the same property.”

3. *Newman v. Home Ins. Co.*, 20 Minn. 422.

judgment by default.¹ Under statutes providing for service on foreign insurance companies through the state superintendent of insurance, the writ should be directed to the superintendent and not to the sheriff.²

2. Service — *a. ACTUAL — ON WHOM SERVICE MAY BE MADE* — (1) *In General*. — In *Missouri* it is held that the statute providing for service of summons on foreign insurance companies does not apply to garnishment proceedings.³ But in *Pennsylvania* this is authorized.⁴ Statutes providing for suits against foreign insurance companies, and permitting service upon certain designated public officers in case no agent can be found, apply only to such companies as do business or have been doing business in the state enacting such statutes.⁵

Courts. — In some jurisdictions it is held that the statutory service may be availed of only in courts of record, and may not be employed in suits in justices' courts.⁶

(2) *Statutory Mode Exclusive*. — It is generally held that statutory provisions for service upon foreign insurance companies are not cumulative to the methods prescribed or allowed for service upon foreign corporations generally, but supersede the latter.⁷ Thus, in case a foreign insurance company has appointed

1. *Phoenix F. Ins. Co. v. Cain*, (Tex. Civ. App. 1893) 21 S. W. Rep. 709.

2. *Westchester F. Ins. Co. v. Coverdale*, 48 Kan. 446; *Long Island Ins. Co. v. Great Western Mfg. Co.*, 2 Kan. App. 377; *German Ins. Co. v. Hall*, 1 Kan. App. 43.

Statement of Nature of Action. — Under a statute requiring the summons to state "the cause and general nature" of the action, the following statement in a writ has been held sufficient: "The said action is brought to recover the sum of fifteen hundred dollars due from the defendant to the plaintiff on a certain policy of insurance described in the complaint; also for interest thereon." *Tabor v. Goss, etc., Mfg. Co.*, 11 Colo. 419.

3. *Hansard v. German Ins. Co.*, 62 Mo. App. 146. Compare *Schmidlapp v. La Confiance Ins. Co.*, 71 Ga. 246. But see *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214.

4. *Kennedy v. Agricultural Ins. Co.*, 165 Pa. St. 179.

5. *Hazeltine v. Mississippi Valley F. Ins. Co.*, 55 Fed. Rep. 743; *Romaine v. Union Ins. Co.*, 55 Fed. Rep. 751.

6. *Hartford F. Ins. Co. v. Owen*, 30 Mich. 441; *U. S. Mutual Acc. Ins. Co. v. Reisinger*, 43 Mo. App. 571.

7. *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223;

Union Guaranty, etc., Co. v. Craddock, 59 Ark. 593, where the court said: "The bureau act provided for the protection of policy holders in case of inability or unwillingness of foreign insurance companies to redeem their pledges; and since then, bond and security have been required as part of the conditions imposed (and the sureties on these bonds must be largely citizens of the state), as in the present instance. These bondsmen, as well as the foreign corporations, have a vital interest in the law being confined in its administration to the exact terms and provisions of the bureau act — the law under and in view of which they entered into their obligations. All of them have a right to demand that when they (principals and sureties) are sued on the bonds, no obscure, incompetent, or careless agent shall represent the corporation in this particular matter; but the chosen agent — the confidential representative — shall be notified of the institution of all suits, and they all, by the state's sacred contract and treaty with them, have the right to enjoy the benefit of this agent's promptness and efficiency. We think that the law, when construed in the light of surrounding circumstances, the objects to be attained, and the great interest to be subserved, can mean

an agent to receive service of process as required by law, service can be had only upon such agent, and in the absence of statutory provisions for the same, service upon a local agent of the company, not so appointed, is invalid.¹ But in *New York* the latest statute authorizing service on the insurance commissioner has been held to be permissive only.²

(3) *Agents*. — Special enactments exist in almost every state as to the method of serving process on insurance companies, and these are held to supersede other statutory modes of serving corporations.³ Under the *Texas* statute, which provides for service upon any one who solicits insurance on behalf of the defendant, it is sufficient that the party served had been supplied with blank applications by another party, to whom they had been furnished by the defendant, and with these took the application of the plaintiff.⁴ Service on the local secretary of a foreign mutual insurance company, who is authorized to receive assessments, countersign and deliver receipts, and forward money to the home office, is sufficient under the *Kansas* statute, especially where the company has no other officer in the county where the service is made.⁵ It has been held proper to serve a writ upon the

nothing else than that the service upon the agreed and designated agent is the only service that can authorize a judgment in such cases." Compare *Lafflin v. Travelers' Ins. Co.*, 121 N. Y. 713, 31 N. Y. St. Rep. 900.

1. *Philp v. Covenant Mut. Ben. Assoc.*, 62 Iowa 633; *Oland v. Agricultural Ins. Co.*, 69 Md. 248; *Gates v. Tusten*, 89 Mo. 13; *Baile v. Equitable F. Ins. Co.*, 68 Mo. 617; *Eberman v. American F. Ins. Co.*, 164 Pa. St. 515; *Conners v. Prudential Ins. Co.*, 11 Pa. Co. Ct. Rep. 50, 6 Kulp (Pa.) 400. Compare *Rehm v. German Ins., etc., Inst.*, 125 Ind. 135.

2. *Silver v. Western Assur. Co.*, 3 N. Y. App. Div. 572.

3. *Rehm v. German Ins., etc., Inst.*, 125 Ind. 135.

4. *Southern Ins. Co. v. Wolverton Hardware Co.*, (Tex. 1892) 19 S. W. Rep. 616.

In *Wisconsin* the statutes provide that a person who solicits insurance and receives compensation therefor shall be deemed the agent of the company, and that service of process may be made upon him. Service upon such person was held good where the defendant was a foreign company that had not complied with the requirements of the statutes so as to be entitled to do business in the state, although the policy provided that such person should

be the agent of the insured only. *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 95 Iowa 31. See also *Farmers' Ins. Co. v. Highsmith*, 44 Iowa 330, where service on the agent who made the contract of insurance upon which suit was brought was upheld.

5. *Southwestern Mut. Ben. Assoc. v. Swenson*, 49 Kan. 455, the court saying: "The plaintiff in error claims that the court erred in overruling its motion to set aside the service of summons. We think, however, that the service of summons upon V. Brown can be sustained under paragraph 4152, General Statutes of 1889. Brown was at least the agent of the company at El Dorado for the purpose of representing it in making collections of dues and assessments from members of the company holding certificates therein, and receipting for the same. He signed receipts as local secretary; that is, he designated himself as local secretary of the plaintiff company. In his testimony he said he was collection agent for the company at El Dorado. In the notices of assessments sent out from the home office he is referred to both as local secretary and as branch secretary of the company. He also signed one of the papers in evidence as secretary of the local board. Mr. Halbert, secretary of the company, in his testimony on the trial, referred to Brown both as

general manager of agencies for the defendant.¹ Nevertheless, a service upon one who is interested in the recovery of the loss will not support a judgment by default upon the company, especially if it was without knowledge of the action.² So it has been held improper to make the service upon the "recording agent" of an insurance company,³ the attorney,⁴ a traveling agent authorized only to effect insurance,⁵ and even upon the superintendent of soliciting agents.⁶ In *Pennsylvania* it is held that service upon the agent in an action before a justice of the peace against a foreign insurance company is insufficient unless the record shows that the insured resides in the county where the suit is brought.⁷ Generally, service on the local agent of an insurance

local collector and as local secretary of the company. Blank receipts were sent from the home office of the company to Brown, to be countersigned by him, as local or branch secretary, and delivered to members on payment of their assessments. And Brown was the only person in Butler county, where the case was tried, in any way authorized to represent the company. The company says it was not taking, at the date of service, and had not been for a long time, any new memberships in Kansas, and that it had no agent for that purpose in the state. However, it was still assessing members in the state, and collecting the assessments here, and to that extent doing business here. We do not think it could do any business here through an agency for that purpose, even the settlement of their old business, without at the same time being here for the purpose of service. If the company thought it proper and to its interest to have a local secretary or secretary of a local branch of said company here to do business for it, even to the extent of collecting and receipting assessments and forwarding them to the home office, we think, in the absence of any other officer or agent of the company upon whom service could be had in the county, that service upon him is good under our statute."

1. Centennial Mut. L. Assoc. v. Walker, 50 Iowa 75.

2. North British, etc., Ins. Co. v. Storms, 6 Tex. Civ. App. 659.

3. State Ins. Co. v. Waterhouse, 78 Iowa 674.

4. Philp v. Covenant Mut. Ben. Assoc., 62 Iowa 633. Compare Taylor v. Granite State Provident Assoc., 136 N. Y. 343.

In the case first cited the showing

was thus referred to: "The further evidence submitted upon the motion showed that at the time service was made upon Hambleton he was in Keokuk, acting as attorney for the defendant in an action before a justice of the peace; that his home was in Galesburg, Illinois, and he had no headquarters in Iowa; that he was assistant manager of agencies, and acted for the company whenever sent out by them to investigate losses, to look up testimony in lawsuits in which the company was engaged, and at times to look after local agents, investigating the facts, and report to the general manager; but that he did not take risks or issue policies, and that the person performing such duties as Hambleton performed did not act in states where there were agents, and that Funk, of Des Moines, was the agent for defendant in Iowa. Some evidence was introduced of declarations made by Hambleton, but this evidence we regard as incompetent. Hambleton's agency cannot be proved by his own declarations. So far as is shown by competent evidence, Hambleton was not authorized to do any act for the defendant in Iowa except to appear as attorney in behalf of the defendant in the justice's suit before referred to."

5. Parke v. Commonwealth Ins. Co., 44 Pa. St. 422. This decision was rendered under a statute since abrogated. For a discussion of the *Pennsylvania* statute now in force, with reference to service of process on foreign insurance companies, see Kennedy v. Agricultural Ins. Co., 165 Pa. St. 179.

6. Schryver v. Metropolitan L. Ins. Co., (Ulster County Ct.) 29 N. Y. Supp. 1092.

7. Dillon v. Metropolitan L. Ins. Co., 4 Pa. Dist. Rep. 262, 7 Kulp (Pa.) 507.

company is sufficient.¹ And the fact that such agent has not given bond or been formally commissioned will not invalidate the service.²

(4) *Statutory Appointees.* — In many jurisdictions there are statutes which require a foreign insurance company to designate some party upon whom process may be served. Such enactments are constitutional,³ and when complied with by the company render other modes of service inoperative.⁴ Service upon the designated party confers jurisdiction over the company,⁵ and the method is applicable to suits in admiralty.⁶ Where the superintendent of insurance has been appointed attorney to receive service of process, his written admission of service effected by mail was held sufficient in *New York*,⁷ but denied validity in the federal court.⁸ Where the superintendent had been specially designated, service on his clerk was held sufficient.⁹

Where a foreign insurance company does business in a state without procuring a license or without appointing an agent to receive service of process as required by the statutes of such state, under such statutes process may be served on the agent through whom the business is transacted or any agent doing business in the company's behalf.¹⁰ The conditions imposed on foreign insurance companies by state statutes as a prerequisite to doing business are binding.¹¹ And by doing business in a state a foreign corporation submits to them.¹² Therefore, although a foreign insurance company may not have taken a license or appointed a public officer, or designated an agent to receive service of process, as required, yet where it has done business in the state some courts hold that service may be made as if it had complied with

1. *Sadler v. Mobile L. Ins. Co.*, 60 Miss. 391; *Walker v. Continental Ins. Co.*, 2 Utah 331; *State v. U. S. Mutual Acc. Assoc.*, 67 Wis. 624; *State v. Northwestern Endowment, etc., Assoc.*, 62 Wis. 174.

The rule was formerly different in *Louisiana*, but has since been changed by statute. *Weight v. Liverpool, etc., Ins. Co.*, 30 La. Ann. 1186.

2. *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 633.

3. *Kennedy v. Agricultural Ins. Co.*, 165 Pa. St. 179, 183, holding that the act was not open to the objection that it was special legislation.

4. *Connors v. Prudential Ins. Co.*, 1 Pa. Dist. Rep. 115, 6 Kulp (Pa.) 400; *Liblong v. Kansas F. Ins. Co.*, 82 Pa. St. 413; *Thayer v. Tyler*, 10 Gray (Mass.) 164.

5. *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114.

6. *In re Louisville Underwriters*, 134 U. S. 488.

7. *Farmer v. National L. Assoc.*, 67 Hun (N. Y.) 119.

8. *Farmer v. National L. Assoc.*, 50 Fed. Rep. 829.

9. *South Pub. Co. v. Fire Assoc.*, 67 Hun (N. Y.) 41.

10. *Sadler v. Mobile L. Ins. Co.*, 60 Miss. 391; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; *Osborne v. Shawmut Ins. Co.*, 51 Vt. 278; *State v. U. S. Mutual Acc. Assoc.*, 67 Wis. 624; *Moch v. Virginia F. & M. Ins. Co.*, 4 Hughes (U. S.) 61; *Dixon v. Order of Railway Conductors, etc.*, 49 Fed. Rep. 910; *Funk v. Anglo-American Ins. Co.*, 27 Fed. Rep. 336.

11. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404.

12. *Reyer v. Odd Fellows' Fraternal Acc. Assoc.*, 157 Mass. 367; *Rothrock v. Dwelling-House Ins. Co.*, 161 Mass. 423.

the statute,¹ though there is opposing authority.² Such statutes do not apply, unless it is so provided, to domestic insurance companies, which are governed by the statutory provisions for service on domestic corporations.³

(5) *Public Officers.*—In many jurisdictions statutes provide for the service of summons on some public officer, such as the auditor or superintendent of insurance, or the insurance commissioner, in actions against foreign companies.⁴ In such cases it is held that a foreign corporation doing business in the state asserts thereby that it has complied with such statutes and assents to service on that officer; and such service is upheld though the company has not filed a written stipulation or written appointment of the designated officer as its agent, as required in the statute,⁵ or although the stipulation or appointment filed is irregular or informal.⁶ But such enactments usually govern only actions involving the class of business which the defendant is specially authorized to transact, and in *Indiana* a suit for an alleged breach of contract of employment is not within the terms of such a statute so as to authorize service upon the state auditor.⁷ The

1. Sparks *v.* National Masonic Acc. Assoc., 73 Fed. Rep. 277; Moch *v.* Virginia F. & M. Ins. Co., 10 Fed. Rep. 696; Funk *v.* Anglo-American Ins. Co., 27 Fed. Rep. 336; Ehrman *v.* Teutonia Ins. Co., 1 McCrary (U. S.) 123, 1 Fed. Rep. 471; Masons' Fraternal Acc. Assoc. *v.* Riley, 60 Ark. 578.

In the case first cited it is said: "The next contention of the defendant is that, although it was doing business in the state at the time the policy was issued, it had not then done those things which, by the laws of the state, were conditions precedent to its right to do business in the state, and that therefore, in the language of its counsel, 'the defendant did not in any way submit to the jurisdiction of the state,' and is in no manner bound by its laws. The state laws referred to were enacted for the benefit of the state and the protection of the policy holders. By failing to comply with them the defendant and its agents incurred the prescribed penalties; but such failure does not affect the validity of its policies, or in any manner operate to the prejudice of its policy holders. By the fact of doing business in the state, it asserted a compliance with the laws of the state, and after enjoying all the benefits of that business and receiving the money of the assured, it will not be heard to say that it never submitted 'to the jurisdiction of the state.' It can reap no advantage from its own wrong. To sus-

tain this defense would be giving judicial sanction to business methods much below the standard of common honesty."

2. Rothrock *v.* Dwelling-House Ins. Co., 161 Mass. 423.

3. Eberman *v.* American F. Ins. Co., 164 Pa. St. 515; Hamburg-Bremen F. Ins. Co. *v.* Moses, 13 Ins. L. J. 793.

4. See, for example, statutes construed in Fink *v.* Lancashire Ins. Co., 60 Mo. App. 673; Rehm *v.* German Ins., etc., Inst., 125 Ind. 135.

5. Sparks *v.* National Masonic Acc. Assoc., 73 Fed. Rep. 277; Diamond Plate Glass Co. *v.* Minneapolis Mut. F. Ins. Co., 55 Fed. Rep. 27; Berry *v.* Knights Templar, etc., L. Indemnity Co., 46 Fed. Rep. 439; Knapp *v.* National Mut. F. Ins. Co., 30 Fed. Rep. 607; Ehrman *v.* Teutonia Ins. Co., 1 McCrary (U. S.) 123, 1 Fed. Rep. 471. *Contra*, Rothrock *v.* Dwelling-House Ins. Co., 161 Mass. 423.

6. Lafflin *v.* Travelers' Ins. Co., 121 N. Y. 713, 31 N. Y. St. Rep. 900.

7. Rehm *v.* German Ins., etc., Inst., 125 Ind. 138, the court saying: "The proposition that under any circumstances the defendant to an action may be compelled to appear and answer, or be subjected to a judgment upon a default upon service of process upon his adversary, is so out of line with all of our ideas of right, and the mode of procedure in courts of justice, that we cannot for a moment suppose that the

superintendent of insurance may be served at his office in the state capital, though the action is pending in another county,¹ and the refusal of an officer to receive process when he has the power to do so will not invalidate the service.²

(6) *Withdrawal from the State; Revocation or Cessation of Agency.*—The appointment of an agent to receive service of process, under the statutes referred to, is irrevocable, at least as to controversies arising out of transactions while doing business under such appointment, unless by the appointment of a new agent duly notified upon the public record; so that service on the agent appointed will bind the company as to such transactions after it has left the state.³ An appointment of the superintendent of

legislature ever intended to authorize such a proceeding. It is our opinion, therefore, that the appellants were not deprived of the benefit of the provision in the Act of 1883 authorizing service of process upon the auditor of state, because they happened to be the agents of the appellee when they instituted their action. But their cause of action did not arise out of any business transaction within the purview of the statute. The business contemplated is such as an insurance company is authorized to transact after it has complied with the conditions imposed by the statute, and which is forbidden until such compliance. The business contemplated is that of insurance; that is the subject to which the statute relates. The statute contemplates a company having agents in the state, and relates to such business as they may do after the company has complied with its conditions. A compliance with the requirements of the statute, and the appointment of agents, are preliminary conditions to the business contemplated. The contract sued upon is not a contract such as will ordinarily be intrusted to a mere agent of the company, but one ordinarily executed by the company itself through its general officers. It has no connection with the ordinary business of insurance, but is preparatory to such business. This contract might have been entered into in the state of Illinois or elsewhere, and if executed in Indiana it is none the less a valid contract because of the Act of 1883. The contract is an ordinary common-law contract, whereby the appellants agree to serve the appellee in a particular manner for a certain compensation. We think the action is controlled by the rules of the common law, and could only be maintained in a

forum within the place of the appellee's domicile."

1. *People v. City Ct.*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 418.

2. *Knapp v. National Mut. F. Ins. Co.*, 30 Fed. Rep. 607.

3. *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Gillespie v. Commercial Mut. Marine Ins. Co.*, 12 Gray (Mass.) 201; *Moulin v. Trenton Mut. L.*, etc., Ins. Co., 25 N. J. L. 57; *Gibson v. Manufacturers' F. & M. Ins. Co.*, 144 Mass. 81. But see *People v. Commercial Alliance L. Ins. Co.*, 7 N. Y. App. Div. 297; *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737.

Re-entry and New Appointment.—A foreign insurance company withdrew from a state and revoked its appointment of an agent, but afterwards reentered the state and appointed an agent under a new law. It was held that the new law referred to past as well as to future contracts, and service on the new agent in an action on a contract made when the company was previously doing business in the state was sustained. *Connecticut Mut. L. Ins. Co. v. Duerson*, 28 Gratt. (Va.) 630. But see *Ellis v. Connecticut Mut. L. Ins. Co.*, 8 Fed. Rep. 81.

Construction of Statute.—Under a statute authorizing service upon an agent in actions growing out of or connected with the business of an office or agency maintained by a foreign insurance company, service on one agent in an action growing out of business done by a former agent, who conducted a different office in the same town, was held insufficient. *State Ins. Co. v. Granger*, 62 Iowa 272.

No Notice of Revocation.—Where an agent whose authority to receive service of process had been revoked continued to collect premiums and to adjust

insurance to receive service does not become operative where such superintendent refuses to admit the company to transact business within the state, and hence a service upon him is insufficient as against such a defendant.¹ The provision authorizing service upon the last designated agent of a foreign insurance company which has ceased to do business in the state refers to the agent last acting in the state, and not in the county where the suit is brought.² But a suit which authorizes service upon the personal representative of the deceased agent does not apply to an insurance company which had ceased doing business in the state and whose agent died before the enactment of the statute.³

b. CONSTRUCTIVE. (See *supra*, IV. 2. *a.* (5) *Public Officers.*) — Statutes in several states provide for the issuance of summons to a public officer, to be mailed by him to the home office of the company. Other statutes provide for publication in certain cases. Decisions on these and similar statutes are collected in the notes.⁴

3. Return. — A return of service on the "state agent" sufficiently designates the person appointed as agent for the purpose of receiving service of process under a statute.⁵

losses for the company, and it was not shown that the plaintiff knew of the revocation, the power of attorney appointing him being on file in the proper public office, service upon such agent was upheld. *Ætna L. Ins. Co. v. Hanna*, 81 Tex. 487.

1. *Richardson v. Western Home Ins. Co.*, (Supreme Ct.) 8 N. Y. Supp. 873, 29 N. Y. St. Rep. 820.

2. *Michigan State Ins. Co. v. Abens*, 3 Ill. App. 488.

3. *Ellis v. Connecticut Mut. L. Ins. Co.*, 19 Blatchf. (U. S.) 383.

4. The statute provided that where a foreign corporation ceased to do business in, and had no agent in, the county where the action was brought, service might be had by the sheriff mailing a copy of the summons, postage prepaid, to the home office of the corporation. In an action on a policy where the corporation continued to do business in the state after the statute was enacted, such service, though prior to the enactment, was held good on the ground that the insurer had by continuing business assented to and become bound by the law. *Thayer v. Life Ins. Co.*, (Ohio Dist. Ct.) 10 Ins. L. J. 719.

As to mailing of summons by superintendent of insurance, see *supra*, IV. 1. *Form and Contents*; *Westchester F. Ins. Co. v. Coverdale*, 48 Kan. 446;

Long Island Ins. Co. v. Great Western Mfg. Co., 2 Kan. App. 377; *Farmer v. National L. Assoc.*, 67 Hun (N. Y.) 119.

In *Virginia*, where there is no agent of a corporation in the county in which the action is brought, service by publication is permitted. Such service was upheld in an action against an insurance company which also did a banking business, though another kind of service is provided for in an action against banks. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629.

A statute of *Virginia* provided that where the agent appointed by a foreign insurance company was dead, his personal representative was authorized to accept service of process. This was held to be prospective, not retrospective, and service on such representative in a suit on a contract made prior to the statute, the company having withdrawn from the state, was held invalid. *Ellis v. Connecticut Mut. L. Ins. Co.*, 8 Fed. Rep. 81.

In *Michigan* notice of proceedings by the insurance commissioner to wind up mutual insurance companies and appoint a receiver is had by publication, and the statute providing for such service is held valid. *Wardle v. Cummings*, 86 Mich. 395.

5. *Stone v. Travelers' Ins. Co.*, 78 Mo. 655.

Where the statute provides that

V. DECLARATION, PETITION, OR COMPLAINT — 1. Statutory Forms. — In some jurisdictions there are statutes permitting a special and abbreviated form of declaration in actions on policies of insurance.¹ Under such a statute a declaration from which it is evident that the pleader intended to proceed under the statute is good, although it largely follows the form of an ordinary declaration in debt.² Where the declaration is drawn under such a statute, and additional statements are ordered by the court, the statements are to be regarded as informal pleadings.³

In *Assumpsit* the common counts, or other counts proper in that action, may be joined with a count in the statutory form.⁴

Under the *Virginia Statute* the performance of conditions precedent may be alleged in general terms, and it is not necessary to aver an award, though the policy provides that no suit shall be brought until after an award.⁵

2. Specific Allegations — a. NECESSARY ALLEGATIONS ENUMERATED. — The allegations required in a declaration, petition, or complaint on a policy of insurance are: an insurable interest in the plaintiff or insured; consideration (unless the policy is under seal) and issuance of the policy; the terms of the policy; a loss within the purview of the contract, and in certain cases the

actions against insurance companies may be brought in the county where the insured resides, and summons may be directed to any county in the state, the return need not set forth that the insured was a resident of the county where the action is brought. *Coyle v. Metropolitan L. Ins. Co.*, 8 Kulp (Pa.) 169.

Under the *Kansas* statute it is proper for the superintendent of insurance to make return of summons sent directly to him by the clerk of the court. *Long Island Ins. Co. v. Great Western Mfg. Co.*, 2 Kan. App. 377.

1. *Alabama*. — *Commercial F. Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320.

Virginia. — *Tilley v. Connecticut F. Ins. Co.*, 86 Va. 811; *Virginia F. & M. Ins. Co. v. Saunders*, 84 Va. 210.

West Virginia. — *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729; *Rheims v. Standard F. Ins. Co.*, 39 W. Va. 672.

2. *Virginia F. & M. Ins. Co. v. Saunders*, 84 Va. 213, where the court says: "The learned counsel for the plaintiff in error refer to the case of *Moseley v. Moss*, 6 Gratt. (Va.) 534, as deciding a principle analogous to the view for which they contend; namely, that a plaintiff cannot proceed under

the statute and at common law at the same time. But we do not perceive any analogy between that case and the present. In that case it was decided that in an action for insulting words the plaintiff must declare under the statute, and that such a cause of action cannot be blended in the same count with one for defamation at common law; for, said the court, there are essential points of difference, affecting both the pleadings and the evidence, between an action for defamation on the one hand and an action for insults on the other, and that to ignore these distinctions would lead to the utmost perplexity and confusion. Clearly this reasoning cannot apply to a case like the present; for here no right of action is given by the statute above quoted which does not exist independently of the statute, and, as we have seen, the right of the defendant to plead, and the rules relating to the maturing of actions and the subsequent proceedings therein, remain substantially the same as before the statute was passed."

3. *Rheims v. Standard F. Ins. Co.*, 39 W. Va. 672.

4. *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729.

5. *Tilley v. Connecticut F. Ins. Co.*, 86 Va. 811.

amount thereof; performance of the conditions of the policy; and a breach of the contract on the part of the insurer.¹

b. INSURABLE INTEREST. — The interest of the plaintiff and of the insured, whether as owner, mortgagee, bailee, or agent, or, in case of life insurance, the proper degree of relationship or dependence, must be alleged,² and interest should be alleged at the date of the insurance and at that of the loss,³ except in marine insurance.⁴ In *Alabama* the code prescribes forms of pleading, and such a form is sufficient in a suit on an insurance policy, though it contain no allegation of insurable interest.⁵

1. *Madigan v. West Coast F. & M. Ins. Co.*, 3 Wash. 454; *Emigh v. State Ins. Co.*, 3 Wash. 122; *Massachusetts Ben. Assoc. v. Richart*, (Ky. 1896) 35 S. W. Rep. 541; *Clark v. Phoenix Ins. Co.*, 36 Cal. 168. The several allegations are taken up *seriatim* in the following sections.

2. *Burton v. Connecticut Mut. L. Ins. Co.*, 119 Ind. 207; *Indiana Live-Stock Ins. Co. v. Bogeman*, 4 Ind. App. 237; *Fowler v. New York Indemnity Ins. Co.*, 26 N. Y. 423; *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. (N. Y.) 340; *Freeman v. Fulton F. Ins. Co.*, 14 Abb. Pr. (N. Y. Supreme Ct.) 398; *Hardwick v. State Ins. Co.*, 20 Oregon 547; *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 478; *Dickerman v. Vermont Mut. F. Ins. Co.*, 67 Vt. 99; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507. But as to life insurance, see *infra*, V. 2. *h.* (2) *Life and Benefit Insurance*.

Contra. — *Tabor v. Goss, etc., Mfg. Co.*, 11 Colo. 419; *Franklin v. National Ins. Co.*, 43 Mo. 491; *Fowler v. New York Indemnity Ins. Co.*, 23 Barb. (N. Y.) 150. But see *Fowler v. New York Indemnity Ins. Co.*, 26 N. Y. 423. See also *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Nichols v. Fayette Mut. F. Ins. Co.*, 1 Allen (Mass.) 63. As is pointed out in *Freeman v. Fulton F. Ins. Co.*, 14 Abb. Pr. (N. Y. Supreme Ct.) 404, most of these cases proceed upon the analogy of marine insurance, in which insurable interest is not necessary.

3. See cases cited in the last note.

But it has been held that an allegation of interest at the time the insurance was effected is enough, as the interest will be presumed to have continued. *Roussel v. St. Nicholas Ins. Co.*, 41 N. Y. Super. Ct. 279.

Sufficiency of Averment. — A general averment that the plaintiff, at the in-

ception of the insurance and at the time of the loss, was the owner of the property is sufficient to admit evidence of any interest he may have had, and in such case a motion to make the allegation more definite and specific is properly overruled, although the policy stipulates that it shall be void if the insured shall not be the sole and unconditional owner in fee. *Phoenix Ins. Co. v. Stark*, 120 Ind. 444; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202; *Rediker v. Queen Ins. Co.*, (Mich. 1895) 65 N. W. Rep. 105.

In an action on a policy of life insurance, an allegation that neither the plaintiff nor the insured "was actuated by any speculative motive" was held sufficient on error after judgment, there having been no demurrer and no motion in arrest of judgment. *Kentucky L., etc., Ins. Co. v. Hamilton*, 22 U. S. App. 548.

Where the petition alleged that the plaintiff was the owner and had an insurable interest in the property insured, it was held that the allegation of interest did not qualify or restrict that of ownership, and might be treated as a surplusage. *St. Paul F. & M. Ins. Co. v. Kelly*, 43 Kan. 741.

Mortgagees. — Where suit is brought by a mortgagee to whom loss is made payable, he must allege his interest in such a way as to bring it within the rule in force in the particular jurisdiction as to suits by mortgagees. *Chrisman v. State Ins. Co.*, 16 Oregon 283; *Donaldson v. Sun Mut. Ins. Co.*, 95 Tenn. 280. See *supra*, III. 1. *h.* *Mortgagees*.

4. See *infra*, V. 2. *h.* (3) *Marine Insurance*.

5. *Commercial F. Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320, where Stone, C. J., for the court, says: "It cannot be questioned that to maintain an action

Generally, too, the want of this allegation may be supplied by amendment.¹

c. CONSIDERATION, TERMS OF POLICY, AND AMOUNT OF LOSS — Consideration. — An allegation that a policy was executed and delivered in consideration of a certain sum as a premium is sufficient, as it is immaterial whether it was paid in cash or credit given.²

Terms of Policy. — The terms of the policy must be alleged.³ But it is enough to set forth the promise of the insurer applicable to the state of facts declared on; and promises applicable to the other facts, upon which no recovery is sought, and conditions not touching the plaintiff's right of recovery, need not be alleged.⁴ Where the policy declared on requires the loss "to be paid sixty days after proof" this is at least an argumentative allegation of a promise to pay.⁵

Amount of Loss. — See *infra*, V. 2. *h.* (1) *Fire Insurance.*

d. PERFORMANCE OF CONDITIONS OF POLICY. — Performance of the conditions of the policy, except those not affecting plaintiff's right of recovery, as in case of conditions relating to fatal accident in a suit on an accident policy for an injury, must be pleaded.⁶

such as the present one there must have been, when the policy was taken out and when the loss occurred, such ownership or right as amounts to an insurable interest, and the plaintiff must show himself entitled to assert that interest. *Lynch v. Dalzel*, 3 Bro. P. C. 497; *Sadlers Co. v. Badcock*, 2 Atk. 554; *Wilson v. Hill*, 3 Met. (Mass.) 66; *Phil. on Ins.* 59; *May on Ins.*, §§ 115, 116. Form 16, Code of 1876, p. 704, is framed for a suit on a policy of insurance. It contains no averment of property or insurable interest in the plaintiff. In section 2979 of the code it is provided that 'any pleading which conforms substantially to the schedule of forms attached to this part is sufficient.' Form 16 is one of said forms. It must be inferred that the legislature treated the averment that the policy was issued by the insurance company as the equivalent, *prima facie*, of an averment that the assured owned an insurable interest in the property. Each count in the complaint is sufficient, and the demurrer to it was rightly overruled. 2 Brick. Dig. 344-345."

1. *Koshland v. Philadelphia F. Assoc.*, (Oregon 1897) 49 Pac. Rep. 865.

2. *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205; *Farrell v. American Employers' Liability Ins. Co.*, 68 Vt. 136; *River Falls Bank v.*

German American Ins. Co., 72 Wis. 535.

3. *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418.

4. *Farrell v. American Employers' Liability Ins. Co.*, 68 Vt. 136; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20; *Manhattan L. Ins. Co. v. Willis*, 23 U. S. App. 103. In the case last cited an averment in the petition of a policy of insurance covenanting and promising to pay to A. P., his executors, administrators, or assigns, ten thousand dollars upon satisfactory proof of the death of the said A. P. during the continuance of the said policy, was held a sufficient description of the policy.

Averments of Loss. — Where suit is brought by a mortgagee to whom the loss is payable, an allegation that he has sustained loss to a certain amount sufficiently alleges loss to the insured owner as against a general demurrer. *Maxcy v. New Hampshire F. Ins. Co.*, 54 Minn. 272.

And alleging that the property insured was damaged by fire sufficiently avers damage sustained by the owner. *Keeler v. Niagara F. Ins. Co.*, 16 Wis. 523.

5. *Powers v. New England F. Ins. Co.*, 69 Vt. 494.

6. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Home Ins. Co. v. Duke*, 43 Ind. 418; *Dolbier v. Agricultural Ins. Co.*, 67 Me. 180; *Johnson v. Phoenix Ins.*

The plaintiff need not negative the performance of conditions subsequent.¹

c. BREACH OF CONTRACT. — If by the terms of the policy the loss is not payable until a specified time after loss occurs, or after notice and proofs of loss, it is necessary to allege that this time has expired before the commencement of the action.² It must also be shown that the loss occurred from one of the perils insured against.³

Co., 112 Mass. 49; *Campbell v. Charter Oak F. & M. Ins. Co.*, 10 Allen (Mass.) 213; *Wellcome v. People's Equitable Mut. F. Ins. Co.*, 2 Gray (Mass.) 480; *Dawes v. North River Ins. Co.*, 7 Cow. (N. Y.) 462. See also *infra*, V. 2. *g. Alleging Notice and Proofs*; and, generally, article CONDITIONS PRECEDENT, vol. 4, p. 626.

1. *Whittle v. United F. Ins. Co.*, (R. I. 1897) 38 Atl. Rep. 498, where the court said: "The defendant criticises the declaration because the plaintiffs have not averred and negatived the several provisions contained in the policy which are in the nature of conditions subsequent, the existence of the facts creating which would avoid the policy. All that is necessary, however, for a plaintiff to do in declaring a contract of insurance is to set forth so much of it as will show a right to recover. 2 May Ins., § 589; 2 Greenl. Ev. (13th ed.), § 376. Hence it follows that the various limitations, conditions, and stipulations of a policy which are in the nature of conditions subsequent and go to defeat the liability of the insurer, are matters of defense and have no place in the declaration. *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459."

2. *Cowan v. Phenix Ins. Co.*, 78 Cal. 181; *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264; *German Ins. Co. v. Hall*, 1 Kan. App. 43; *Taylor v. National Temperance Relief Union*, 94 Mo. 40; *Baton Rouge First Nat. Bank v. Dakota F. & M. Ins. Co.*, 6 S. Dak. 424; *Carberry v. German Ins. Co.*, 51 Wis. 605.

If the Fact Appears from the Date of the Declaration, a distinct allegation that the time specified has elapsed is not essential. *Connecticut Mut. L. Ins. Co. v. McWhirter*, 44 U. S. App. 492, 73 Fed. Rep. 444.

3. *Louisville M. & F. Ins. Co. v. Bland*, 9 Dana (Ky.) 143.

Anticipating Defenses. — The plaintiff is not required to anticipate defenses by alleging that the loss was not pro-

duced by any of the causes for which it is provided that the insured shall not be liable, or, in case of life or accident insurance, that death or injury was not brought about by any of the means specially excepted in the policy. These are matters to be pleaded by the defendant.

Fire. — *Blasingame v. Home Ins. Co.*, 75 Cal. 633; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 466; *Ætna Ins. Co. v. McLead*, 57 Kan. 95; *Hunt v. Hudson River F. Ins. Co.*, 2 Duer (N. Y.) 481; *London, etc., F. Ins. Co. v. Crunk*, 91 Tenn. 376; *Burlington Ins. Co. v. Rivers*, 9 Tex. Civ. App. 177; *River Falls Bank v. German American Ins. Co.*, 72 Wis. 535; *Redman v. Ætna Ins. Co.*, 49 Wis. 431; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20.

Life and Accident. — *Jones v. U. S. Mutual Acc. Assoc.*, 92 Iowa 652; *Employers' Liability Assur. Corp. v. Rochelle*, (Tex. Civ. App. 1896) 35 S. W. Rep. 869; *Standard L., etc., Ins. Co. v. Koen*, 11 Tex. Civ. App. 273; *Coolidge v. Continental Ins. Co.*, 67 Vt. 14.

Other Unnecessary Allegations. — So, also, the plaintiff need not plead compliance with warranties made part of the policy. *Dennis v. Union Mut. L. Ins. Co.*, 84 Cal. 570; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474; *Louisville Underwriters v. Durland*, 123 Ind. 544; *Piedmont, etc., L. Ins. Co. v. Ewing*, 92 U. S. 377. Nor nonpayment of the loss. *Hanover F. Ins. Co. v. Schellak*, 35 Neb. 701. Nor arbitration and award, as required by the policy. *German-American Ins. Co. v. Etherton*, 25 Neb. 505. Nor that the insurer did not elect to rebuild. *Benedix v. German Ins. Co.*, 78 Wis. 77; *Howard F. & M. Ins. Co. v. Cornick*, 24 Ill. 463.

Agreement to Insure. — In an action on a parol contract of insurance there must be an allegation of a present contract to insure. *Farmers', etc., Ins. Co. v. Graham*, (Neb. 1897) 70 N. W. Rep. 386.

f. NECESSITY OF ATTACHING COPY OF POLICY. — It is generally provided by statute that parties may attach copies of written instruments sued on instead of pleading their terms. Commonly it is required that such copies be attached. In *Illinois* the policy, or a sufficient portion of it to show a right of recovery, must be set out either in terms or in substance.¹ Setting out the policy *in hæc verba* in the declaration is equivalent to attaching a copy.² It is generally held that the application on which the policy issued, and the answers therein, even though referred to in the policy and especially made a part thereof, need not be set out, and that no copy of the application or answers need be attached.³ But there are decisions to the contrary.⁴ By-laws of an insurance company annexed to the policy need not be set out.⁵ In *New Jersey* the policy, when attached to the declaration, becomes a part of the record.⁶

g. ALLEGING NOTICE AND PROOFS. (See also article CONDITIONS PRECEDENT, vol. 4, p. 626.) — In the notes will be found a collection of decisions relative to the proper mode of pleading compliance with those provisions of the policy requiring notices and proofs of loss to be furnished.⁷

h. ALLEGATIONS PECULIAR TO SUITS ON PARTICULAR KINDS OF POLICIES — (1) *Fire Insurance* — **Proportion of Loss to Insurance.** — If the policy provides that the insured shall not be liable for a

1. *Richter v. Michigan Mut. L. Ins. Co.*, 66 Ill. App. 606; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

2. *Phenix Ins. Co. v. Stocks*, 149 Ill. 319.

But in a suit on a note given for a policy of insurance, it is not necessary to file a copy of the complaint as an exhibit. *Mitchell v. American Ins. Co.*, 51 Ind. 396.

3. *Himmellin v. Supreme Council, etc.*, (Cal. 1893) 33 Pac. Rep. 1130; *Cowan v. Phenix Ins. Co.*, 78 Cal. 181; *Supreme Lodge, etc., v. Wollschlager*, 22 Colo. 213; *Jacobs v. National L. Ins. Co.*, 1 MacArthur (D. C.) 632; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 40 Ill. App. 64; *Herron v. Peoria M. & F. Ins. Co.*, 28 Ill. 235; *Indiana Farmers' Live Stock Ins. Co. v. Byrnett*, 9 Ind. App. 443; *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266; *Phoenix Ins. Co. v. Stark*, 120 Ind. 444; *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92; *Continental L. Ins. Co. v. Kessler*, 84 Ind. 310; *Britt v. Mutual Ben. L. Ins. Co.*, 105 N. Car. 175; *Connecticut Mut. L. Ins. Co. v. McWhirter*, 44 U. S. App. 492, 73 Fed. Rep. 444.

4. *Gilmore v. Lycoming F. Ins. Co.*, 55 Cal. 123; *Tischler v. California*

Farmers' Mut. F. Ins. Co., 66 Cal. 178; *Bidwell v. Connecticut Mut. L. Ins. Co.*, 3 Sawy. (U. S.) 261.

5. *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20.

6. *Seebass v. Mutual Reserve Fund L. Assoc.*, 82 Fed. Rep. 792.

7. **Alleging Notice and Proofs.** — An allegation that "more than ninety days had elapsed prior to the commencement of this suit, after sufficient proof," and that the plaintiff and the deceased "have duly complied with all the terms and conditions of said policy to be kept or performed," sufficiently alleges notice and proofs. *Richards v. Travelers' Ins. Co.*, 89 Cal. 170; *Emery v. Svea F. Ins. Co.*, 88 Cal. 300; *Benedix v. German Ins. Co.*, 78 Wis. 77; *Butternut Mfg. Co. v. Manufacturers' Mut. F. Ins. Co.*, 78 Wis. 202.

But there must be an allegation that notice and proofs were furnished within the time required, or, if the loss is payable a fixed time after proof, that proof was made for that space of time before suit. *Doyle v. Phoenix Ins. Co.*, 44 Cal. 265; *Pierson v. Springfield F. & M. Ins. Co.*, 7 Houst. (Del.) 307; *Carberry v. German Ins. Co.*, 51 Wis. 605. *Contra.* — *Pennsylvania F. Ins. Co.*

greater proportion of the loss than the amount of the policy bears to the whole insurance on the property, the amount of other insurance or the fact that there is none must be alleged.¹

Amount of Loss. — The amount of loss sustained on each subject of insurance must be alleged where there are two or more included in the policy;² but where the liability of the insurer is limited by the policy to the actual cash value of the property at the time of the loss, the value at such time need not be alleged.³

(2) *Life and Benefit Insurance* — **Life** — **Insurable Interest.** — Where one person has procured insurance on the life of another, in an

v. Faires, (Tex. Civ. App. 1896) 35 S. W. Rep. 55.

An allegation that the plaintiff rendered to the insurer a particular account and proof of the loss, and fully complied with all of the conditions of the contract, sufficiently shows receipt of the proofs by the insurer, where the policy provides that the loss shall be payable sixty days after proofs are made and received by the company. *River Falls Bank v. German American Ins. Co.*, 72 Wis. 535.

Waiver of Notice and Proofs. — Allegations of waiver of notice or proofs should show that waiver was made within the time stipulated for furnishing the notice and proofs; but it is enough if this is shown by necessary implication, as where it was alleged that the plaintiff did not give notice or furnish proof within the time required because the "said defendant had actual knowledge thereof, and notified the plaintiff that it would not pay said loss." *Phenix Ins. Co. v. Pickel*, 3 Ind. App. 332; *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 72; *Butternut Mfg. Co. v. Manufacturers' Mut. F. Ins. Co.*, 78 Wis. 202.

In jurisdictions where it is held that a general allegation that all terms and conditions of a contract have been performed sufficiently alleges performance of conditions precedent, no allegation of proof of loss need be made in addition to the general allegation. *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; *Commercial Union Assur. Co. v. State*, 113 Ind. 331; *Indiana Ins. Co. v. Campehart*, 108 Ind. 270. And in such jurisdictions, if in addition to allegations of waiver of proofs of loss there is a general allegation of performance of conditions, or an allegation that proofs were furnished, the latter may be treated as a surplusage, and a motion to require the complaint to be made

more definite and certain is properly overruled. *American F. Ins. Co. v. Sisk*, 9 Ind. App. 305.

But it is held that waiver of proofs of loss may be shown under a general allegation of performance of conditions. *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. St. 259.

Where a policy provided that an award should be a condition precedent to suit, and the plaintiffs alleged an award and also proofs of loss without arbitration, it was held that these allegations were not inconsistent. *Randall v. Phoenix Ins. Co.*, 10 Mont. 362. But in such case, in jurisdictions where provisions of that character are held valid, either award or waiver thereof must be pleaded. *Carroll v. Girard F. Ins. Co.*, 72 Cal. 297.

Parol Agreement to Insure. — In declaring on a parol agreement to insure or to renew an existing policy, or in a suit in equity on such an agreement, it is not necessary to allege performance of conditions usually limited by the insurer in its policies, or of conditions of the policy agreed to be renewed. *Gold v. Sun Ins. Co.*, 73 Cal. 216; *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371; *Schwahn v. Michigan F. & M. Ins. Co.*, 89 Wis. 84; *Nebraska, etc., Ins. Co. v. Seivers*, 27 Neb. 541, *distinguishing* *McCann v. Aetna Ins. Co.*, 3 Neb. 198.

1. *Coats v. West Coast F. & M. Ins. Co.*, 4 Wash. 375.

In an action by a carrier on a policy insuring, to the extent of its liability, against loss by fire in transporting grain, it is not necessary for the plaintiff to allege that the loss was occasioned by reason of its negligence. *Minneapolis, etc., R. Co. v. Home Ins. Co.*, 64 Minn. 61.

2. *Hegard v. California Ins. Co.*, 72 Cal. 535.

3. *Hegard v. California Ins. Co.*, 72 Cal. 535.

action on the policy he must allege an insurable interest,¹ but a beneficiary for whose benefit the deceased took out the insurance need not allege interest.²

Benefit Insurance. — The allegations necessary in an action upon a certificate of mutual benefit depend somewhat upon the view taken in the particular jurisdiction as to the appropriate remedy in such cases.³ Where the promise is to pay a definite amount in no way dependent upon or limited by an assessment, although an assessment is provided for as the method of securing the fund; or where statutes require the policy or certificate to state the exact amount which is to be paid, or require that the company pay the maximum amount named in the policy; or where statutes require the company to make its ordinary assessments sufficient to pay its certificates in full; or where the certificates provide for the payment of a certain per cent. of the assessment, not to exceed a specified sum, and there is no restriction upon the amount which may be levied upon each member in the assessment, it is not necessary to allege the amount that would be realized by an assessment, a demand for an assessment and refusal, the number of members subject to assessment, that an assessment has been made and collected, or that the company has bonds on hand to pay the certificate.⁴ In the absence of such statutes or of such provisions in the certificate or policy, in some jurisdictions it is held that such certificate is *prima facie* evidence of the maximum amount which may be realized by assessment, and that it is for the company to plead and prove that the sum named in the certificate cannot be realized.⁵ But elsewhere it is generally held in such cases that the plaintiff must

1. *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Burton v. Connecticut Mut. L. Ins. Co.*, 119 Ind. 207. See also *supra*, V. 2. *b. Insurable Interest*.

2. *Massachusetts Mut. L. Ins. Co. v. Kellogg*, 82 Ill. 614.

For a precedent showing the general allegations required in a suit on a policy of life insurance, see *Hall v. Scottish Rite, etc.*, *Aid Assoc.*, 6 Ohio Cir. Ct. Rep. 137.

If a statute of the state wherein the insurance company was incorporated is relied on to prevent a forfeiture for nonpayment of premiums, the facts bringing the case within such statute must be set forth particularly. *Scheifers v. Massachusetts Mut. L. Ins. Co.*, 46 Ohio St. 418.

If a life insurance policy contains a provision that the insurer shall not be liable for a loss while a premium note is due and unpaid, an allegation that the note was extended before maturity and that death occurred during the extension sufficiently alleges a waiver of

the condition. *Michigan Mut. L. Ins. Co. v. Custer*, 128 Ind. 25.

A complaint on a policy payable to the wife of the insured, or, if she does not survive him, to his representatives, must allege that the insured survived his wife. *Knorr v. State Mut. Ben. Assoc.*, 79 Hun (N. Y.) 83. But it would doubtless be otherwise in those jurisdictions where suit may only be brought by the insured or his representatives.

3. See *supra*, I. 3. *Mutual Benefit Insurance*.

4. *Great Western Mut. Aid. Assoc. v. Colmar*, 7 Colo. App. 275; *National Acc. Soc. v. Taylor*, 42 Ill. App. 97; *Follis v. U. S. Mutual Acc. Assoc.*, 94 Iowa 435; *Warner v. National L. Assoc.*, 100 Mich. 157; *McFarland v. U. S. Mutual Acc. Assoc.*, 124 Mo. 204.

5. *Elkhart Mut. Aid. etc., Assoc. v. Houghton*, 103 Ind. 289; *Kansas Protective Union v. Whitt*, 36 Kan. 760; *Lueders v. Hartford L., etc., Ins. Co.*, 4 McCrary (U. S.) 149, 12 Fed. Rep. 465.

allege the amount payable upon a proper assessment of the members of the company,¹ or the amount of the share of the plaintiff in the fund to be raised,² or the number of members liable to assessment,³ and a refusal to levy an assessment.⁴ But any allegations which sufficiently show the amount to which the plaintiff is entitled, as that an assessment would produce more than the maximum amount, or that the membership is large enough to assure the stated amount by assessment, are enough.⁵

(3) *Marine Insurance*. — In an action on a policy of marine insurance an allegation of interest in the insured at the time of insurance is unnecessary.⁶ Nor is it necessary to allege abandonment or other facts necessary to constitute total loss, as an allegation of a total loss covers actual as well as constructive total loss.⁷

(4) *Accident, Casualty, and Fidelity Insurance*. — In an action on a Policy of Accident Insurance the particular circumstances of the injury need not be alleged.⁸ But it must be alleged that the injury was received or inflicted accidentally.⁹ Only such of the terms and conditions of the policy need be set forth as are applicable to the kind of injury or to the state of facts complained of.¹⁰

1. Deardorff v. Guaranty Mut. Acc. Assoc., 89 Cal. 599; Abe Lincoln Mut. L., etc., Soc. v. Miller, 23 Ill. App. 341; Newman v. Covenant Mut. Ben. Assoc., 72 Iowa 242; Silvers v. Michigan Mut. Ben. Assoc., 94 Mich. 39; O'Brien v. Home Ben. Co., 117 N. Y. 310; Darrow v. Family Fund Soc., 116 N. Y. 537; Martin v. Equitable Acc. Assoc., 55 Hun (N. Y.) 574; Meyers v. United L. Ins. Assoc., (City Ct.) 17 N. Y. Supp. 727.

2. Congower v. Equitable Mut. L., etc., Assoc., 94 Iowa 499.

3. Mutual Acc. Assoc. v. Tuggle, 138 Ill. 428.

4. Taylor v. National Temperance Relief Union, 94 Mo. 40.

5. Gossett v. Union Mut. Acc. Assoc., 27 Ill. App. 266; Herndon v. Triple Alliance, 45 Mo. App. 426; Martin v. Equitable Acc. Assoc., 61 Hun (N. Y.) 467.

Negating Designation of Other Beneficiary. — If a certificate is payable to a designated beneficiary or to such person or persons as the insured may subsequently direct, in a suit by the beneficiary named it is not necessary to allege that no other person was afterwards designated. Laudenschlager v. Northwestern Endowment, etc., Assoc., 36 Minn. 131.

6. Fowler v. New York Indemnity Ins. Co., 26 N. Y. 425; Freeman v. Fulton F. Ins. Co., 38 Barb. (N. Y.) 247,

14 Abb. Rr. (N. Y.) 398; Buchanan v. Ocean Ins. Co., 6 Cow. (N. Y.) 332; Henshaw v. Mutual Safety Ins. Co., 2 Blatchf. (U. S.) 99.

7. Snow v. Union Mut. Marine Ins. Co., 119 Mass. 592; Heebner v. Eagle Ins. Co., 10 Gray (Mass.) 131; Hodgson v. Marine Ins. Co., 5 Cranch (U. S.) 100.

If the policy is an open one for such insurance as shall be agreed upon and indorsed upon the policy, the plaintiff must allege that an amount was agreed on and indorsed on the policy. Crane v. Evansville Ins. Co., 13 Ind. 446.

8. Richards v. Travelers' Ins. Co., 89 Cal. 170.

9. Newman v. Railway Officials', etc., Acc. Assoc., 15 Ind. App. 29.

10. Farrell v. American Employers' Liability Ins. Co., 68 Vt. 136.

Occupation of Insured. — Where a petition showed that the occupation of the insured at the time the policy issued was stated in the application, and that the latter was in the sole possession of the insurer, it was held unnecessary to allege the occupation of the insured at that time. In the same petition it was alleged that the insured, while at supper at a restaurant, was injured by flying timber from a cyclone. It was held unnecessary to allege his occupation at the time of the injury. Standard L., etc., Ins. Co. v. Koen, 11 Tex. Civ. App. 273.

A Declaration on a Policy of Casualty Insurance covering all loss or damage except losses caused directly or indirectly by fire or lightning must aver that the loss was not due directly or indirectly to the causes excepted.¹

Fidelity Insurance. — Where the obligation of a fidelity insurance company covers acts of fraud and dishonesty only, but it is provided that a shortage shall be *prima facie* evidence of dishonesty, a complaint setting forth a shortage, but not alleging that it was caused by fraud and dishonesty, states a cause of action.²

1. *Western Refrigerator Co. v. American Casualty Ins., etc., Co.*, 51 Fed. Rep. 155, where, in ruling on a general demurrer, Blodgett, J., said: "In construing this policy it must be borne in mind that it is a policy strictly against accidents, and not a fire policy. The whole tenor of the instrument shows clearly that it was intended only as an accident policy, and not as an insurance against fire. The true meaning of the fifth item of the policy would, I think, be more clearly expressed if the clause in brackets excepting loss by fire had been omitted, and there had been written at the end of the paragraph a proviso saying that this policy is not to cover any losses caused directly or indirectly by fire or lightning. In other words, it is not a policy against fire, even if fire is the result or immediate consequence of the accident. With this view of the true construction of the policy I think the demurrer is well taken to these counts, because the pleader has not stated that the loss was not caused directly or indirectly by fire."

2. *Fidelity, etc., Co. v. Eickhoff*, 63 Minn. 170, where the point is thus discussed in the opinion: "The fourth objection urged against the complaint is that while the bond only covers acts of fraud and dishonesty, it contains no allegation that this shortage was caused by the fraud or dishonesty of the defendant. Whoever drafted this bond used language very loosely, and employed a great many words to express, or else conceal, very few ideas. But after taking it by the four corners and considering all its provisions, our construction is that the plaintiff was only bound to make good, and reimburse the elevator company for, loss sustained by reason of a shortage of grain caused by the actual fraud or dishonesty of the defendant. But the bond also provides how the existence and amount of a shortage shall be ascer-

tained, and that when thus ascertained it shall be accepted as evidence that it was caused by the fraud or dishonesty of the defendant, and not by any of the various other causes, enumerated as exceptions, for which the plaintiff was not to be liable; in other words, that a shortage ascertained in the manner prescribed should be *prima facie* evidence of its existence, and that it was caused by the defendant's fraud or dishonesty, thus casting the burden upon the plaintiff to rebut this *prima facie* case by proof. It is not bound to do this by affirmative evidence showing the particular one of the causes, enumerated as exceptions, which produced the shortage; but may do it by negative evidence showing that it was not caused by the fraud or dishonesty of the defendant, and hence must have been produced by one or more of the excepted causes. This it may do by a fair preponderance of evidence as to any of the excepted causes, except errors or carelessness in weighing, and thefts by persons other than those covered by the bond, in which cases the proofs must be conclusive. The word 'conclusive' in that connection, we think, must be construed as meaning so strong as to require a finding or verdict that the shortage resulted from the cause alleged. This may also be done by negative or circumstantial evidence. So much for the construction of the bond. The bond having been executed at the request of the defendant, and in the form requested by him, it follows that his obligation to indemnify the plaintiff is coextensive with that of the plaintiff to reimburse the elevator company; also, that any provisions in the bond as to proof of liability, binding on the plaintiff in favor of the elevator company, are equally binding on the defendant in an action brought by the plaintiff against him to recover indemnity for what it has paid in his behalf. Therefore it follows that the com-

i. IN ACTION AGAINST FOREIGN INSURANCE COMPANY. — It is not necessary to allege, in an action against a foreign insurance company, that the company has complied with the laws of the state so as to be entitled to do business therein.¹

j. ALLEGING ESTOPPEL. — In pleading an estoppel by reason of the acts of the agent of an insurance company which obviate the necessity of reformation, it need not be alleged that there was nothing in the charter of the company to prevent the acts of the agent from operating as an estoppel.²

3. Prayer. — Where the same court administers both legal and equitable relief, a prayer in the alternative to reform the policy, or to recover on the policy itself, is proper.³ If the policy sued on covers several classes of property, and the complaint states the amount of loss upon each class, a prayer for the aggregate of such amounts is proper.⁴

VI. DEMURRER. — Under the Code Practice the question whether an action is barred by terms of a policy made part of the petition may be raised by demurrer.⁵

In West Virginia the plaintiff may be required to file, in addition to his declaration, a sworn statement of the facts which he expects to prove, and in an insurance case the legal sufficiency of the facts thus presented was held to be properly raised by a demurrer.⁶

plaint alleges facts which, under the provisions of the bond, constitute a cause of action against the defendant; that is, if all the facts alleged are proved on the trial, it would follow, as a matter of law, that the plaintiff would be entitled to recover. That the facts alleged are in one sense merely evidentiary, and may be rebutted by other evidence, is not material, inasmuch as, by the agreement of the parties, they make out *prima facie* a cause of action, and if not rebutted they conclusively make it out. Otherwise expressed, under the contract of the parties, the facts alleged prove that the shortage was caused by the defendant's fraud or dishonesty. Under these circumstances, an express and direct allegation that it was so caused is unnecessary."

1. New England F. & M. Ins. Co. v. Robinson, 25 Ind. 536; Fitzsimmons v. City F. Ins. Co., 18 Wis. 234.

2. Germania L. Ins. Co. v. Lunkeneimer, 127 Ind. 536. See generally article ESTOPPEL, vol. 8, p. 5.

3. Weinberger v. Merchants' Mut. Ins. Co., 41 La. Ann. 31, the court saying: "Defendant moved to compel plaintiffs to elect whether they would proceed on the demand to reform the policy, or on the policy itself. The

evidence was correctly overruled. There is no inconsistency in the alternative prayers of the plaintiffs, and if the allegations in a petition will warrant equitable relief this court, under the well-recognized jurisprudence of the state, will grant it. Such is the prayer of plaintiffs in their petition."

4. Hegard v. California Ins. Co., 72 Cal. 535.

5. Moore v. State Ins. Co., 72 Iowa 414.

6. Deitz v. Providence Washington Ins. Co., 31 W. Va. 851, the court saying: "The important question is whether or not, according to the facts thus appearing, the plaintiff has any right to maintain this action. I think this question is properly raised by the defendant's demurrer to the declaration and the plaintiff's statement filed in support thereof. The statement, being a specific averment of the facts intended to be proved, to sustain the action must be considered a part of the declaration; and if it so modifies or contradicts the general averments of the declaration as to show that the plaintiff has no cause of action, it would be vain and useless to put the plaintiff to the proof of them, because that would be, in effect, to call upon him to prove facts which, when proved, would

VII. PLEA OR ANSWER — 1. In General — As to Interest of Insured. — Where the policy provides that it shall be void if the interest of the insured is other than that of unconditional ownership in fee simple unless the consent of the company to a different ownership be indorsed thereon, it is not necessary, in pleading a breach of this condition, to allege that consent was not so indorsed, the consent being a matter for replication.¹

Negative Pregnant. — An answer denying loss on the particular day alleged, or that the conditions of the policy were complied with as stated in the complaint, there being an allegation in the complaint of performance on a particular day, or that consent to other insurance was not indorsed on the policy, the latter providing only for consent in writing, is insufficient.²

Argumentative Denial. — Where the plaintiff, in suing on an accident policy, alleges an accidental injury, an averment in the answer that the alleged injury was caused by poison, and that the policy did not extend to this cause, was declared to be merely an argumentative denial, not good as a plea in bar to the action.³

2. Specific Pleas — *a. GENERAL ISSUE OR GENERAL DENIAL* — **General Issue.** — The courts incline to restrict the scope of the general issue in actions on insurance policies, especially where applications containing a large number of "warranties" or representations are referred to and made a part of the policy. In such case, although the application and all the statements therein are expressly incorporated in the policy by reference, a breach thereof, or a defense based thereon going to avoid the insurance, cannot be proved under the general issue, but must be pleaded specially.⁴ But breaches of conditions in the policy itself, as that the insured was the owner of the property, that the property was

defeat his action. The demurrer at this stage of the proceedings is analogous to a motion to dismiss on the plaintiff's opening statement of his case, or, according to the practice in this state, of moving the court to exclude the plaintiff's evidence. *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *Dresser v. West Virginia Transp. Co.*, 8 W. Va. 553; *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622."

1. *Brown v. Commercial F. Ins. Co.*, 86 Ala. 189.

2. *Schaetzel v. Germantown Farmers' Mut. Ins. Co.*, 22 Wis. 412, the court saying: "The answer states no defense and offers no material issue. The denials are all liable to the objection that they are negatives pregnant. The complaint avers that on a particular day the property was all destroyed

by fire. The answer denies this in the very words of the complaint. Such a denial is a negative pregnant with the admission that it may have been all destroyed on some other day, or that a part may have been destroyed on the day named. Such denials have been always held insufficient. *Baker v. Bailey*, 16 Barb. (N. Y.) 54; *Salinger v. Lusk*, 7 How. Pr. (N. Y. Supreme Ct.) 430; *Davison v. Powell*, 16 How. Pr. (N. Y. Supreme Ct.) 467. Many other authorities to the same effect might be cited."

3. *Bernays v. U. S. Mutual Acc. Assoc.*, 45 Fed. Rep. 455.

4. *Benjamin v. Connecticut Indemnity Assoc.*, 44 La. Ann. 1017; *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214; *Piedmont, etc., L. Ins. Co. v. Ewing*, 92 U. S. 377. See also *infra*, VII. 2. *b. Breaches of Condition.*

unoccupied, or fraud in proofs of loss, may be shown under the general issue.¹

General Denial. — Where the code practice obtains the defendant may show, under a general denial, breach of conditions precedent, such as failure to give notice or proofs of loss,² or that the loss or cause of the loss was not within the purview of the contract;³ but he cannot show a breach of conditions, representations or "warranties" not conditions precedent,⁴ or facts showing a right to avoid the policy,⁵ such as a wilful burning of the insured property by the plaintiff.⁶

b. BREACHES OF CONDITION. — Breaches of conditions other than conditions precedent, and breaches of warranties, representations, or statements in the application or policy, must be pleaded specially.⁷ In pleading breach of condition, care is necessary to cover the conditions in question so as to set out a breach with certainty.⁸ Thus where a condition takes effect only in case of

1. *Home Ins. Co. v. Field*, 42 Ill. App. 392; *Illinois Live Stock Ins. Co. v. Baker*, 49 Ill. App. 92.

If the Declaration Is in a Special Form Prescribed by rules of courts for actions on policies, allowing the plaintiff to set forth merely the date and the amount of the policy premium paid, property insured, and loss, breach of a condition requiring arbitration may be shown under the general issue without notice. *Morley v. Liverpool, etc., Ins. Co.*, 85 Mich. 210.

Covenants Performed. — In an action of covenant on a policy under seal, the defendant cannot show matters tending to avoid the policy under a plea of covenants performed. *Marine Ins. Co. v. Hodgson*, 6 Cranch (U. S.) 206.

2. *Manchester F. Assur. Co. v. Glenn*, 13 Ind. App. 365.

3. *Pelican Ins. Co. v. Troy Co-operative Assoc.*, 77 Tex. 225; *Bernays v. U. S. Mutual Acc. Assoc.*, 45 Fed. Rep. 455.

4. *Mitchell v. Home Ins. Co.*, 32 Iowa 421; *Redman v. Aetna Ins. Co.*, 49 Wis. 431; *Bennett v. Maryland F. Ins. Co.*, 14 Blatchf. (U. S.) 422.

5. *British American Assur. Co. v. Cooper*, 6 Colo. App. 25, the court saying: "The denial by the defendant that it ever insured the plaintiff amounts, at most, to a denial of the execution of the policy, and is not sufficient in itself to admit proof of facts or circumstances which would give the defendant the right to avoid the policy after it was executed. Therefore the only question for consideration is

whether the facts stated amount to a cancellation of the policy."

6. Incendiarism Not Provable Under General Denial. — In *Residence F. Ins. Co. v. Hannawold*, 37 Mich. 106, the court said: "Objection is also made that the court ruled out testimony offered as tending to show that Hannawold burned his own house. It is enough to say that no such defense is set up. Such a defense must be specially averred, and the burden is on the company to establish it. *Thurtell v. Beaumont*, 1 Bing. 339, 8 E. C. L. 538; *Regnier v. Louisiana State M. & F. Ins. Co.*, 12 La. 336; *McConnell v. Delaware Mut. Safety Ins. Co.*, 18 Ill. 228; *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105."

In *Alamo F. Ins. Co. v. Heidemann Mfg. Co.*, (Tex. Civ. App. 1894) 28 S. W. Rep. 910, it was said: "The court properly excluded evidence of a wilful burning of the property by the insured. Such a defense cannot be made under a general denial. *Residence F. Ins. Co. v. Hannawold*, 37 Mich. 103; *Morley v. Liverpool, etc., Ins. Co.*, 92 Mich. 590; *Heidenreich v. Aetna Ins. Co.*, 26 Oregon 70; *May, Ins.*, § 583."

7. *Indiana Farmers' Live Stock Ins. Co. v. Rundell*, 7 Ind. App. 426; *Coburn v. Travelers' Ins. Co.*, 145 Mass. 226; *Forbes v. American Mut. L. Ins. Co.*, 15 Gray (Mass.) 249; *Mueller v. Putnam F. Ins. Co.*, 45 Mo. 84; *Copeland v. Western Assur. Co.*, 43 S. Car. 26; *Continental Ins. Co. v. Chase*, (Tex. 1896) 34 S. W. Rep. 93.

8. *Copeland v. Phoenix Ins. Co.*, 96

a. written request, such request must be pleaded.¹ When incumbrance is permitted with the consent of the insurer, in pleading incumbrance of the property it should be alleged that there was no consent thereto.²

c. BREACHES OF REPRESENTATIONS OR WARRANTIES. — Where an application contains a large number of answers which are incorporated by reference to the policy and termed "warranties" therein, a breach of any of these warranties or falsity of the statements must be alleged specially.³ And it must be alleged specially which answer or statement is false, and wherein it is false.⁴

d. FRAUD. — Particularity is required also in alleging fraud.⁵

Ala. 615; Rogers v. Phenix Ins. Co., 121 Ind. 570; Germania F. Ins. Co. v. Stewart, 13 Ind. App. 627; Kentucky, etc., Mut. Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634; Mitchell v. Mississippi Home Ins. Co., 72 Miss. 53.

Injury While Committing Unlawful Act. — If the policy excepts injury or death while engaged in violation of the law, and acts are stated constituting a violation of law, it is not necessary to allege that they were "unlawful." Bloom v. Franklin L. Ins. Co., 97 Ind. 478.

But where the acts charged to have been unlawful were such by reason of a particular statute of a foreign jurisdiction, they must be brought fully within the statute by the answer. Conboy v. Railway Officials', etc., Acc. Assoc., (Ind. App. 1896) 43 N. E. Rep. 1017.

In Equity breach of condition precedent may be set up properly by answer, and is not set up by plea. Doxey v. Royal Ins. Co., (Tenn. 1896) 36 S. W. Rep. 950.

1. Aurora F. Ins. Co. v. Johnson, 46 Ind. 315.

2. Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553, where the point is thus stated in the opinion: "The eleventh plea alleges as a bar that defendants executed an incumbrance upon the premises insured. The seventh article of the conditions has made no provision against incumbrances of this character. A change of title or any undivided interest in it by assignment of the whole or any interest in the policy, without the consent of the company, would avoid the policy. Admitting that this would be an assignment within the meaning of this article of the conditions, yet the plea ought to aver that the company did not assent and agree

to such transfer. For a sale and transfer by assignment of the policy would be good with the consent of the company. This we may presume, or that the conditions were complied with, until the contrary is averred in the plea. See, for assignments, Wilson v. Genesee Mut. Ins. Co., 16 Barb. (N. Y.) 511."

3. See the preceding section, *Breaches of Condition*.

4. Girard F. Ins. Co. v. Boulden, (Ala. 1892) 11 So. Rep. 773; Indiana Farmers' Live Stock Ins. Co. v. Rundell, 7 Ind. App. 426; Denny v. Conway Stock, etc., Ins. Co., 13 Gray (Mass.) 492; German Ins. Co. v. Hunter, (Tex. Civ. App. 1895) 32 S. W. Rep. 344; American Employers' Liability Ins. Co. v. Barr, 32 U. S. App. 444, 68 Fed. Rep. 873.

Where by statute it is provided that if the application is not indorsed the insurer may not take advantage of false representations therein, a plea that statements in the application were false must allege that the representations were indorsed on or attached to the policy. McConnell v. Iowa Mut. Aid Assoc., 79 Iowa 757; Metropolitan L. Ins. Co. v. Jenkins, (Pa. 1886) 10 Atl. Rep. 474.

5. Greiss v. State Invest., etc., Co., 98 Cal. 241; Aurora F. Ins. Co. v. Johnson, 46 Ind. 315. In the case first cited it is observed: "The complaint avers due proof of loss and a compliance with the conditions of the policy in other respects. The answer denies this allegation, sets out the proof of loss made, and points out several alleged defects in it, but does not charge that it is either false or fraudulent. It does state, however, that 'thereafter on or about the twenty-first day of March, A. D. 1887, defendant presented to and served upon plaintiff its objections and excep-

Generally, in pleading false answers in an application,¹ or false statements in proofs of loss,² a mere allegation that the answer or statement was false is insufficient. The particular false statement must be pointed out,³ and it must be alleged that it was fraudulent.⁴

e. OTHER DEFENSES. — Concealment or failure to state material facts, or failure of the insured to disclose his real interest, or failure to comply with a demand for an appraisal of the amount of the loss as provided for by the policy, must be pleaded specially.⁵ In pleading forfeiture for failure to pay assessments, where the charter of the insurer requires notice of assessment to be given, the facts showing that the notice required by the charter had been given must be set out. A general allegation of failure to pay after legal notice is insufficient.⁶

f. ATTACHING COPY OF POLICY OR APPLICATION TO ANSWER. — Under the Code Practice, where the petition or complaint sets out the policy sued on, it is not necessary, in pleading breach of conditions or representations contained in the policy, to attach a copy thereof to the answer.⁷ But where the answer sets up breaches of representations contained in the application or other defenses growing out of an application, even though the application is referred to in and expressly made a part of the policy, or growing out of rules or by-laws incorporated in the policy by reference, it is necessary to attach a copy or to set forth the application or rules and by-laws, and it is not enough to state general conclusions as to their effect.⁸

tions to said proof of loss, a full, true, and correct copy of which said objections and exceptions is hereto annexed, marked Exhibit B, and is hereby expressly referred to and made a part hereof, and that said objections and exceptions to said proof of loss, and each of them, are and is in all respects true and correct as therein stated, and the same are hereby expressly referred to and made a part hereof.' The matter is not otherwise alluded to in the answer, and, as already said, it charges no fraud nor does it claim a forfeiture. No facts are stated which could amount to fraud." See generally article FRAUD, vol. 9, p. 675.

1. Studwell v. Charter Oak L. Ins. Co., 17 Hun (N. Y.) 602.

2. Bowlus v. Phenix Ins. Co., 133 Ind. 106.

3. Studwell v. Charter Oak L. Ins. Co., 17 Hun (N. Y.) 602, where the following language, used by the court at the general term, was adopted: "We think it is the duty of the pleader, in presenting such an answer, to state

particularly the violation which is set up as a defense — for example, whether the parent was afflicted with consumption or scrofula, rheumatism, gout or insanity, or some hereditary disease; and not to class these all together, and therefore put the plaintiff to the necessity of preparing to show, by evidence, that no one of these numerous diseases existed in the family."

4. Bowlus v. Phenix Ins. Co., 133 Ind. 106; Pino v. Merchants' Mut. Ins. Co., 19 La. Ann. 214.

5. Liverpool, etc., Ins. Co. v. Hall, 1 Kan. App. 18; Sussex County Mut. Ins. Co. v. Woodruff, 26 N. J. L. 541; American Employers' Liability Ins. Co. v. Barr, 32 U. S. App. 444, 68 Fed. Rep. 873.

6. Coyle v. Kentucky Grangers' Mut. Ben. Soc., (Ky. 1887) 2 S. W. Rep. 676.

7. Replogle v. American Ins. Co., 132 Ind. 360; Germania F. Ins. Co. v. Deckard, 3 Ind. App. 361.

8. Supreme Lodge, etc. v. Edwards, 15 Ind. App. 524; Gray v. National Ben. Assoc., 111 Ind. 531.

VIII. REPLICATION OR REPLY — 1. In General — To Answer Alleging Breach of Conditions. — Although the plaintiff in his declaration, petition, or complaint denies by anticipation breach of any of the conditions of the policy, and specially denies breach of certain conditions, an answer alleging a breach of such conditions requires a reply.¹ In a replication to a plea setting up breach of conditions of the policy, the breach should be denied or avoided. A replication attempting to set out compliance with the condition, not amounting to a denial, is bad.²

In Respect of Authority of Defendant's Agent. — A replication setting up that the person with whom the plaintiff dealt was an agent of the insured must expressly allege agency; if the facts relied on as constituting agency are set out instead, they must be such that agency follows as a conclusion of law, admitting no other construction, though if agency is expressly alleged it may be sufficiently proved by circumstances from which it is a reasonable inference.³ Under the practice in *Texas* it is unnecessary for the insured to plead ratification of unauthorized acts of an agent by the insurer in a replication to an answer alleging want of authority in the agent.⁴

Waiver of Proofs of Loss is properly pleaded in a reply where the answer sets up failure to furnish them.⁵

Conclusion. — A common-law replication which introduces new matter should conclude with a verification, and not to the country.⁶

2. Departure. — If, in an action on a policy, the plea or answer

1. *Western Horse, etc., Ins. Co. v. Timm*, 23 Neb. 526, the court saying: "We are all of the opinion that the third answer of the defendant presents a defense which, if admitted in pleading or proved on trial, would defeat a recovery. It certainly contains new matter, although it may be said that the allegation of said clause of the answer, that plaintiff caused the death of the insured mules by suffering them to be overworked, was in a sense negatived in advance by the allegations of the petition that 'said death did not result from any act, design, procurement, or fault on the part of the plaintiff,' but those words of the petition were probably necessary to prevent the petition being open to demurrer, and are too general to be held to answer in advance the special allegations of the answer. It has often been said by this court on the bench, and I think more than once in its written opinions, that in a case where a reply was necessary and none made, yet, if the cause was tried as though there was a proper reply on file,

no advantage could be taken of its absence in this court. But that rule cannot be applied to a case like the one at bar, where the cause is submitted on the pleadings."

2. *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434; *Fuller v. Baltimore, etc., Employers' Relief Assoc.*, 67 Md. 434.

3. *Brown v. Commercial F. Ins. Co.*, 86 Ala. 189.

4. *Hanover F. Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255.

5. *Jacobs v. St. Paul F. & M. Ins. Co.*, 86 Iowa 145.

6. *Virginia F. & M. Ins. Co. v. Saunders*, 84 Va. 210. In that case the plea set forth a warranty that the insured building cost a certain sum, and the replication averred that the defendant's agent, knowing its cost, valued the property at the sum stated, and concluded to the country. On account of this erroneous conclusion it was held that the court erred in overruling the defendant's motion that the replication be rejected.

sets up that the policy was issued without authority, or without payment of premiums, or in consequence of misrepresentations in the application, or was delivered by one who was not the agent of the insurer, a replication or reply alleging ratification of the acts of the agent, waiver of rules as to authority of agents, waiver of conditions as to payment of premiums in advance, or that the agent of the insurer drew up the application with knowledge of the facts, is not a departure.¹

3. Duplicity. — Where the plea alleges misrepresentation in the application as to the value of the insured property, a replication that the agent of the insurer received the property and inserted the valuation in the policy is not double as being both by way of estoppel and in confession and avoidance.²

IX. REJOINDER. — In an action on a policy where the plea set forth a breach of certain conditions, and the replication alleged an offer by an adjuster to pay a sum of money in settlement of the loss, and further, that the plaintiff, at the request of the defendant, incurred expense in procuring an estimate of the cost of rebuilding, a rejoinder denying the adjuster's authority was held bad as failing to meet the material averments of the replication.³

X. VERIFICATION OF PLEADINGS. — Under the practice in *Alabama* a general denial in an action on a policy of insurance must be supported by affidavit, since it puts in issue the execution of the policy.⁴

1. Standard Acc. Ins. Co. *v.* Friedenthal, 1 Colo. App. 5; Ohio Farmers' Ins. Co. *v.* Stowman, 16 Ind. App. 205; German F. Ins. Co. *v.* Columbia Encaustic Tile Co., 15 Ind. App. 623; Virginia F. & M. Ins. Co. *v.* Saunders, 86 Va. 969.

2. Virginia F. & M. Ins. Co. *v.* Saunders, 86 Va. 969, the court saying: "A learned author lays it down that the only mode of taking advantage of a departure is by demurrer. 4 Min. Inst. 1040. But be that as it may, here there has been no departure. To the general rule which requires the pleader either to traverse or to confess and avoid there are several exceptions, one of which arises in the case of pleadings in estoppel. Steph. Pl. 219. Indeed, it is one of the essential qualities of a replication that it must present matter of estoppel, or must traverse or confess and avoid the plea. 1 Chitt. Pl. 643. Moreover, a departure takes place only when the party deserts the ground that he took in his last antecedent pleading and resorts to another. Thus the replication must be conformable to the declaration, the rejoinder to the plea,

etc. Or, as Lord Coke expresses it, 'Each party must take heed of the ordering of the matter of his pleading, lest his replication depart from his count, or his rejoinder from his bar; *et sic de cæteris*. 3 Co. Litt. 435; 4 Min. Inst. 1038. In the present case this rule has been observed; that is to say, there has been no abandonment of the case stated in the declaration and a resort to another, but the matter contained in the replication conforms to and fortifies that contained in the declaration. There was no error, therefore, in overruling the motion to reject the replications."

3. Boulden *v.* Liberty Ins. Co., 112 Ala. 490, because the expense was alleged in the replication to have been caused by the defendant itself, and this was not answered by the rejoinder. See generally article VERIFICATION.

4. Equitable Acc. Ins. Co. *v.* Osborn, 90 Ala. 201, the court saying: "The first plea of the defendant, being a general denial of all the allegations of the complaint, necessarily put in issue the execution of the written policy of insurance which was the foundation of the

XI. AMENDMENTS. — Under the liberal code system of pleading amendments may be allowed even during the trial.¹ Thus in an action on an insurance policy it was held proper to permit the plaintiff so to amend as to allege that the loss did not occur from any of the causes excepted in the policy,² to aver an insurable interest,³ and also to change the complaint so as to avoid a variance between pleading and proof.⁴ It is proper to amend by claiming larger damages or loss to additional property under the same policy by the same fire.⁵ But an amendment setting up an oral contract of insurance states a new cause of action.⁶ And a defendant who asks leave to add a new defense to his plea during the trial must show that he is entitled to such favor and that it can be granted without injustice.⁷

XII. TRIAL — 1. **Questions for the Jury.** — The materiality of facts concealed or misrepresented in an application for insurance;⁸

suit, as well as the plaintiff's ownership of the policy, as the beneficiary under it. The plea should therefore have been supported by affidavit, and for want of such verification it was subject to the demurrer which was interposed to it and was properly sustained by the trial court. *Mobile, etc., R. Co. v. Gilmer*, 85 Ala. 423; Code 1886, §§ 2676, 2770; *Manning v. Maroney*, 87 Ala. 563."

1. See article AMENDMENTS, vol. I, p. 598.

2. *Alamo F. Ins. Co. v. Shacklett*, (Tex. Civ. App. 1894) 26 S.W. Rep. 630, where a demurrer for the defect mentioned had been overruled, and the amendment was allowed in order to meet an objection on the same ground to the admission of any evidence.

3. *Koshland v. Philadelphia F. Assoc.*, (Oregon 1897) 49 Pac. Rep. 865.

4. *Clark v. Phoenix Ins. Co.*, 36 Cal. 168. As to such amendments generally, see article AMENDMENTS, vol. I, p. 577 *et seq.*

5. *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729. See article AMENDMENTS, vol. I, p. 586 *et seq.*

6. *Connecticut F. Ins. Co. v. Kinne*, 77 Mich. 236, the court saying: "It seems to me that the first count of the amended declaration introduces a new cause of action. The original declaration, as before said, counted upon a written contract of insurance, and claimed damages for the breach of that contract in the failure or refusal to pay the amount of the insurance upon loss by fire without the fault of plaintiffs. The first count of the amended declaration claims damages for the refusal of the defendant to deliver a policy of in-

surance in conformity to a verbal agreement, by which the plaintiffs were deprived of the insurance upon their goods for which they had contracted. These are two independent and distinct causes of action, although both sound in assumpsit and may be said to grow out of the same transaction. Does our statute of amendments in the discretion of the circuit judge allow an amendment of this character? We think not." See, generally, as to amendments constituting a new cause of action, article AMENDMENTS, vol. I, p. 547 *et seq.*

7. "Apart from the delay and the fact that the case had been opened before the question was presented, the court was abundantly justified by the entire omission of defendant to make any showing whatever in support of the application. A party desiring such a favor must show in some way that he is entitled to it, and that it can be had without injustice. Sometimes this will appear from what comes out on the trial. But in this case the motion was not made on anything appearing upon the trial, and it proposed to introduce a new issue that the plaintiff could not be expected to meet. It is certain that allowing such a motion as was made here, which, for anything that appears, was not made on any new information, would operate very unjustly, and it was properly denied." *Deline v. Michigan F. & M. Ins. Co.*, 70 Mich. 435. See article AMENDMENTS, vol. I, p. 547 *et seq.*

8. *State Ins. Co. v. DuBois*, 7 Colo. App. 214; *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 266; *Richmondville*

the truth or falsity of statements in such application;¹ whether a disease which the insured had had is covered by a question in the application so as to make his answer untrue;² whether property was insured in excess of its value;³ whether the loss was total or partial;⁴ whether a warranty depending on a matter of fact exists;⁵ whether (under proper instructions) the plaintiff has an insurable interest;⁶ the meaning of certain terms used in the policy;⁷

Union Seminary v. Hamilton Mut. Ins. Co., 14 Gray (Mass.) 459; Mutual F. Ins. Co. v. Deale, 18 Md. 26; Clark v. Union Mut. F. Ins. Co., 40 N. H. 333; Stebbins v. Globe Ins. Co., 2 Hall (N. Y.) 632; Sexton v. Montgomery County Mut. Ins. Co., 9 Barb. (N. Y.) 191; New York Firemen's Ins. Co. v. Walden, 12 Johns. (N. Y.) 513; Gates v. Madison County Mut. Ins. Co., 2 N. Y. 43; Mathers v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624; Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Cumberland Valley Mut. Protection Co. v. Mitchell, 48 Pa. St. 374; Himely v. South Carolina Ins. Co., 1 Mill (S. Car.) 154; Columbia Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507. *Contra*, Orient Ins. Co. v. Weaver, 22 Ill. App. 122.

1. New Home L. Assoc. v. Owen, 39 Ill. App. 413; Levie v. Metropolitan L. Ins. Co., 163 Mass. 117; Flynn v. Massachusetts Ben. Assoc., 152 Mass. 288; Boos v. World Mut. L. Ins. Co., 6 Thomp. & C. (N. Y.) 364; Mutual L. Ins. Co. v. Baker, 10 Tex. Civ. App. 515; Manufacturers' Acc. Indemnity Co. v. Dorgan, 16 U. S. App. 290. See *McLaws v. United Kingdom, etc., Inst.*, 33 Scottish Jur. 286, for a form of the issues, under the Scotch practice, where the falsity of answers was involved.

2. "In the present instance the apparent purpose of the charge asked by the counsel for the defendant below, and refused by the court, was to charge as a matter of law that the answer of Trefz, 'Never sick,' was to be taken as meaning — as it literally does, standing by itself — that he had never during his life had any sickness whatever; and thence to draw the necessary inference that it was untrue in that sense, as it no doubt was, and that for that reason the plaintiff's recovery was made legally impossible. In that view it became the duty of the court to say to the jury that in determining whether that statement was true or untrue, in view of the terms of the policy, they might properly consider that it was the ex-

pression of a man ignorant of the language, who did not on that account understand, and consequently did not intend, the literal scope of the expression. And whatever sense the jury as reasonable men, in the light of that circumstance, would put upon it might well be taken as the sense in which it was understood by the company, to whose agent it was personally spoken. For that would be the sense in which it would be understood commonly by reasonable men in similar circumstances. Indeed, the court might well have gone further, for it is matter of law that the answer, 'Never sick,' in the connection in which it was used in the application, must be taken to mean not that the party was never sick at all of any disorder, but only that he never had had any of the enumerated diseases so as to constitute an attack of sickness. The generality of the language of the answer must be restrained to the particulars to which alone it was meant to be applied, and the surplusage does not fall within the agreement which warrants the answer to be true. *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 197. See also *Boos v. World Mut. Ins. Co.*, 6 Thomp. & C. (N. Y.) 364.

3. *Wich v. Equitable F. & M. Ins. Co.*, 2 Colo. App. 484.

4. *Marine Ins. Co. v. Tucker*, 3 Cranch (U. S.) 357.

5. *Dennis v. Ludlow*, 2 Cai. (N. Y.)

111. *Compare Percival v. Maine Mut. Ins. Co.*, 33 Me. 242.

6. *Mitchell v. Home Ins. Co.*, 32 Iowa 421; *Mowry v. Home L. Ins. Co.*, 9 R. I. 346.

7. Thus it has been left to the jury to determine the signification of the following words as used in policies:

"Bar iron." *Evans v. Commercial Mut. Ins. Co.*, 6 R. I. 52.

"Cargo." *Houghton v. Gilbert*, 7 C. & P. 701, 32 E. C. L. 696.

"Perils of the sea." *Crofts v. Marshall*, 7 C. & P. 597, 32 E. C. L. 646.

"Room." *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416.

whether the insurer made "diligent" effort to save his property as required by a policy;¹ whether proofs of loss were furnished,² if so, when,³ and whether they were furnished "forthwith" as required by the policy;⁴ whether the notice of loss was sufficient in substance;⁵ whether certain facts increased the risk or caused the loss;⁶ the ownership of the insured property at the time of

1. *Jones v. Howard Ins. Co.*, 45 Hun (N. Y.) 594, 117 N. Y. 108.

2. *Hermany v. Fidelity Mut. L. Assoc.*, 151 Pa. St. 17.

3. *Home F. Ins. Co. v. Adler*, 71 Ala. 528; *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209.

4. "Forthwith" being construed as equivalent to "with reasonable diligence under the circumstances" or "within a reasonable time." *Schaeffer v. Farmers' Mut. F. Ins. Co.*, 80 Md. 563; *Edwards v. Baltimore F. Ins. Co.*, 3 Gill (Md.) 176; *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382; *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298; *Home Ins. Co. v. Davis*, 98 Pa. St. 280; *Davis v. Western Massachusetts Ins. Co.*, 8 R. I. 277; *Donahue v. Windsor County Mut. F. Ins. Co.*, 56 Vt. 374. *Compare Davis v. Western Massachusetts Ins. Co.*, 8 R. I. 277.

The following phrases used in policies in this connection have also been construed to require the furnishing of proof of loss only within a reasonable time: "As soon as possible," *Brink v. Hanover F. Ins. Co.*, 80 N. Y. 108; "immediately," *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149; *Continental Ins. Co. v. Lippold*, 3 Neb. 391. See also *State Ins. Co. v. Maackens*, 38 N. J. L. 569; *Strunk v. Firemen's Ins. Co.*, 23 Ins. L. J. 475; *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; *Columbia Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507. But see *McFarland v. U. S. Mutual Acc. Assoc.*, 124 Mo. 204.

5. *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. (N. Y.) 191. *Compare Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350, holding that the jurors were judges of the degree of particularity in the proofs which the case admitted of.

6. *Connecticut*. — *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553.

Illinois. — *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 298; *North British, etc., Ins. Co. v. Steiger*, 124 Ill. 81.

Indiana. — *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361.

Iowa. — *Collins v. Merchants', etc., Mut. Ins. Co.*, 95 Iowa 540; *Russell v. Cedar Rapids Ins. Co.*, 71 Iowa 69.

Louisiana. — *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 266.

Maine. — *White v. Phoenix Ins. Co.*, 83 Me. 279; *Thayer v. Providence Washington Ins. Co.*, 70 Me. 531; *Richards v. Protection Ins. Co.*, 30 Me. 273.

Maryland. — *Farmers' Mut. F. Ins. Co. v. Schaeffer*, 82 Md. 377; *Jolly v. Baltimore Equitable Soc.*, 1 Har. & G. (Md.) 295.

Massachusetts. — *Gamwell v. Merchants', etc., Mut. F. Ins. Co.*, 12 Cush. (Mass.) 167; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535, 20 Am. Dec. 547; *Rice v. Tower*, 1 Gray (Mass.) 426; *Lyman v. State Mut. F. Ins. Co.*, 14 Allen (Mass.) 329; *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522.

Missouri. — *Anthony v. German-American Ins. Co.*, 48 Mo. App. 65; *Griswold v. American Cent. Ins. Co.*, 70 Mo. 654.

New Jersey. — *Schenck v. Mercer County Mut. F. Ins. Co.*, 24 N. J. L. 447. *Compare Robinson v. Mercer County Mut. F. Ins. Co.*, 27 N. J. L. 134, 4 Bennet F. Ins. Cas. 277.

New York. — *Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375; *Grant v. Howard Ins. Co.*, 5 Hill (N. Y.) 10; *Smith v. Mechanics', etc., F. Ins. Co.*, 32 N. Y. 399; *Williams v. People's F. Ins. Co.*, 57 N. Y. 274; *Cornish v. Farm Buildings F. Ins. Co.*, 74 N. Y. 297; *Driscoll v. German-American Ins. Co.*, 74 Hun (N. Y.) 153.

Pennsylvania. — *Perry County Ins. Co. v. Stewart*, 19 Pa. St. 45.

Wisconsin. — *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.*, 74 Wis. 470.

United States. — *Phoenix Assur. Co. v. Franklin Brass Co.*, 8 U. S. App. 451.

Canada. — *Peck v. Phoenix Mut. Ins. Co.*, 45 U. C. Q. B. 620.

the insurance; ¹ whether a vessel is seaworthy; ² whether the death of an insured was due to accident or suicide, ³ or to voluntary and unnecessary exposure to great danger; ⁴ whether the habits of the insured were temperate, ⁵ or so intemperate as to impair his health, ⁶ or whether he had been addicted to the use of intoxicating liquors, ⁷ or whether death was caused by intoxication ⁸ or took place while he was intoxicated; ⁹ whether the insured, who killed himself, was sane and had mind enough to know the nature of his act; ¹⁰ the contents of a lost policy; ¹¹ whether a building was vacant within the meaning of a policy (under proper instructions); ¹² whether a person was totally disabled within the meaning

1. Rochester Loan, etc., Co. v. Liberty Ins. Co., 44 Neb. 537.

2. Field v. Insurance Co. of North America, 3 Md. 244.

3. Hale v. Life Indemnity, etc., Co., 61 Minn. 516; Washburn v. National Acc. Soc., 57 Hun (N. Y.) 585, 32 N. Y. St. Rep. 34; Columbian Acc. Co. v. Sanford, 50 Ill. App. 424; Traders', etc., Acc. Co. v. Wagley, 74 Fed. Rep. 457.

4. Travellers' Ins. Co. v. Seaver, 19 Wall. (U. S.) 544; Tooley v. Railway Pass. Assur. Co., 3 Biss. (U. S.) 399, 4 Bigelow Life & Acc. Ins. Rep. 34; Cotten v. Fidelity, etc., Co., 41 Fed. Rep. 506; Pacific Mut. L. Ins. Co. v. Snowden, 58 Fed. Rep. 342; Jones v. U. S. Mutual Acc. Assoc., 92 Iowa 652; Providence L. Ins., etc., Co. v. Martin, 32 Md. 310, 2 Bigelow Life & Acc. Ins. Rep. 40; Freeman v. Travelers' Ins. Co., 144 Mass. 572, 18 Ins. L. J. 822; Stone v. U. S. Casualty Co., 34 N. J. L. 371; Duncan v. Preferred Mut. Assoc., 59 N. Y. Super. Ct. 145; Guldenkirch v. U. S. Mutual Acc. Assoc., (Brooklyn City Ct.) 5 N. Y. Supp. 428.

5. Northwestern L. Ins. Co. v. Muskegon Bank, 122 U. S. 510, 22 Ins. L. J. 353; McGinley v. U. S. Life Ins. Co., 8 Daly (N. Y.) 390, 7 Ins. L. J. 791, affirmed in 77 N. Y. 495; Bickford v. New York State L. Ins. Co., unreported but discussed in Bliss on L. Ins., § 366.

6. Aetna L. Ins. Co. v. Hanna, 81 Tex. 487; Mutual L. Ins. Co. v. Thomson, 94 Ky. 253.

7. Van Valkenburgh v. American Popular L. Ins. Co., 70 N. Y. 605.

8. Aetna L. Ins. Co. v. Davey, 123 U. S. 739; Aetna L. Ins. Co. v. Ward, 140 U. S. 76; Meacham v. State Mut. Ben. Assoc., 120 N. Y. 237; Maier v. Massachusetts Ben. Assoc., (Mich. 1895) 65 N. W. Rep. 552.

9. Sutherland v. Standard L., etc.,

Ins. Co., 87 Iowa 505; Follis v. U. S. Mutual Acc. Assoc., 94 Iowa 435.

10. Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541.

11. Metropolitan L. Ins. Co. v. Dempsey, 72 Md. 288.

12. Rockford Ins. Co. v. Storig, 137 Ill. 646; German-American Ins. Co. v. Buckstaff, 38 Neb. 145, where the following instructions were approved: "You are instructed that the policy of insurance provides that if the premises insured become unoccupied without the assent of the defendant company indorsed thereon, then the policy should become void. And if you believe from the evidence that at the time of the fire the premises were wholly unoccupied without the assent of the defendant, the policy had become invalid, and you should find for the defendant. In determining, under the evidence, whether the premises became unoccupied before the fire and were vacant at the time of the fire, you are instructed as a matter of law that, when the property insured is a hotel, the occupancy required under such a policy as this is such occupancy as ordinarily attends a hotel. The word 'unoccupied' is to be construed in its ordinary and popular sense, and if you believe from the evidence that after the making of the policy the insured or his tenant had moved from the building in controversy, and entirely ceased to occupy the same at the time of the fire, then the policy became void. However, if you believe from the evidence that such vacancy was temporary only, and was occasioned by the fact that plaintiff's tenant was, at the time of the fire, or a short time before, moving from said plaintiff's building, and had not removed all his goods and furniture when the fire occurred, such removal would not render the premises vacant and un-

of a certificate of benefit insurance;¹ whether there was an extension of time to pay premiums; and, generally, the truth or falsity of facts relied on to show waiver of terms and conditions² — are questions for the jury.

2. Questions for the Court. — The legal effect of proofs of loss;³ whether certain facts constituted a waiver;⁴ whether there has been compliance with a plain and unambiguous provision of a policy, where the facts are undisputed,⁵ and also, in such case, whether the evidence is sufficient to go to the jury;⁶ whether a policy comes within the purview of the statute against wagers;⁷ whether certain admitted acts constitute voluntary and unnecessary exposure to danger, where the court can say as a matter of law that the danger was plain and the exposure unnecessary⁸ in marine insurance; whether there was a deviation where the facts are admitted;⁹ whether the loss was one within the scope of the policy, there being no dispute as to the facts;¹⁰ what words were used in a policy where the writing is uncertain or illegible¹¹ — are questions for the court. It should also pass upon the meaning and intent of an inquiry contained in the application.¹²

3. Directing Verdict. — In actions on insurance policies the practice of directing verdict is governed by the same rules which prevail generally with reference to that practice.¹³ If the insured fails to offer evidence necessary to prove his material allegations,¹⁴

occupied within the meaning of the policy of insurance, and your verdict in such case should be in favor of the plaintiff."

1. *Starling v. Supreme Council, etc.*, (Mich. 1896) 66 N. W. Rep. 340.

2. *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. St. 259; *Hastings v. Brooklyn L. Ins. Co.*, 138 N. Y. 473; *Noonan v. Hartford F. Ins. Co.*, 21 Mo. 90; *Charleston Ins., etc., Co. v. Neve*, 2 McMull. L. (S. Car.) 237.

3. *Thomas v. Burlington Ins. Co.*, 47 Mo. App. 169.

It is for the court also to determine what facts amount to a waiver of proofs of loss, but for the jury to pass upon the existence of such facts. *Noonan v. Hartford F. Ins. Co.*, 21 Mo. 81; *Bodle v. Chenango County Mut. Ins. Co.*, 2 N. Y. 53; *Charleston Ins., etc., Co. v. Neve*, 2 McMull. L. (S. Car.) 237. Whether the insured rendered as full proofs of loss as the circumstances would permit, is also for the jury. *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350.

4. *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 466.

5. *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; *Glendale Woolen Co. v. Pro-*

tection Ins. Co., 21 Conn. 39; *Brooks v. Standard F. Ins. Co.*, 11 Mo. App. 349.

6. *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419.

7. *Valton v. National Loan Fund L. Assur. Soc.*, 22 Barb. (N. Y.) 1.

8. *Follis v. U. S. Mutual Acc. Assoc.*, 94 Iowa 435.

9. **Deviation.** — *Riggin v. Patapsco Ins. Co.*, 7 Har. & J. (Md.) 279, 16 Am. Dec. 302.

10. *Kenniston v. Merrimac County Mut. Ins. Co.*, 14 N. H. 341; *Marine Ins. Co. v. Tucker*, 3 Cranch (U. S.) 357.

11. *Lapeer County Farmers' Mut. F. Ins. Assoc. v. Doyle*, 30 Mich. 159.

12. *Cook v. Standard L., etc., Ins. Co.*, 84 Mich. 12.

13. See the article DIRECTING VERDICT, vol. 6, p. 667.

14. *Continental L. Ins. Co. v. Rogers*, 119 Ill. 481, where the court says: "It is the settled law and practice in this state that where no evidence has been offered to prove any material allegation in the declaration put in issue by the pleadings, and not admitted for the purposes of the trial, or otherwise waived or dispensed with, the court

or if as a matter of law he is not entitled to recover,¹ or if the facts are undisputed,² the case ought to be taken from the jury. But where any question of fact is presented upon which there is even the slightest conflict of evidence it is usual to submit it to the jury.³ In an action on a life policy where the plaintiff introduced evidence to establish the death of the insured, and the making of requisite proofs, and the defendant offered no evidence, but moved for a peremptory instruction, it was held that a verdict should have been directed for the plaintiff.⁴ But in a suit on an accident policy where there are several equally reasonable theories of death the jury will not be permitted to find that it occurred accidentally in the absence of evidence tending to establish accident rather than another cause of death.⁵ A defendant who questions the legal sufficiency of evidence offered to support one of several facts necessary in order to make out the plaintiff's case

should, on motion, exclude the evidence offered on other issues in the case, or direct the jury to find for the defendant." But the rule was held inapplicable in the case cited.

1. *Universal Mut. F. Ins. Co. v. Weiss*, 106 Pa. St. 20; *Tripp v. Northwestern Live Stock Ins. Co.*, 91 Iowa 278, where, in an action on a live-stock policy which excepted intentional killing, it was shown that the animal insured had been killed on the advice of a veterinary surgeon, and on this evidence a verdict was directed.

2. *Appleby v. Astor F. Ins. Co.*, 54 N. Y. 253.

3. *Moulor v. American L. Ins. Co.*, 101 U. S. 708; *Traders', etc., Acc. Co. v. Wagley*, 74 Fed. Rep. 457; *Charleston Ins., etc., Co. v. Carner*, 2 Gill (Md.) 410; *Field v. Insurance Co. of North America*, 3 Md. 244; *Woods v. Atlantic Mut. Ins. Co.*, 50 Mo. 112; *Rochester Loan, etc., Co. v. Liberty Ins. Co.*, 44 Neb. 544; *Boos v. World Mut. L. Ins. Co.*, 6 Thomp. & C. (N. Y.) 364; *Clarkson v. Western Assur. Co.*, 92 Hun (N. Y.) 527; *Campbell v. Preferred Mut. Acc. Assoc.*, 172 Pa. St. 561, where the question was presented as to whether the plaintiff had furnished notice of the injury within the required time, and the only evidence that he had done so was his own statement, which was somewhat shattered on cross-examination. On this point the court said: "It is true, as contended by the company, that the plaintiff's testimony in regard to the time of the notice was somewhat confused and contradictory, and the fact that it was so furnishes a basis for a persuasive argument to the jury

against it. But a careful examination of it has failed to convince us that the court would have been justified in withdrawing it from the jury and directing a verdict for the defendant. The contradictions in his testimony affected his credibility as a witness, and the jury were the proper judges of that. We cannot find in the cases cited by the company any warrant for holding that it was error to submit to the jury the question of notice. The evidence that it was properly given was more than a scintilla. The plaintiff testified positively that it was given to the company within the time prescribed by the policy. The jury saw him upon the stand and heard him testify. The testimony was competent, and it was for them to say what weight should be given to it."

4. *Walcott v. Metropolitan L. Ins. Co.*, 64 Vt. 221.

5. *Merrett v. Preferred Masonic Mut. Acc. Assoc.*, 98 Mich. 340, where the court said: "Of a half dozen or more possible theories, the jury have found one inconsistent with what little evidence there is, and based a verdict upon it. Until there was some evidence tending to show that death resulted from accident rather than from design or natural causes, such as apoplexy or heart failure, there was nothing to go to a jury. There was not a *prima facie* case of accidental death. The burden of proving accidental death is upon the plaintiff. Until some proof is offered tending to establish one of several equally reasonable theories, some consistent with the theory of accidental death, and some inconsistent with it, a case is not made out."

should designate specifically the one to which his contention applies.¹

XIII. VERDICT — 1. General. — A verdict for the plaintiff for a sum much less than the amount sworn to by him in his proofs of loss and on the trial does not conclusively find fraud on his part so as to authorize a judgment on the verdict for the defendant.² A verdict for the amount stated in the application is proper where the plaintiff testified to that as the amount paid for the property and there was no controversy as to value.³ Where the only evidence as to the amount of loss consists of two appraisals, a verdict inconsistent with each will be set aside.⁴

2. Special. — Special verdicts are sometimes resorted to in actions upon insurance policies.⁵ These are usually prepared beforehand by counsel in conjunction with the court,⁶ but sometimes by the court alone.⁷ The defendant may move for judgment on such a verdict and thus present the question of its sufficiency to authorize recovery by the plaintiff,⁸ but the court in giving judgment is confined to those facts found.⁹ A party who wishes to predicate error upon the action of the trial court in directing the jury to find a special verdict must save his rights by specific objections and exceptions thereto.¹⁰ In an action on an insurance policy a special verdict should find full compliance with the conditions of the policy,¹¹ such as that notice and proofs of loss were given or waived; and a finding that the insurer received from the plaintiff notice of loss does not find that the notice was given in the time required, nor does the finding of certain evidentiary facts, which might be held sufficient evidence of notice, amount to a finding that notice was given.¹² A special verdict should also set out the terms of the policy,¹³ unless the policy is set out in the pleading and is a part thereof.¹⁴ And the finding must be responsive to the issues.¹⁵ A special finding that proofs of loss were not fur-

1. *Campbell v. Preferred Mut. Acc. Assoc.*, 172 Pa. St. 561.

2. *Obersteller v. Commercial Assur. Co.*, 96 Cal. 645.

3. *Siltz v. Hawkeye Ins. Co.*, 71 Iowa 710.

4. *Morley v. Liverpool, etc., Ins. Co.*, 85 Mich. 210.

5. See the following notes, and, generally, article VERDICTS. For a recent instance of this practice, see *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547, where the court prepared in advance certain findings for the jurors and instructed them to return such as were in accordance with the facts.

6. *Suydam v. Williamson*, 2 How. (U. S.) 432.

7. As in *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547.

8. *Dixon v. Duke*, 85 Ind. 436.

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9. *Suydam v. Williamson*, 20 How. (U. S.) 432.

10. *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547.

11. *Standard L., etc., Ins. Co. v. Strong*, 13 Ind. App. 315.

12. *Germania F. Ins. Co. v. Columbia Encaustic Tile Co.*, 11 Ind. App. 385; *McFetridge v. American F. Ins. Co.*, 90 Wis. 138.

13. *McCormick v. Royal Ins. Co.*, 163 Pa. St. 184.

14. *Evans v. Queen Ins. Co.*, 5 Ind. App. 198.

15. A policy provided that it should be void if naphtha was used on the premises by the insured. While a naphtha torch was being used to burn off old paint preparatory to repainting, the building took fire and was burned. The jury found that such was "the

nished is not inconsistent with a general verdict for the plaintiff, where the jury may have found that proofs of loss were waived.¹ A finding that the property destroyed was worth a certain amount at the time of the loss, is a finding that such amount was its "actual cash value."²

XIV. JUDGMENT — 1. Amount of Recovery — Recovery in Excess of Proofs of Loss. — Where there is no fraud, and the insurer has not been misled by statements of the amount of loss in the proofs of loss, and acted upon them to his prejudice, the insured is not limited to a recovery of the amount claimed in the proofs of loss.³

2. Attorneys' Fees. — The allowance of attorneys' fees under statutes authorizing their award as a part of the damages can only be made upon proofs as to what constitutes a reasonable fee based upon allegations in the petition, and the demand cannot be successfully made for the first time in the Supreme Court.⁴ So where an allowance has been made in the trial court the Supreme Court will not award the attorney of the insured an additional fee for conducting the cause in the appellate proceeding.⁵ The evidence upon which the allowance is based must be confined to a fee definitely contracted for, and evidence as to the value of legal services rendered upon a promise of a contingent fee is inadmissible.⁶ But the action of the trial court will, on appeal, be presumed to be correct in the absence of a contrary showing.⁷

method ordinarily pursued to remove the paint on the outside of a building preparatory to scraping it off to repaint it." It was held that this did not sufficiently present the matters of fact in issue, as it did not find whether the use of naphtha at the time and under the circumstances was reasonable. *First Congregational Church v. Holyoke Mut. F. Ins. Co.*, 158 Mass. 475.

1. *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202.

2. *German Ins. Co. v. Norris*, 11 Tex. Civ. App. 250.

3. *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329; *Crittenden v. Springfield F. & M. Ins. Co.*, 85 Iowa 652; *Sibley v. Prescott Ins. Co.*, 57 Mich. 14; *Schmidt v. Mutual City, etc., F. Ins. Co.*, 55 Mich. 432; *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. St. 34; *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 739. *Contra*, *Campbell v. Charter Oak F. & M. Ins. Co.*, 10 Allen (Mass.) 213; *Irv- ing v. Excelsior F. Ins. Co.*, 1 Bosw.

(N. Y.) 507. But see *Neill v. American Popular L. Ins. Co.*, 42 N. Y. Super. Ct. 259; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222.

4. *German Ins. Co. v. Eddy*, 37 Neb. 461; *Home F. Ins. Co. v. Skoumal*, (Neb. 1897) 71 N. W. Rep. 290.

5. *Home F. Ins. Co. v. Skoumal*, (Neb. 1897) 71 N. W. Rep. 290.

6. *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751.

7. *Hanover F. Ins. Co. v. Gustin*, 40 Neb. 828.

Amount of Attorney's Fees. — An allowance of an attorney's fee of \$120 on a recovery of \$1,310 was approved in *Omaha F. Ins. Co. v. Thompson*, (Neb. 1897) 70 N. W. Rep. 30.

So where the insurer admitted liability to the amount of \$500, but the judgment exceeded that sum, an allowance of \$75 as an attorney's fee was held supported by the evidence. *Home F. Ins. Co. v. Skoumal*, (Neb. 1897) 71 N. W. Rep. 290.

INTEREST.

I. NECESSITY OF CLAIMING IN PLEADING, 435.

1. *At Law*, 435.
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I. NECESSITY OF CLAIMING IN PLEADING—1. At Law—*a. WHEN NOT EXPRESSLY STIPULATED.*—Where interest is the legal consequence of the debt or obligation without stipulation, it may be recovered though not claimed in pleading.¹ The interest, in such case, is an incident of the debt, and demand of the principal is a demand of both principal and interest.² Thus in cases of

1. *Daquin v. Coiron*, 8 Martin N. S. (La.) 608; *Richmond v. Milne*, 17 La. 328; *Babin v. Nolan*, 6 La. Ann. 295; *Grand Lodge, etc. v. Bagley*, 60 Ill. App. 589; *International, etc., R. Co. v. Lewis*, (Tex. Civ. App. 1893) 23 S. W. Rep. 323.

2. *Richmond v. Milne*, 17 La. 328. See also *Daquin v. Coiron*, 8 Martin N. S. (La.) 608; *Ansley v. Jordan*, 61 Ga. 482; *Tucker v. Page*, 69 Ill. 179; *McConnel v. Thomas*, 3 Bl. 313; *Washington v. Planters' Bank*, 1 How. (Miss.) 230.

In *Grand Lodge, etc. v. Bagley*, 164 Ill. 340, it was held that upon recovering the amount of a beneficiary certificate in an action of debt against a benefit society, the plaintiff may be allowed interest rightfully due thereon as damages, though the declaration contains no interest count. See also *Supreme Lodge, etc. v. Zuhlke*, 129 Ill. 298.

In *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 629, it was held that if an answer is filed judgment may be rendered for the principal, and interest added thereto, although the complaint only prays for judgment for the principal. But see *David v. Conard*, 1 Greene (Iowa) 336. See also *Roberts v. Smith*, 1 Morr. (Iowa) 417, holding that in order

to recover interest on an account the declaration and bill of particulars must demand an account sufficient to include interest.

In *Dunham v. Holloway*, 3 Okla. 244, the suit was instituted upon an account. An itemized bill of the purchase was attached to and made a part of the complaint, and the time of such purchase and the dates when the several items so purchased were to be paid for were set forth. The prayer of the complaint asked for judgment for a specified sum, "with interest thereon according as the same may appear to be due from the items of said exhibit at the rate of seven per cent. per annum." Such prayer was held sufficient to support a verdict for the principal sum and interest as computed from the date when payment for each of the several items as set forth in the exhibit, became due to the date of the verdict.

When the Usage of Trade has fixed a period at which book accounts bear interest, this becomes the law of the purchase, and it is not necessary to demand it in a copy of claim filed. *Adams v. Palmer*, 30 Pa. St. 346. See also, to the same effect, *Hummel v. Brown*, 24 Pa. St. 310; *Watt v. Hoch*, 25 Pa. St. 411.

Recovery Under Common Counts.—In

obligations and promissory notes containing no stipulation as to interest, it need not be demanded in the declaration,¹ nor need its payment be negatived in the averment of breaches.² In such cases the practice is to declare for the debt alone, and interest is recovered as damages for its detention.³

b. WHEN STIPULATED BY CONTRACT. — When, however, interest is expressly stipulated under contract, it cannot be allowed unless prayed for.⁴ Where interest is payable by the

Tucker v. Page, 69 Ill. 179, it was held that interest may be recovered upon the amount of the award after the same is due, and after demand under the common counts, although the declaration contains no count for interest, it being but an incident to the principal sum. See also, to the same effect, McConnel v. Thomas, 3 Ill. 313. For other cases holding that interest may be recovered under common counts without a count for interest, see Lindsey v. Bland, 2 Spears (S. Car.) 30; Brooks v. Holland, 21 Conn. 395; Heiman v. Schroeder, 74 Ill. 158; Pease v. Barber, 3 Cai. N. Y. 266; Marshall v. Poole, 13 East 97; Slack v. Lowell, 3 Taunt. 157.

Necessity of Alleging Demand. — In an action upon a claim due on demand, where no date of demand is alleged, interest can be recovered only from the date of the commencement of the action. Hall v. Farmers', etc. Sav. Bank, 55 Iowa 612.

Action Upon Foreign Judgment. — In *Massachusetts*, in an action upon a foreign judgment, the plaintiff is entitled, without alleging or proving any demand, to recover interest by way of damages upon the judgment sued from the date of the latter to the date of the judgment for its recovery, at the ordinary rate of interest in the state. Hopkins v. Shepard, 129 Mass. 600.

1. Chinn v. Hamilton, Hempst. (U. S.) 438.

2. Chinn v. Hamilton, Hempst. (U. S.) 438.

3. Chinn v. Hamilton, Hempst. (U. S.) 438; Washington v. Planters' Bank, 1 How. (Miss.) 230; Stone v. Bennett, 8 Mo. 41.

In Padley v. Catterlin, 2 Mo. App. Rep. 1258, it was held that where the plaintiff's loss or the defendant's gain is capable of pecuniary estimate the plaintiff may recover interest under a general allegation of damages.

On Bills for Account. — In *North Carolina*, where money has been received

by a party which *ex equo et bono* he ought to refund or pay, interest follows as a matter of course, and this whether it has or has not been prayed for in the bill or ordered by the decree. Thus in bills for account it is not usual to pray for an account with interest; this is implied. Smith v. Godbold, 4 Strobb. Eq. (S. Car.) 186.

4. Race v. Sullivan, 1 Ill. App. 94; March v. Wright, 14 Ill. 248; David v. Conard, 1 Greene (Iowa) 336; Roberts v. Smith, 1 Morr. (Iowa) 417; Green v. Dunn, 5 Kan. 254; Shepard v. Pratt, 16 Kan. 209; Daquin v. Coiron, 8 Martin N. S. (La.) 621; Richmond v. Milne, 17 La. 328; Babin v. Nolan, 6 La. Ann. 295; Van Riper v. Morton, 61 Mo. App. 440; Shockley v. Fischer, 21 Mo. App. 551; Ashby v. Shaw, 82 Mo. 76; Schermerhorn v. Perman, 2 Bailey L. (S. Car.) 173.

"The plaintiffs' recovery is limited by the damages claimed in the petition, and as they pray for no interest they can recover none." Van Riper v. Morton, 61 Mo. App. 440.

Tax Bill Considered as Petition. — In *New Orleans v. Fisk*, 14 La. Ann. 875, under the *Louisiana Act of 1852*, a suit for unpaid taxes due to the city was brought by filing in the court a tax bill, citing the taxpayer by advertisement. It was held that the tax bill must be considered as the petition containing all the demands to which the plaintiff is entitled by law, and consequently in such a suit eight per cent. interest under the statute must be allowed in the judgment as if prayed for.

Time from Which Interest Computed. — In *Shepard v. Pratt*, 16 Kan. 209, it was held that not only must interest be claimed in the petition, but the time from which such interest is computed must be stated.

Agreement or Special Custom. — If an agreement for interest at an earlier period than the usage would allow or a special custom is relied on as giving it, such agreement or custom must be

stipulation of the parties before the principal is due, such interest is part of the contract; and if the plaintiff fails to ask this and to negative payment, he can recover only the amount of debt and interest from maturity of the contract.¹ The demand of principal and interest upon a covenant to pay a specific sum with interest is divisible,² and if the plaintiff chooses to demand the principal only, he may do so, and he need not notice in his declaration the contract for interest.³

2. In Equity. — As a general rule a court of equity will not decree interest upon a balance unless it is specially sued for in the bill.⁴ This rule, however, applies only to interest due at the time the bill is filed. Where interest has accrued subsequently the court may, upon further directions, order the computation of such interest although there is no prayer for this in the bill.⁵

set forth or added to the copy of claim, as otherwise the plaintiff could not embrace it in his judgment, for it would not in such case stand as a necessary incident to the principal. *Adams v. Palmer*, 30 Pa. St. 346.

Prayer Sufficient for Relief. — In an action upon an account where the prayer is for judgment for the amount of an account and for "his costs and other relief," interest may be added to the amount found due from the time it was payable to the time of the trial. *Texas, etc., R. Co. v. Donnelly*, 46 Ark. 87.

1. Chinn v. Hamilton, Hempst. (U. S.) 438.

Negation of Payment of Interest. — Where a note is given bearing interest at a certain rate per annum, the payment of the interest as well as the principal must be negated in the breach or it will be too narrow. *Clay v. Morehouse*, 3 Ark. 261. See also *Dickinson v. Tunstall*, 4 Ark. 170; *Sumner v. Ford*, 3 Ark. 389; *Chinn v. Hamilton, Hempst.* (U. S.) 438. *Contra*, *Cail v. Brookfield*, 4 Ark. 554; *Causin v. Taylor*, 4 Ark. 408; *Wernwag v. Mothershead*, 3 Blackf. (Ind.) 401.

2. Verney v. Iddings, 2 Chit. Rep. 234, 18 E. C. L. 317.

3. McClure v. Cole, 6 Blackf. (Ind.) 290.

4. Godwin v. McGehee, 19 Ala. 468; *Weymouth v. Boyer*, 1 Ves. Jr. 426.

5. Godwin v. McGehee, 19 Ala. 468. See also *Carter v. Lewis*, 29 Ill. 500; *Mills v. Heeney*, 35 Ill. 173; *Heiman v. Schroeder*, 74 Ill. 158; *Prescott v. Maxwell*, 48 Ill. 82; *Lee v. Pindle*, 12 Gill & J. (Md.) 288; *Haven v. Baldwin*, 5 Iowa 503; *Turner v. Turner*, 1 Jac. &

W. 39; *Hollingsworth v. Shakeshaft*, 14 Beav. 492; *Davenport v. Stafford*, 14 Beav. 334; *Johnson v. Prendergast*, 28 Beav. 480.

In *Glenn v. Cockey*, 16 Md. 446, it was held that, upon a bill of *cestuis que trustent* against a trustee for an account and general relief, interest may be allowed against the trustee though not prayed for in the bill, if, under the facts disclosed, it appears equitable that it should be allowed. In this case the court said: "The decree of the Circuit Court from which this appeal was taken confirms the auditor's 'Account C' in charging the trustee with interest, and one of the grounds upon which a reversal is asked is that 'because the bill contains no allegation of misconduct, negligence, or breach of trust, or any claim for interest, none can properly be allowed.' In support of this view the appellants have referred to 1 Hill on Trustees 524, where the author uses this language: 'It may be observed that interest will not be given against a trustee unless it be prayed by the bill,' and to sustain the text refers to *Weymouth v. Boyer*, 1 Ves. Jr. 426; *Bruere v. Pemberton*, 12 Ves. Jr. 389, and *Hooper v. Goodwin*, 1 Swanst. 493. An examination of those cases has not satisfied this court that the principle stated in the text of Hill, however it may in some cases be applicable, can govern the decision of this case. In 2 Daniell's Ch. Pr. 1507, 1508, 1509 (ed. 1846), this question is considered, and several authorities cited which establish the principle that if the circumstances are such, at the time of filing the bill, that a claim for interest did not exist, or

II. ALLEGATION OF INTEREST OF FOREIGN STATE. — In order to entitle a party to recover interest due by the law of another state, it must be alleged in the pleading. It is not sufficient to prove it at the trial under the prayer for damages for the detention of the principal sum due.¹ No interest can be recovered on a note payable beyond the jurisdiction of the state, in the absence of an allegation and proof of the rate of interest at the place of payment.²

III. TIME FOR RECOVERY. — When interest is recoverable merely as damages, no action can be maintained for its recovery after the principal has been paid.³ The rule, however, is different where there is an expressed agreement to pay interest.⁴

could not be known, then it may be allowed if, under the facts disclosed, it appears equitable, even although not claimed in the bill; and the learned author also refers to cases in which bills were filed 'for the express purpose of enforcing an account and payment of balances, and decrees for interest were made, although no interest appears to have been prayed, nor was the consideration of it reserved.' Upon the best consideration we have been able to give this subject we are all of opinion that the objection to the frame of the bill ought not to be sustained."

1. *Hill v. George*, 5 Tex. 87.

2. *Wheeler v. Pope*, 5 Tex. 262; *Hill v. George*, 5 Tex. 87; *Able v. McMurray*, 10 Tex. 350; *Ingram v. Drinkard*, 14 Tex. 351.

Foreign Statute Must Be Pleaded. — If a party to an action wishes to take advantage of the law of any other state fixing the rate of interest upon a contract at a different rate from that fixed by the laws of his own state, he must plead such statute. *Dunham v. Holloway*, 3 Okla. 244.

3. *American Bible Soc. v. Wells*, 68 Me. 572. See also *Fake v. Addy*, 15 Wend. (N. Y.) 76; *Tillotson v. Preston*, 3 Johns. (N. Y.) 229; *Stone v. Bennett*, 8 Mo. 41.

Thus where a bequest or contract is silent as to interest, so that if it can be recovered it can only be recovered as damages, an action to recover it cannot be maintained after payment of the principal. *American Bible Soc. v. Wells*, 68 Me. 572.

4. *Stone v. Bennett*, 8 Mo. 41.

INTERLOCUTORY ORDERS, JUDGMENTS, AND DECREES.

See articles *APPEALS*, vol. 2, p. 1; *DECREES*, vol. 5, p. 946; *JUDGMENTS; ORDERS*; and the particular titles in this work.

INTERNAL REVENUE.

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II. INDICTMENT FOR VIOLATION, 440.

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4. *Charging Different Offenses*, 441.

I. CIVIL ACTIONS — 1. Suits for Forfeiture for Violation — a. NATURE. — Informations under the United States revenue laws for forfeiture of goods which seek no judgment of fine or imprisonment, while civil actions, are so far in the nature of criminal proceedings as to come within the rule that the general verdict upon several counts, seeking in different forms one object, must be upheld if one count is good.¹

b. JURISDICTION — Suits in Rem. — As a general rule, suits *in rem* for forfeiture for violations of internal revenue laws are brought in the District Court;² there are, however, numerous instances of such suits being brought in Circuit Courts.³

1. Coffey v. U. S., 116 U. S. 427; Still, 5 Blatchf. (U. S.) 403; U. S. v. 508 Snyder v. U. S., 112 U. S. 216; Clifton Barrels of Distilled Spirits, 5 Blatchf. v. U. S., 4 How. (U. S.) 242. (U. S.) 407; U. S. v. Six Barrels of Distilled Spirits, 5 Blatchf. (U. S.) 542; 2. Coffey v. U. S., 116 U. S. 427. U. S. v. Seven Barrels of Distilled Oil, 6 Blatchf. (U. S.) 174; U. S. v. 200 3. Coffey v. U. S., 116 U. S. 427. See also U. S. v. Two Tons of Coal, 5 Blatchf. (U. S.) 386; U. S. v. One Barrels of Whisky, 2 Woods (U. S.) 54.

Suits in Personam. — Jurisdiction of a suit *in personam* for violation of the internal revenue laws is generally in the District Court, but in at least one case it has been taken by the Circuit Court.¹

c. INFORMATION. — An information *in rem* which follows the words of the section of the statute on which it is founded is sufficient.²

Act of Agent Imputed to Principal. — In an information for forfeiture or violation of internal revenue laws, the acts and intents of the servants or agents of the complainant are to be imputed to the principal, and may work the forfeiture of the property so used for unlawful purposes.³

2. Actions to Enforce Payment of Legacy and Succession Taxes. — In enforcing the payment of taxes imposed upon successions and legacies by the Act of 1864, and which accrued prior to the repealing Act of 1870,⁴ it was held that the remedy provided by statute must be pursued, and that a common-law action could not be maintained.⁵

1. U. S. v. McKee, 4 Dill. (U. S.) 128.

2. Coffey v. U. S., 116 U. S. 427, where the information charged the complainant with defrauding or attempting to defraud the United States of the tax on spirits distilled by him. It was held that it was not necessary to set forth the particular means by which he defrauded and attempted to defraud the United States of the tax, or to specify the particular spirits covered by the tax; nor was it necessary to aver that the distilled spirits found on the complainant's distillery premises and seized were distilled by him or were the product of his distillery, or that the distillery apparatus was wrongfully used. Section 3257 U. S. Rev. Stat. does not make such facts elements of the causes of forfeitures denounced by it.

Distilled Spirits Unstamped. — In an information for the forfeiture of a cask of distilled spirits found without having thereon the required stamp, the fact that such stamps may have been removed by accident need not be negatived, as this is a matter of defense. U. S. v. 9 Casks, etc., of Distilled Spirits, 51 Fed. Rep. 191.

An Information for Altering Inspection Stamps which charges that the defendant "did unlawfully change and alter" the stamps sufficiently shows that the act was done wilfully and intentionally, as otherwise it could not be said to have been done unlawfully. U. S. v. Bardenheier, 49 Fed. Rep. 846.

Information for Using Inspected Packages for Sale of Other Spirits. — In an information for putting into a cask, after it has been inspected or stamped, other spirits, either of the same or of a different quality, which were not therein at the time of such inspection or stamping,

it must be shown that the change was caused by filling them with other spirits and that other spirits had been placed in the cask after the original contents had been wholly or partially withdrawn. It will not be sufficient to allege that spirits of 102 degrees proof were fraudulently sold in casks marked 105 degrees proof, since the reduction in proof may have been due to natural causes or to the addition of water after a part of the original contents had leaked out or had evaporated. U. S. v. Bardenheier, 49 Fed. Rep. 846.

3. Bush v. U. S., 24 Fed. Rep. 917, where the court said: "Undoubtedly, in a criminal prosecution this rule would not be applied; but considering the scope and intent of the statute solely as it relates to forfeitures, we think the information was supported by proof of the unlawful use and of the intent to defraud, whether such use and intent were by the claimant personally or by some person acting under his authority and control." See also, to the same effect, Dobbins's Distillery v. U. S., 96 U. S. 395.

4. 16 U. S. Stat. at L. 261, § 17.

5. U. S. v. Truck, 28 Fed. Rep. 846. It is provided by the Act of June 30,

3. Actions to Recover Taxes Illegally Collected. — In order to recover taxes alleged to have been illegally collected, the statutory remedy must be strictly pursued and all its conditions complied with in order to give a right of action.¹ Thus an appeal must first be taken to the commissioner of internal revenue, and the suit must then be brought within two years after such commissioner has rendered his decision upon the appeal.²

II. INDICTMENT FOR VIOLATION — 1. Necessity for Indictment. — The violation of internal revenue laws being so punishable as to make it an infamous crime, it follows that the prosecution for such crime must be by indictment or by presentment of the grand jury, and the defendant cannot be held to answer the charge upon an information.³

2. Essential Averments of Indictment. — Generally, as in cases of indictment for other crimes, an indictment for the violation of internal revenue laws must contain sufficient to inform the prisoner of the nature and cause of the accusation against him, and to enable him to plead conviction or acquittal in bar of a subsequent prosecution for the same offense.⁴ It should set forth all the facts essential to constitute the offense with which he is charged.⁵

1864, that "proceedings shall be commenced before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such personal estate or property, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court."

1. *Sinking Fund Com'rs v. Buckner*, 48 Fed. Rep. 533.

2. *Sinking Fund Com'rs v. Buckner*, 48 Fed. Rep. 533. See also *Kings County Sav. Inst. v. Blair*, 116 U. S. 200; *Stuart v. Barnes*, 43 Fed. Rep. 281.

Where Decision Is Delayed. — By the Act of June 6, 1872, c. 315, § 44 (Rev. Stat. U. S., § 3226), which is an amendment of section 19 of the Act of July 13, 1866, c. 184, it is provided that no suit shall be brought to recover taxes illegally or erroneously collected unless an appeal has first been taken to the commissioner of internal revenue and a decision thereon had by him; provided that a suit may nevertheless be brought if his decision is delayed more than six months, but that no such suit shall be brought more than a year after the rejection of the claim. *Hicks v. James*, 48 Fed. Rep. 542.

3. *U. S. v. Johannesen*, 35 Fed. Rep. 411.

It is provided by Rev. Stat. U. S., §§ 5539, 5541, 5542, that a sentence of the United States courts "to imprisonment for a period longer than one year," or a sentence of "imprisonment and confinement to hard labor," may be ordered to be executed in a state prison or penitentiary. Such imprisonment in a state prison or penitentiary, either with or without hard labor, is at the present time an infamous punishment. *Mackin v. U. S.*, 117 U. S. 348.

4. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

5. In *U. S. v. Simmons*, 96 U. S. 360, an indictment founded on U. S. Rev. Stat., § 3281, alleged that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller, within the intent and meaning of the internal revenue laws of the United States, with the intent to defraud the United States of the tax on the spirits distilled by him, against the peace," etc. The court held that the indictment was sufficient to authorize judgment, and that it was not necessary to state the particular means by which the United States was to be defrauded.

An Indictment for Hindering or Resisting an Internal Revenue Officer who attempts without warrant to enter a building

3. Joinder of Defendants. — An indictment for the violation of internal revenue laws may join two or more defendants where nothing in the nature of the offense prevents one of the defendants being principal in the first degree and others principals in the second degree.¹

4. Charging Different Offenses. — Where there are two or more charges against a defendant for two or more acts of the same class of crimes or offenses which may be properly joined, he may be charged with such crimes in separate counts of one indictment.² The accused should not, however, be tried upon an indictment

where illicit distilled spirits subject to taxes are kept and seize said spirits must aver that the attempt to enter was made in the daytime or made at nighttime, when the premises were open, and that such entry was necessary for the purposes of examining said spirits; it must also aver that the distilled spirits were in the custody of some one who purposed selling or removing the same in fraud of the internal revenue laws, or who designed to avoid the payment of taxes thereon. Where the indictment does not contain these averments, the authority of revenue officers to seize is not averred, and it does not appear that the defendant was guilty of any offense in obstructing or preventing such seizure. *U. S. v. Fears*, 3 Woods (U. S.) 510.

In an Indictment for Removing, Without Destroying, Stamps from a cask containing distilled spirits, it is not necessary to set out the stamps removed, verbatim, but it will be sufficient to describe them by their statutory designation; nor is it necessary to describe the spirits as "domestic" in order to charge the offense, nor to charge that the defendant had knowledge of the contents of the casks from which the stamps were removed. The intent with which the stamps were removed need not be charged, since no particular intent is made an ingredient of the offense. *U. S. v. Bayaud*, 16 Fed. Rep. 376.

For Receiving Spirits Unlawfully Removed from Distillery. — In a criminal information for receiving, from a person to the district attorney unknown, spirits which have been unlawfully removed from a distillery to a place other than a distillery warehouse provided by law, it is sufficient to show that the spirits were removed from an illicit distillery, since the provision of the statute is intended to apply not only where the

spirits received are removed from a registered distillery, but also where they are the product of an unauthorized distillery. It is not necessary in such information to aver that the person who delivered the spirits to the defendant was unknown to the district attorney, and such averment need not be proved. This is not the case of an omission to name the defendant or the party injured. *U. S. v. Byrne*, 19 Blatchf. (U. S.) 259.

Indictment for Removal of Distilled Spirits. — An indictment under Rev. Stat. U. S., § 3296, which charges a removal of a certain quantity of "distilled spirits" on which the tax had not been paid to a place other than the distillery warehouse is sufficient. *U. S. v. Anthony*, 14 Blatchf. (U. S.) 92, where the court said: "While, in a strictly chemical sense, the terms 'ethyl alcohol' and 'spirits of wine' are generic terms, and the term 'distilled spirits,' as defined by section 3248, when used in that sense, would be generic, and not necessarily confined to the product of distillation, still the term 'distilled spirits' has also an ordinary and literal meaning, which implies distillation, and when it is used in the latter sense it is confined to the product of distillation. It is so used in section 3296 and in this indictment. Consequently the indictment shows the subject-matter to be subject to tax, under section 3254, and is good."

1. *U. S. v. Bayaud*, 16 Fed. Rep. 376, where the indictment charged the defendant and another with having removed certain United States internal revenue stamps from packages containing distilled spirits without defacing and destroying the said stamps. It was held that the nature of this offense was such that a joinder of the defendants was permissible.

2. Rev. Stat. U. S., § 1024; *U. S. v. Gaston*, 28 Fed. Rep. 848.

charging different offenses; and an indictment which contains under separate counts two distinct offenses, with different penalties, will be quashed.¹

1. U. S. *v.* Gaston, 28 Fed. Rep. 848, where the indictment charged the accused in one count with carrying on the business of retailing liquor without the payment of the special tax, and in another charged him with dealing in manufactured tobacco without having paid the special tax. In sustaining a motion to quash this indictment the court said: "This indictment contains, in separate counts, two distinct

offenses, the penalty in each offense being different from the other; as a retail liquor dealer he *must* be imprisoned as a part of the penalty, and as a dealer in manufactured tobacco he *may* be imprisoned, and the minimum fine is different. These offenses are, besides, separate and distinct transactions, and not of the same class of crimes or offenses that may be joined under section 1024 of the Revised Statutes."

INTERPLEADER.

BY CHARLES C. MOORE.

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See in general articles *INTERVENTION*, *post*, p. 494; *RIGHT OF PROPERTY*, *TRIAL OF*.

I. INTERPLEADER AT COMMON LAW.—The only personal action in which the right of interpleader existed at common law was *detinue*. It was applied to a few other cases such as *quare impedit* and writs of right of ward.¹ Except in *Pennsyl-*

1. *Russell v. First Presb. Church*, 65 Pa. St. 14, where Sharswood, J., said: "The defendant in *detinue* could plead that the chattel for which suit was brought was held by him as bailee or depositary; that it was claimed by a third person in privity with the plaintiff, and that he was willing to deliver it to the party who was legally entitled to it. Thereupon a process of garnishment issued to compel such third person to appear and defend, or else disclaim his title. This practice has been adopted by the courts of this state and extended to other forms of action. The want of a court of chancery rendered this necessary to prevent a failure of justice. For, although a defendant might protect himself by giving notice of the suit to the claimant, and calling upon him to appear and take defense in his name, yet the latter, not being a party

to the record, would not be concluded by the judgment without proof of the notice. If that proof should fail, the defendant would be remediless, and thus might be subjected to two judgments against him for the same cause of action by two different plaintiffs. Hence the practice was early introduced of compelling such third person to become a party by rule or *scire facias* founded on a suggestion of the defendants, and no doubt he would be admitted to appear and plead *gratis* without order or process on such suggestion. *Coates v. Roberts*, 4 Rawle (Pa.) 109; *Wallace v. Clingen*, 9 Pa. St. 51; *Tritt v. Crotzer*, 13 Pa. St. 458; *McMann v. Caruthers*, 2 Am. L. J. 133. It is the defendant, however, who is to be protected. He must, in due time, make the suggestion, show that the claimant is in privity with the plaintiff, state his

vania,¹ it is believed that interpleader in common-law actions exists in the United States only by virtue of statutory provisions.²

II. BILLS OF INTERPLEADER — 1. Definition. — A bill of interpleader is ordinarily exhibited where two or more persons³ claim the same debt or duty or other thing⁴ from the plaintiff by differ-

willingness to pay the money to the one found entitled to recover it, and pray for the substitution."

In *Brownfield v. Canon*, 25 Pa. St. 301, the court said: "The principles of interpleading, and the cases in which it may be applied, are best exemplified in the practice in equity; but the form of the procedure in a common-law case is very simple, and requires but little modification. It may be found very fully presented in the abridgments of Fitzherbert, Brooke, and Viner, under the titles Garnishee, Enterpleader, and Interpleader, and in 2 Mod. Ent. 425, 427. The principle appears in various forms in our law; as where heirs, devisees, or alienees come in on notice by writ or by the party to defend for their interests, where a warrantee or landlord comes in on notice to defend an action of ejectment, and other cases. See Brightley's Equity 226. Under our practice, where the middleman or stakeholder is sued, he may take the simple course of giving notice to the other claimant of the money or thing in controversy to come and defend the action or be barred of his claim. But this does not conclusively save the middleman from his liability to action by the other claimant; for the latter, not being a party on the record, is not held barred by the judgment until the fact of notice is properly proved. The middleman is not, therefore, conclusively protected by such judgment, for his proof of notice may fail him. Besides, if the middleman fail, he will have to pay the costs himself, and may have no available recourse. It would therefore seem more prudent for the defendant to pursue the regular common-law form of filing his suggestion, admitting the debt or duty, and his willingness to pay or perform, and stating the claims of third persons, and therefore pray for a *scire facias* to bring him in to interplead. Thus, the third person, called, from his being warned, the garnishee, or, in other forms of procedure, the intervener, 3 Adams's Ecc. R. 37; 1 L. Ecc. R. 599; 2 Domat 676, is compelled to come in as a party and set up his claim, and is concluded

by the record. By the service of the *scire facias*, the intervener or garnishee actually becomes a party; and if he makes default, the plaintiff will have judgment to recover the money or thing claimed from the defendant, and his damages and costs from the garnishee. If he comes in and disclaims, the plaintiff recovers of course from the defendant. If he defends unsuccessfully, the plaintiff will have judgment for the thing claimed against the defendant, and against the garnishee for damages, or interest and costs. If the intervener plead, the issue to the court or jury is between him and the plaintiff, and the defendant stands aside altogether and has nothing further to do but to pay the money or deliver the thing sued for according to the judgment of the court. If the intervener recover he shall have judgment against the defendant for the thing claimed and against the plaintiff for his damages and costs. If, however, the money be in court, the judgment of course is that the party recovering shall take it out of court. If it has been delivered to one of the claimants, the judgment will accord with the fact. Usually, when the suit is for money, the defendant offers to bring it into court, and does so; and if it is for some other thing, he keeps it safely to abide the order or judgment of the court. If the middleman be sued by two claimants severally, he must sue out his *scire facias* to interplead in the suit first brought, or if they are both brought at once, then in the one in which the declaration shall be first filed or which the court shall direct."

1. See the preceding note.

2. See the article RIGHT OF PROPERTY, TRIAL OF.

3. **More than Two.** — In *Travellers' Ins. Co. v. Healey*, (Supreme Ct.) 28 N. Y. Supp. 478, it was held that there was no difficulty upon principle in maintaining a bill of interpleader against more than two persons — three in that case — where each claims the same property in a different and distinct right.

4. See *infra*, II. 3. *c. Defendants Claiming the Same Fund or Thing.*

ent or separate interests, and he, not knowing to which of the claimants he ought of right to render the same debt, duty, or other thing, fears that he may suffer injury from their conflicting claims, and therefore prays that they may be compelled to interplead and state their several claims, so that the court may adjudge to whom the same debt, duty, or other thing belongs.¹

2. Interpleader by Cross-bill. — Interpleader is an original bill,² and is not the proper subject of a cross-bill.³ But if a cross-bill contains all the substantial allegations of a bill of interpleader, including a prayer for process and for relief, it seems that it may be treated as an original bill of interpleader.⁴

3. Conditions Essential to Maintenance of Bill — *a. NO OTHER ADEQUATE REMEDY* — **Remedy at Law.** — The general rule is that a bill of interpleader will not be entertained where the plaintiff has a clear⁵ and unembarrassed remedy at law⁶ — and in this

1. *Cogswell v. Armstrong*, 77 Ill. 139; *Delaware, etc., R. Co. v. Corwith*, 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 312. See also *Newhall v. Kastens*, 70 Ill. 156.

Lord Cottenham's Definition. — In *Hogart v. Cutts*, 1 Craig & P. 204, Lord Cottenham said: "The definition of interpleader is not and cannot now be disputed. It is where the plaintiff says, 'I have a fund in my possession in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into court, and you shall contest it between yourselves.'" This quotation has been cited with approval in *Cogswell v. Armstrong*, 77 Ill. 139; *Wakeman v. Kingsland*, 46 N. J. Eq. 113; *Anderson v. Wilkinson*, 10 Smed. & M. (Miss.) 601; *Greene v. Mumford*, 4 R. I. 313; *Horton v. Baptist Church, etc.*, 34 Vt. 309.

The Remedy Not Encouraged. — It is said that bills of interpleader are not encouraged. *Bedell v. Hoffman*, 2 Paige (N. Y.) 199.

2. Article BILLS IN EQUITY, vol. 3, p. 338.

3. *Curtis v. Williams*, 35 Ill. App. 518.

4. *Foss v. Denver First Nat. Bank*, 3 Fed. Rep. 185.

5. **A Reasonable Doubt** as to the efficacy of his remedy would not prevent him from maintaining the bill. See *infra*, II. 3. j. *Plaintiff Ignorant of Claimants' Rights — Claimants' Rights Uncertain.*

6. *Carroll v. Parkes*, 1 Baxt. (Tenn.) 269; *Hathaway v. Foy*, 40 Mo. 540; *Killian v. Ebbinghaus*, 110 U. S. 568; *Curtis v. Williams*, 35 Ill. App. 533.

In Admiralty. — The rule was applied

without being stated in *Sablich v. Russell*, L. R. 2 Eq. 441, to proceedings in admiralty, upon the ground that "inasmuch as two persons cannot succeed against the ship in respect of the same subject-matter, it may be supposed that the Court of Admiralty will do complete justice between the parties."

Defense in Pending Action of Replevin.

— The defendant in an action of replevin brought a suit to enjoin the plaintiff from further prosecution of the suit, alleging in his bill that he purchased the property from one who had deduced title under an irregular tax sale and that the plaintiff in the replevin suit claimed to own the property. The bill prayed that the vendor and the plaintiff in replevin be required to interplead and settle the question of title between themselves. It was held that the title to the property could be fully litigated and established in the action of replevin, and hence that there was no ground for the bill of interpleader. *Long v. Barker*, 85 Ill. 431.

Remedy by Sheriff. — When a sheriff is in doubt as to the appropriation of money on execution, he may pay the money into the court whence the execution issued, make a return of the facts, notifying the conflicting claimants, and leave them to apply to the court to determine the priority of their respective claims. *McDonald v. Allen*, 37 Wis. 108; *Turner v. Lawrence*, 11 Ala. 427; *Henderson v. Richardson*, 5 Ala. 350. Hence, he should not, under such circumstances, be allowed to maintain a bill of interpleader. *McDonald v. Allen*, 37 Wis. 108; *Parker v. Barker*, 42 N. H. 78.

behalf, a remedy given by statute may generally be considered as a legal remedy¹ — or, having had such a remedy, has neglected to avail himself of it until too late.²

Another Equitable Remedy. — It is not necessarily an objection to a bill of interpleader that the plaintiff has another equitable remedy which may be regarded as more convenient or less troublesome to pursue.³ But where the plaintiff may have full relief by peti-

1. *Dry Dock M. E. Mission Church v. Carr*, 2 Barb. (N. Y.) 60, where the statute provided an ample remedy for the owner of a building against the contractor and the creditors of the contractor in relation to the balance due from the owner upon the building contract. *Board of Education v. Scoville*, 13 Kan. 17, holding, however, that the statutory remedy by substitution upon application of a defendant in an action who holds a fund claimed by the plaintiff and the person whom the defendant seeks to substitute is a concurrent equitable remedy which presents no obstacle to an action of interpleader. On the last point see also *Barry v. Mutual L. Ins. Co.*, 53 N. Y. 536; *Wood v. Swift*, 81 N. Y. 31; *New York, etc., R. Co. v. Haws*, 56 N. Y. 175.

Remedy in Probate Court. — Where an executor or administrator has a clear remedy in the probate court in respect of conflicting claims of distributees or others, he should pursue that remedy instead of resorting to an action of interpleader. *Freeland v. Wilson*, 18 Mo. 380; *Baker v. Brown*, 64 Hun (N. Y.) 627.

And so far as the probate court has by statute exclusive original jurisdiction of the subject there would seem to be an insuperable bar to relief in equity. *Chandler v. Dodson*, 52 Mo. 128.

2. *Carroll v. Parkes*, 1 Baxt. (Tenn.) 269, where the plaintiff had been sued by one of the claimants, and had suffered judgment to go against him without interposing a perfect defense which was available to him. To the same point, see *McKinney v. Kuhn*, 59 Miss. 186; *Yarborough v. Thompson*, 3 Smed. & M. (Miss.) 291; *Holmes v. Clark*, 46 Vt. 22.

3. *Curtis v. Williams*, 35 Ill. App. 518. In that case the court overruled the contention that the bill of interpleader should be dismissed because the plaintiff could obtain the relief sought by setting up the facts in his

answer in an equity suit pending against him by one claimant and requiring the other claimant to be made a party to the suit. The court cited *Warrington v. Wheatstone*, 1 Jac. 203, where an injunction went to restrain an action at law by one claimant and another to restrain a bill in chancery by another, and also *Morgan v. Marsack*, 2 Meriv. 107, and *Crawford v. Fisher*, 10 Sim. 479. "If the doctrine under consideration was known to equity practice," said the court, in the case first above cited, "the question arises why, in these cases, which were well considered, it was not directed that the claimant in the action at law be made a party to the suit of the claimants in equity, so that the holder of the fund might be protected, and the interpleader made unnecessary." See also *Prudential Assur. Co. v. Thomas*, L. R. 3 Ch. 74.

In New York the right to file an interpleader complaint has been recognized although actions are pending in which, under the code, the court may in its discretion direct that all parties in interest be made parties. *Barry v. Mutual L. Ins. Co.*, 53 N. Y. 536; *Wood v. Swift*, 81 N. Y. 31; *New York, etc., R. Co. v. Haws*, 56 N. Y. 175, reversing a decision of the general term dismissing the interpleader on the ground that the plaintiff might have made one of the claimants a party to the other claimant's suit.

Kansas. — In *Board of Education v. Scoville*, 13 Kan. 17, the plaintiff had been sued by one of the defendants in an action still pending, and in which the defendant (plaintiff in the interpleader suit) had a right under section 43 of the Code to have all the other parties brought in and have them interplead as to who should receive the fund, etc. But the court held that the remedy given by the Code was an equitable remedy and did not supersede the remedy by action of interpleader — that the two remedies were in effect concurrent.

tion in another equity suit pending against him in which all the claimants are parties, it seems that he must resort to that remedy.¹

b. PRIVACY OF TITLE BETWEEN CLAIMANTS — (1) The General Rule.— Some authorities are exacting in the requirement that in order to make a proper case for a bill of interpleader there must be a privity of estate, title, or contract between the defendant claimants, and that if one of the defendants claims under title paramount there is an absence of privity and the suit cannot be maintained.² Thus the bill cannot be filed by a tenant so as to

1. In *Lowe v. Richardson*, 3 Madd. 277, a bill of interpleader was filed by a captain against the consignee and a person who claimed against the bill of lading, but it appearing that the defendant who so claimed had filed a prior claim against the captain and the consignee, and obtained an injunction against the captain restraining him from delivering the cargo to the consignee, an injunction on the interpleader was refused, as the captain was protected by the former suit and his bill was unnecessary. There, it will be noticed, all the persons in interest were before the court as parties. The case is cited in *Badeau v. Rogers*, 2 Paige (N. Y.) 209, in support of the suggestion by the chancellor that a bill of interpleader was unnecessary in that case because suits in chancery were pending in which the claimants had made each other defendants, and to which the plaintiff was a party, and in which he might by petition have had the same relief.

And precisely the same relief as in the chancery practice may be had in an equitable action under the code in which all the persons interested are parties. Thus, in *Lane v. New York L. Ins. Co.*, 56 Hun (N. Y.) 92, an action was brought against an insurance company by a plaintiff claiming to be entitled to a certain fund, and a rival claimant was made a joint defendant. It was held that the court might properly allow the insurance company to pay the fund into court and be dismissed from the action. The court incidentally declared that the code provision—N. Y. Code Civ. Pro., § 820—allowing a defendant to have an order of substitution in certain cases did not apply, because that remedy was intended to apply only to actions at law. See also *Williams v. Wright*, 20 Tex. 499.

2. See opinion of Vann, J., in *Crane v. McDonald*, 118 N. Y. 657; and further,

Snodgrass v. Butler, 54 Miss. 45; *Fulton Bank v. Chase*, (Supreme Ct.) 6 N. Y. Supp. 126; *Gibson v. Goldthwaite*, 7 Ala. 281; *Stone v. Reed*, 152 Mass. 179; *Boston Third Nat. Bank v. Skillings, etc.*, *Lumber Co.*, 132 Mass. 410; *Fairbanks v. Belknap*, 135 Mass. 179.

"One of the essential elements of the equitable remedy of interpleader as laid down is that all the adverse titles or claims to the thing or debt in reference to which the bill is filed must be dependent, or be derived from a common source." *Kyle v. Mary Lee Coal, etc., Co.*, 112 Ala. 606.

"In the cases of adverse independent titles. it is said, the true doctrine seems to be that the party holding the property must defend himself as well as he can at law, and he is not entitled to the assistance of a court of equity; for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person who calls for an interpleader." *Gibson v. Goldthwaite*, 7 Ala. 281; and to the same point see *Boston Third Nat. Bank v. Skillings, etc.*, *Lumber Co.*, 132 Mass. 410; *Morristown First Nat. Bank v. Bininger*, 26 N. J. Eq. 345; *Bartlett v. Sultan*, 23 Fed. Rep. 257.

Bill by Shipmaster.— In *Lowe v. Richardson*, 3 Madd. 277, it was doubted whether a bill of interpleader would lie at the suit of a master of a ship where the adverse claims were paramount to the bill of lading; although it was conceded that it was maintainable where the parties claim adversely at law or in equity under the bill of lading. But subsequently the came court, in *Morley v. Thompson*, 3 Madd. Index, Interpleader, 564, decided that the master might file such a bill although the adverse claims were paramount to the bill of lading. Mr. Justice Story remarks upon this decision that the bill does not seem to have

make his landlord a party thereto,¹ nor by a bailee against his bailor,² nor by an agent against his principal,³ nor by a debtor against his creditor,⁴ nor by a sheriff against the execution creditor,⁵ nor by a bank against a depositor,⁶ nor by a vendee

been founded upon any legal adverse titles, wholly independent of each other, and not derived from a common source. 2 Story Eq. Jur. 121.

1. See *infra*, II. 3. b. (2) *Landlord and Tenant*.

2. See *infra*, II. 3. b. (3) *Bailor and Bailee*.

3. *Gibson v. Goldthwaite*, 7 Ala. 281; *Fairbanks v. Belknap*, 135 Mass. 179; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365.

See, for a proper case for interpleader, *Schuyler v. Pelissier*, 3 Edw. Ch. (N. Y.) 191.

"That an agent should have the power of filing a bill of interpleader when his principal demands the redelivery of goods bailed with him appeared to me so monstrous a proposition and to involve such frightful consequences in mercantile transactions, that I could not suppose it was meant to contend for any such doctrine." *Per* Lord Brougham, in *Pearson v. Cardon*, 2 Russ. & M. 606.

In *Crawshay v. Thornton*, 2 Myl. & C. 1, Lord Cottenham said that a bill of interpleader as between principal and agent was admissible only where the claim was under a derivative and not under an adverse title.

An Attorney cannot maintain such a bill to settle the claim to money which he has collected for his client where a mere stranger claims the money upon the ground that the security upon which the money was collected was originally obtained by his client wrongfully. *Marvin v. Ellwood*, 11 Paige (N. Y.) 365.

Derivative Claims.—An attorney at law who has collected money may file a bill of interpleader in respect to the same against defendants who set up a derivative claim from the person for whom the attorney undertook the collection. *Goddard v. Leech*, Wright (Ohio) 476; *Gibson v. Goldthwaite*, 7 Ala. 281. See also *Wakeman v. Dickey*, 19 Abb. Pr. (N. Y. C. Pl.) 24.

Thus, an attorney having money collected for a client in his hands, which money is claimed by two creditors of the client, the latter disclaiming any interest in favor of himself, the at-

torney not being so fully cognizant of the fact as to be able to determine the right, may properly bring a bill of interpleader against the creditors. *Sammis v. L'Engle*, 19 Fla. 800.

4. "No case can be found in the books where a debtor has ever sustained a bill to interplead his creditor and an outsider—a mere stranger—who had no other claim to assert than a mere equity against the creditor to reach the fund loaned." *U. S. Trust Co. v. Wiley*, 41 Barb. (N. Y.) 477. See also *Boston Third Nat. Bank v. Skillings*, etc., *Lumber Co.*, 132 Mass. 410.

5. **Bill by Sheriff.**—"A sheriff who has seized property upon execution cannot maintain a bill of interpleader to determine whether the execution debtor or a third person claiming it is entitled to the property, as their claims against him are not of the same character or in the same right." *Boston Third Nat. Bank v. Skillings*, etc., *Lumber Co.*, 132 Mass. 410; *Morristown First Nat. Bank v. Bininger*, 26 N. J. Eq. 345. See also *infra*, II. 3. c. *Plaintiff Not a Wrongdoer*, notes.

But he may file such a bill against the assignee in bankruptcy, and the execution creditor, when it is doubtful whether as against the latter the property passed by the assignment. The title of each in such a case is derived from that of the execution debtor. *Child v. Mann*, L. R. 3 Eq. 806, cited with approval in *Fairbanks v. Belknap*, 135 Mass. 179. For other cases proper for a bill of interpleader by a sheriff, see *Lawson v. Jordan*, 19 Ark. 297; *Storrs v. Payne*, 4 Hen. & M. (Va.) 506; *Parker v. Barker*, 42 N. H. 95.

And as to the exclusive remedy by a sheriff against conflicting claimants by paying into the court whence the execution issued the money collected therein, see *McDonald v. Allen*, 37 Wis. 108; *Parker v. Barker*, 42 N. H. 78; *Turner v. Lawrence*, 11 Ala. 427.

6. *Fulton Bank v. Chase*, (Supreme Ct.) 6 N. Y. Supp. 126; *German Sav. Bank v. Friend*, 61 N. Y. Super. Ct. 400; *German Exch. Bank v. Excise Com'rs*, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 394.

But in the case last cited it was help-

against his vendor,¹ when a distinctly adverse and paramount title is asserted against the landlord, bailor, principal, creditor, execution creditor, depositor, or vendor. But the doctrine of privity seems to have been abrogated in England, partly by statute and partly by judicial decisions.² And in the United States, according to high authority, the code provisions for interpleader by order apparently do not recognize the rule,³ and its validity has also been regarded as doubtful in ordinary actions of interpleader.⁴

(2) *Landlord and Tenant*.—A tenant may file a bill of interpleader against his landlord and persons who claim rent in privity of contract or tenure with the landlord,⁵ as where the conflict is

that the bill could be maintained, as the claimant's title was derived from the depositor. For other like cases, see *Wells v. Miner*, 25 Fed. Rep. 533; *Wayne County Sav. Bank v. Airey*, 95 Mich. 520; *People's Sav. Bank v. Wilcox*, 15 R. I. 258; *Rahway Sav. Inst. v. Drake*, 25 N. J. Eq. 220; *City Bank v. Skelton*, 2 Blatchf. (U. S.) 14; *Alley v. Adams County, 76 Ill. 101*; *People's Sav. Bank v. Look*, 95 Mich. 7; *German Sav. Inst. v. Adae*, 8 Fed. Rep. 106; *Bruggemann v. Bank of Metropolis*, 1 N. Y. City Ct. 86; *Foss v. Denver First Nat. Bank*, 3 Fed. Rep. 185.

1. *Trigg v. Hitz*, 17 Abb. Pr. (N. Y. Supreme Ct.) 436.

2. *Attenborough v. London, etc., Dock Co.*, 3 C. P. Div. 450.

3. *Obiter*, *Crane v. McDonald*, 118 N. Y. 648. See also *Wells v. Miner*, 25 Fed. Rep. 533.

4. In *Crane v. McDonald*, 118 N. Y. 648, the court refrained from deciding whether the rule requiring privity between the claimants still exists in *New York*, but in discussing the subject the opinion of the court evidently leans towards the view that the severity of the rule ought to be mitigated.

5. *Snodgrass v. Butler*, 54 Miss. 45; *Glaser v. Priest*, 29 Mo. App. 1; *Seaman v. Wright*, 12 Abb. Pr. (N. Y. Supreme Ct.) 304; *Warnock v. Harlow*, 96 Cal. 298; *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525; *Birmingham v. Tuite*, 7 Ir. R. Eq. 221. See also *McCoy v. Bateman*, 8 Nev. 126; *McDevitt v. Sullivan*, 8 Cal. 592.

Upon the Death of the Lessor, who was a married woman, her husband claimed the rent as her devisee in fee, and her heirs claimed by descent. It was held that the tenant might well file a bill of interpleader against them if he was unable to determine which of the claim-

ants had the better right. *Badeau v. Tylee*, 1 Sandf. Ch. (N. Y.) 270.

Other Instances.—In *Hodges v. Smith*, 1 Cox 357, and *Angell v. Hadden*, 16 Ves. Jr. 203, such a bill was sustained by a tenant for the purpose of ascertaining to which of two different claimants he was to pay his rent.

In *Dungey v. Angove*, 2 Ves. Jr. 312, where the bill was dismissed, Lord Rosslyn said that a bill of interpleader would lie where the tenant may be liable to pay the rent to one of two different persons; and he puts a variety of cases where the tenant affirming the title, the tenure, and the contract by which the rent is payable, but where it is uncertain to whom it is to be paid, may file a bill of interpleader.

In *Doran v. Everitt*, 2 Ir. R. Eq. 28, a bill of interpleader was sustained in behalf of a tenant against the devisee of the landlord and an heir who claimed that the will was obtained by fraud and had instituted a suit to set it aside. And *Schell v. Lowe*, 75 Hun (N. Y.) 43, was a case where the facts were practically the same as those in the case last cited.

In *Jew v. Wood*, 3 Beav. 579, before the master of the rolls, and affirmed by the chancellor on appeal in 1 Craig & P. 185, 5 Jur. 954, a tenant after the death of his landlord paid rent to the landlord's executors and devisees for two or three years, when the heirs of the landlord gave notice to pay to them in the future. The tenant ceased to pay altogether, and the executors and devisees distrained. He then filed a bill of interpleader, and it was sustained.

In *Angell v. Hadden*, 15 Ves. Jr. 244, 16 Ves. Jr. 202, the tenant maintained a bill of interpleader in the case of annuities charged upon land.

between the latter and one claiming the rent as assignee thereof.¹ But if a stranger claims under title paramount, the suit cannot be maintained against him and the landlord, as there is an absence of privity between them.²

(3) *Bailor and Bailee*.—A bailee may file a bill of interpleader against his bailor and one who claims in privity of title with the latter,³ but he cannot maintain a bill to protect himself against the claim of his bailor and that of a third person who asserts an adverse title to that of the bailor.⁴

c. DEFENDANTS CLAIMING THE SAME FUND OR THING.—In order to maintain a bill of interpleader it is commonly declared to be essential that the several defendants who are asked to interplead are claiming the same debt, fund, or duty,⁵ and some of the

1. *Snodgrass v. Butler*, 54 Miss. 45; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515. See also *Fairbanks v. Belknap*, 135 Mass. 179.

In *Cowtan v. Williams*, 9 Ves. Jr. 107, Lord Eldon sustained a bill of interpleader by a lessee of tithes against the vicar and his assignees under an insolvent act of which the vicar had taken the benefit subsequent to the lease, both claiming the rent. In *Clarke v. Byne*, 13 Ves. Jr. 383, the same principle was affirmed and applied to claimants of the rent under voluntary transfers made by the lessor.

2. *Snodgrass v. Butler*, 54 Miss. 45, where the bill was dismissed on demurrer. *Dodd v. Bellows*, 29 N. J. Eq. 127; *Whitney v. Cowan*, 55 Miss. 645; *Fairbanks v. Belknap*, 135 Mass. 179; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; *Crane v. Burntrager*, 1 Ind. 165; *Standley v. Roberts*, 59 Fed. Rep. 836; *Seaman v. Wright*, 12 Abb. Pr. (N. Y. Supreme Ct.) 304; *White Water Valley Canal Co. v. Comegys*, 2 Ind. 469. See also *Dungey v. Angove*, 2 Ves. Jr. 310; *Johnson v. Atkinson*, 3 Anstr. 798; *Langston v. Boylston*, 2 Ves. Jr. 108; *Clarke v. Byne*, 13 Ves. Jr. 386; *Boston Third Nat. Bank v. Skillings*, etc., *Lumber Co.*, 132 Mass. 410, where the court said: "Where a tenant is liable to pay rent, and a third person claims it by a title independent of the landlord, the tenant cannot maintain a bill of interpleader. But if the third person claims under the landlord, so that the question arises from the act of the landlord, this creates a privity with the tenant, and the bill will lie."

In *Dodd v. Bellows*, 29 N. J. Eq. 127, the bill was filed by a tenant against his landlord and the purchaser of the

demised premises under proceedings at law in attachment. The conflicting claims set up in the bill were the claim of the landlord to rent under the lease and the claim of the purchaser under the proceedings in attachment to damages for the use and occupation of the premises by the plaintiff since the purchaser's title began. It was held that as the purchaser was not in privity of contract or tenure with the landlord, the bill could not be maintained.

3. *Foss v. Denver First Nat. Bank*, 3 Fed. Rep. 185; *City Bank v. Skelton*, 2 Blatchf. (U. S.) 14; *German Exch. Bank v. Excise Com'rs*, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 394; *McKay v. Draper*, 27 N. Y. 256.

4. *Bartlett v. Sultan*, 23 Fed. Rep. 257; *Pearson v. Cardon*, 2 Russ. & M. 606; *Kyle v. Mary Lee Coal, etc., Co.*, 112 Ala. 606; *Cromwell v. American L. & T. Co.*, 57 Hun (N. Y.) 149; *U. S. v. Viator*, 16 Abb. Pr. (N. Y. Supreme Ct.) 153; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Boston Third Nat. Bank v. Skillings*, etc., *Lumber Co.*, 132 Mass. 410.

One Who Has Become a Receiptor for Goods upon which the sheriff has made a valid levy cannot compel him to come into court and litigate with other parties respecting the title to the goods. *Cromwell v. American L. & T. Co.*, 57 Hun (N. Y.) 149.

5. *Alabama*.—*Hayes v. Johnson*, 4 Ala. 267; *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472; *Wilkinson v. Searcy*, 74 Ala. 243.

California.—*Pfister v. Wade*, 56 Cal. 43.

Illinois.—*Newhall v. Kastens*, 70 Ill. 156.

Indiana.—*Crane v. Burntrager*, 1

cases seem to insist that there must be an absolute identity in

Ind. 165; *White Water Valley Canal Co. v. Comegys*, 2 Ind. 469.

Kentucky. — *French v. Howard*, 3 Bibb (Ky.) 301.

Massachusetts. — *Boston Third Nat. Bank v. Skillings, etc., Lumber Co.*, 132 Mass. 410.

Michigan. — *Sprague v. Soule*, 35 Mich. 35; *Wallace v. Sortor*, 52 Mich. 159.

Mississippi. — *Blue v. Watson*, 59 Miss. 619.

Missouri. — *Hathaway v. Foy*, 40 Mo. 540.

Nevada. — *Orr Water Ditch Co. v. Larcombe*, 14 Nev. 53.

New Jersey. — *Leddel v. Starr*, 20 N. J. Eq. 274.

New York. — *Redfield v. Genesee County, Clarke Ch.* (N. Y.) 42; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Schell v. Lowe*, 75 Hun (N. Y.) 43; *Wenstrom Electric Co. v. Bloomer*, 85 Hun (N. Y.) 389; *Travelers' Ins. Co. v. Healey*, 86 Hun (N. Y.) 524; *Bassett v. Leslie*, (Supreme Ct.) 10 N. Y. Supp. 483; *Chamberlain v. Almy*, 3 Misc. Rep. (N. Y. City Ct.) 555; *Heyman v. Smadbeck*, 6 Misc. Rep. (N. Y. City Ct.) 527; *American Tel., etc., Co. v. Day*, 52 N. Y. Super. Ct. 128; *Crane v. McDonald*, 118 N. Y. 648; *Dorn v. Fox*, 61 N. Y. 264; *Bassett v. Leslie*, 123 N. Y. 396.

Rhode Island. — *Greene v. Mumford*, 4 R. I. 313.

West Virginia. — *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525.

United States. — *Wells v. Miner*, 25 Fed. Rep. 533.

England. — *Dungey v. Angove*, 2 Ves. Jr. 310.

Rent and Use and Occupation. — In *Crane v. Burntrager*, 1 Ind. 165, one claimed rent from the plaintiff under a contract, while the others claimed compensation for use and occupation. "The two claims are not for the same debt," said the court, "and hence the parties cannot be called upon to interplead." *Dodd v. Bellows*, 29 N. J. Eq. 127, is *quatuor pedibus* with the case last cited.

Several Leases. — And one who has taken an independent lease from each of two adverse claimants cannot compel them to interplead with regard to their titles and the validity of their leases. *Standley v. Roberts*, 59 Fed. Rep. 836.

Mortgage Notes and Purchase-Money Notes. — When mortgaged lands are sold and conveyed by the mortgagor by deed with covenants of warranty, the purchaser paying part of the price in cash and giving his note for the residue, if the note secured by the mortgage and the note for the unpaid purchase money are afterwards transferred to different persons the purchaser cannot maintain a bill of interpleader against them. The claims are not for the same fund or debt. *Wilkinson v. Searcy*, 74 Ala. 243.

Bill of Exchange and Purchase Money. — At the request of a vendee of goods a bank gave the vendor its acceptance for the purchase money, taking the vendee's acceptance for the same amount. The bank assigned the vendee's acceptance to a third person, who sued the vendee on it. In the meanwhile the bank had failed before its acceptance matured, and the vendor sued the vendee for the price of the goods. It was held that the vendee could not maintain an action of interpleader against the vendor and the assignee of the vendee's acceptance, because the conflicting claims were not for the same fund or debt. *Bassett v. Leslie*, (Supreme Ct.) 10 N. Y. Supp. 483, *affirmed* in 123 N. Y. 396.

Purchase Price and Value. — A vendee sued by his vendor for the price of goods, and by a third party in trover for their value, cannot maintain an interpleader suit, since the claims made against him are not identical, the one seeking to have the benefit of a contract, the other claiming the value of chattels which are the subject of it. *Slaney v. Sidney*, 14 M. & W. 800.

Identity of Choses in Action. — "When the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity, for no dispute can arise as to the identity of matter. But where the subject in dispute is a chose in action, which has no bodily existence, it becomes necessary to determine what constitutes identity. Where the claims made by the defendants are of different amounts, they never can be identical; but where they are the same in amount, that circumstance goes far to determine their identity. The amount, however, may not be sufficient of itself to determine the identity; for

the thing claimed.¹ But according to the weight of authority, it is not indispensable that the identity shall be absolute and perfect throughout.²

the amount may be the same and the debt may be different." Pfister v. Wade, 56 Cal. 43, *quoting* Shadwell v. C., in Glyn v. Duesbury, 11 Sim. 139.

Various Tax Assessments. — Where the same property is taxed in two different towns for different amounts, the same debt or duty is not due from the owner so as to enable him to maintain a bill of interpleader against the collectors of the several towns to compel them, as officers of the towns, to litigate with each other instead of with the plaintiff. *Greene v. Mumford*, 4 R. I. 313.

1. "It is an inflexible rule that the thing to which the parties make adverse claims must be one and the same thing. * * * Where the claims made by the defendants are of different amounts, they never can be identical." Pfister v. Wade, 56 Cal. 46.

Various Lien Claimants. — Where the owner of a building files a bill against contractors, subcontractors, and material men, to have their respective rights to the funds in his hands determined so that he may pay as the court shall direct, it is not strictly a bill of interpleader, for the reason that all do not claim the same fund. *Newhall v. Kastens*, 70 Ill. 156.

Original and Substituted Insurance Policies. — Where an insurance policy is erroneously canceled and a new policy substituted in favor of new beneficiaries, the several policies do not represent the same debt or duty so as to sustain a bill of interpleader by the company against both sets of beneficiaries. *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472.

2. *School Dist. No. 1 v. Weston*, 31 Mich. 85, *distinguished* in *Wallace v. Sortor*, 52 Mich. 159. In the case first cited the plaintiff (School District) was indebted to a contractor for building a schoolhouse. This contractor became insolvent, owing largely for material and labor for building the schoolhouse, and otherwise. The plaintiff agreed to pay, at a future time named, a certain sum to parties to whom the contractor had given orders on the plaintiff and parties having claims for material and labor *pro rata*. Before the money fell due some of these parties commenced proceedings to enforce their claims as mechanics' liens, others sued the con-

tractors and garnished the plaintiff, judgment creditors of the contractors filed creditors' bills and enjoined the plaintiff from paying over the fund, and still others were threatening suit. It was held to be no objection to a bill of interpleader by the plaintiff against the several claimants that each of the latter claimed only a part of the fund where all together claimed an amount far in excess of the whole fund. The court alluded to "the narrow and technical ground as to the identity of the several claims" as indicated in several cases cited, and said: "A much more liberal and reasonable rule has been established; and bills of interpleader have been frequently maintained where the several claimants, instead of claiming the whole fund or matter in dispute, have claimed different portions of the fund, when the aggregate of all the claims exceeded the full amount of the fund, and the complainant being, as in the present case, virtually a stakeholder, and unable to determine to whom or in what proportions the payments should be made. See *Suart v. Welch*, 4 Myl. & C. 320; *Angell v. Hadden*, 15 Ves. Jr. 244, 16 Ves. Jr. 203, 2 Meriv. 169; *Paris v. Gilham*, *Cooper* 56; *Sieveling v. Behrens*, 2 Myl. & C. 592; *Morley v. Thompson*, 3 Madd. Index Interpleader 564; * * * *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268; *City Bank v. Bangs*, 2 Paige (N. Y.) 570; *Gibson v. Goldthwaite*, 7 Ala. 282; *Peel v. Board of Metropolitan Police*, 5 Am. L. Reg. N. S. 98."

"As to the identity of the debt alleged to be in dispute, it is sufficient if the claimant's demand is one which must be satisfied out of the fund, even though he does not claim the whole." *Koenig v. New York L. Ins. Co.*, (Supreme Ct.) 14 N. Y. St. Rep. 250.

Original and Substituted Insurance Policies. — Where a mutual benefit association, having issued a certificate to a member in favor of his children, and upon the affidavit of the member that it had been lost or destroyed, issued a new one to him in favor of another person, who sued the association thereon after the member's death, and the children at the same time notified the association that they held the first

d. PLAINTIFF INDIFFERENT AND DISINTERESTED — Indifferent as Between Claimants. — It is of the essence of an interpleader suit that the plaintiff shall be and continue¹ entirely indifferent between the conflicting claims.² But the plaintiff is not precluded from filing a bill of interpleader by defending a suit brought against him by one of the claimants to the fund if the defense is not too far persisted in.³

Plaintiff Claiming No Interest in Subject-matter. — The bill will not lie where the plaintiff asserts an interest in any part of the fund or other thing in dispute.⁴ Interest or want of interest is not a

certificate and claimed the amount thereon, it was decided to be a proper case for interpleader at the instance of the association. There was the same debt to be litigated, for "while there may be two * * * written instruments outstanding, there was but one insurance effected, and but one set of premiums paid." *McCormick v. Supreme Council*, 6 N. Y. App. Div. 175. But see *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472, cited in the preceding note.

1. "Not only must he be disinterested when he brings his bill, but he must continue to be disinterested — his position must be one of 'continuous impartiality.'" *Wing v. Spaulding*, 64 Vt. 83.

2. *United States.* — *Groves v. Sentell*, 153 U. S. 465; *Wells v. Miner*, 25 Fed. Rep. 533.

Alabama. — *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472.

Maryland. — *Kerr v. Union Bank*, 18 Md. 396.

New York. — *Cromwell v. American L. & T. Co.*, 57 Hun (N. Y.) 149; *Dows v. Kidder*, 84 N. Y. 121; *Cady v. Potter*, 55 Barb. (N. Y.) 463; *Lawson v. Terminal Warehouse Co.*, 70 Hun (N. Y.) 281.

Vermont. — *Horton v. Baptist Church*, etc., 34 Vt. 309; *French v. Robrhard*, 50 Vt. 43; *Holmes v. Clark*, 46 Vt. 22.

"His relation to the controversy must be such that on interpleader decreed he can step out of the case altogether." *Wing v. Spaulding*, 64 Vt. 83.

"The assertion of perfect disinterestedness is an essential ingredient of such a bill." *Groves v. Sentell*, 153 U. S. 485.

Interested to Justify Erroneous Conduct. — A life insurance company, at the request of the assured, canceled his policies and issued them anew, changing

only the names of the beneficiaries. Both sets of beneficiaries claimed the money arising from the policies. It was held that the situation was caused by the erroneous conduct of the company, and that it had such an interest in the defeat of one set of claimants as to prevent it from maintaining a bill of interpleader. *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472.

3. *Curtis v. Williams*, 35 Ill. App. 518, where the record showed that the answer of the plaintiff in a suit in equity against him had been amended by leave of the court so as to eliminate from it all hostile or antagonistic assertions.

In *Jew v. Wood*, 3 Beav. 579, it was insisted that the plaintiff should not be allowed to file the bill because he had attempted to defend himself in an action at law, and had himself brought an action of replevin which was an attack on the right of one of the parties, but it was held that the defense set up at law ought not to preclude the plaintiff from relief on his interpleader in equity.

In *Jacobson v. Blackkurst*, 2 John & H. 486, where a plaintiff in an interpleader suit had previously set up a claim of lien and had pleaded it in an action at law, it was held no bar to the interpleader when it was shown that he had, concurrently with filing the bill, withdrawn the plea.

4. *Alabama.* — *Crass v. Memphis*, etc., R. Co., 96 Ala. 447; *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472.

Illinois. — *Cogswell v. Armstrong*, 77 Ill. 139; *Long v. Barker*, 85 Ill. 431; *Curtis v. Williams*, 35 Ill. App. 518.

Massachusetts. — *Ladd v. Chase*, 155 Mass. 417.

Michigan. — *Sprague v. Soule*, 35 Mich. 35.

Minnesota. — *St. Louis L. Ins. Co. v. Alliance Mut. L. Ins. Co.*, 23 Minn. 7.

mere formal matter, but goes to the very right of maintaining

Mississippi. — Hyman *v.* Cameron, 46 Miss. 725; Whitney *v.* Cowan, 55 Miss. 626; Blue *v.* Watson, 59 Miss. 619; Anderson *v.* Wilkinson, 10 Smed. & M. (Miss.) 601.

Missouri. — Hathaway *v.* Foy, 40 Mo. 540.

Nevada. — Orr Water Ditch Co. *v.* Larcombe, 14 Nev. 53.

New Jersey. — Wakeman *v.* Kingsland, 46 N. J. Eq. 113; Williams *v.* Matthews, 47 N. J. Eq. 196.

New York. — Baltimore, etc., *R. Co. v.* Arthur, 90 N. Y. 234; Bender *v.* Sherwood, 15 How. Pr. (N. Y. City Ct.) 258; Lawson *v.* Terminal Warehouse Co., 70 Hun (N. Y.) 281; Wenstrom Electric Co. *v.* Bloomer, 85 Hun (N. Y.) 389; Schell *v.* Lowe, 75 Hun (N. Y.) 43; Wakeman *v.* Dickey, 19 Abb. Pr. (N. Y. C. Pl.) 24; Beck *v.* Stephani, 9 How. Pr. (N. Y. Supreme Ct.) 193; Dows *v.* Kidder, 84 N. Y. 121. See also Bender *v.* Sherwood, 15 How. Pr. (N. Y. Supreme Ct.) 258.

Pennsylvania. — De Zouche *v.* Garrison, 140 Pa. St. 430; Dohnert's Appeal, 64 Pa. St. 314; Bridesburg Mfg. Co.'s Appeal, 106 Pa. St. 275.

Tennessee. — State Ins. Co. *v.* Gen-nett, 2 Tenn. Ch. 82.

Vermont. — Wing *v.* Spaulding, 64 Vt. 83.

United States. — Killian *v.* Ebbinghaus, 110 U. S. 568.

"Notwithstanding what was said * * * in Atkinson *v.* Manks, 1 Cow. (N. Y.) 704, we think it is well settled, both in England and in this country, that a bill of interpleader cannot be maintained by a plaintiff who has a personal interest in the subject of the controversy." Bridesburg Mfg. Co.'s Appeal, 106 Pa. St. 276.

"In an action of interpleader the amount due from a plaintiff cannot be the subject of controversy." New England Mut. L. Ins. Co. *v.* Odell, 50 Hun (N. Y.) 279; DuBois *v.* Union Dime Sav. Inst., 89 Hun (N. Y.) 382; Baltimore, etc., *R. Co. v.* Arthur, 90 N. Y. 234; Delaware, etc., *R. Co. v.* Corwith, 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 312; Van Zandt *v.* Van Zandt, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 448; Crass *v.* Memphis, etc., *R. Co.*, 96 Ala. 447.

But if the property in dispute is definite and certain in character, this is sufficient to support the bill. Its exact

value is wholly immaterial. Cady *v.* Potter, 55 Barb. (N. Y.) 463.

In Mitchell *v.* Hayne, 2 Sim. & S. 63, and Diplock *v.* Hammond, 2 Sm. & G. 141, where the proceedings disclosed a contest between the plaintiff and defendants as to the amount of the debt due by the plaintiff, it was held that the bill could not be maintained. Moore *v.* Usher, 7 Sim. 390, and Bignold *v.* Audland, 11 Sim. 23, are to the same effect.

Plaintiff Denying Liability for Interest. — In Bridesburg Mfg. Co.'s Appeal, 106 Pa. St. 275, the circumstance that the plaintiff denied in his bill and the defendants affirmed in their answer that he was liable for interest on the fund in dispute was held to be fatal to the bill.

Plaintiff Claiming Commissions. — An auctioneer could not maintain a bill of interpleader where he claimed to deduct his commissions from the amount of the purchaser's deposit in his hands which was the subject of controversy. Mitchell *v.* Hayne, 2 Sim. & S. 63.

Plaintiff Disputing Amount of Tax. — Where trust property was taxed in two different towns, the tax in one town being upwards of double what it was in the other, it was held that the trustee could not maintain a bill of interpleader against the respective tax collectors of those towns to compel them to litigate with each other the right to tax the same property, because the trustee was interested in the question at issue to the whole amount of the difference between the two taxes. Greene *v.* Mumford, 4 R. I. 313.

Attorney Claiming Lien for Services. — In Wakeman *v.* Dickey, 19 Abb. Pr. (N. Y. C. Pl.) 24, the plaintiffs, who were attorneys at law, had collected a demand and were sued by one person and threatened with suit by another, each claimant being insolvent and asserting sole title to the fund. The court would have sustained the plaintiff's bill of interpleader against these parties except for the fact that the plaintiffs claimed to retain out of the fund their compensation for services in collecting it, which was held alone sufficient to defeat their right to the relief asked. But see Gibson *v.* Goldthwaite, 7 Ala. 281, where it was expressly held to be no objection to a bill of interpleader by an attorney that he claimed

the bill,¹ and it is entirely immaterial at what stage of the controversy such interest in the litigation appears.²

e. **PLAINTIFF NOT A WRONGDOER.** — On the same principle the bill cannot be sustained where it appears that as to either of the defendants the plaintiff is a wrongdoer.³

to retain a part of the fund for his services in collecting it.

Lien of Carrier or Warehouseman. — In *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447, a common carrier filed a bill of interpleader in respect of property which had been transported by it, but was held precluded from maintaining it by reason of setting up a lien upon the property for unpaid freight charges. *Lawson v. Terminal Warehouse Co.*, 70 Hun (N. Y.) 281, is a similar case, where the plaintiff was a warehouseman.

Executor Interested as Residuary Legatee. — An executor who is also residuary legatee may maintain a bill for instructions as to the disposition of the funds in his hands, but his interest prevents him from maintaining a strict bill of interpleader for that purpose. *Ladd v. Chase*, 155 Mass. 417. *Blue v. Watson*, 59 Miss. 619, was precisely like the foregoing case, except that the plaintiff was an administrator and distributee.

Plaintiff's Interest Extinguished by Decree. — The consequence of the rule stated in the text is that if a plaintiff prosecutes an interpleader suit to a decree requiring the defendants to interplead, he effectually extinguishes any right which he might otherwise have asserted to the fund in litigation. *Supreme Council, etc. v. Bennett*, 47 N. J. Eq. 39.

Plaintiff's Interest Admitted or Not Disputed. — Perhaps the assertion of a charge, lien, or claim upon the very thing or fund itself which is admitted to be valid by both the defendants will not defeat the plaintiff's bill. *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447. In *Bartlett v. Sultan*, 23 Fed. Rep. 257, the plaintiff, a bailee, claimed a lien for storage which was held not to defeat his right to maintain a bill of interpleader so long as it appeared that neither of the defendants disputed the validity of his charge and lien.

But where the bill does not show that the defendants assent to the correctness of the charge or lien, and the prayer of the bill is that the decree for the delivery of the property to the defendant

entitled thereto be conditioned upon payment of plaintiff's claim, the bill is bad on demurrer. *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447.

Objection Cured by Amendment. — If one of the defendants claims a greater amount than is admitted to be due in the plaintiff's complaint, the objection that the plaintiff is interested to the amount of the excess may be removed by amending the complaint so as to admit the amount as claimed by the defendant. *Orient Ins. Co. v. Reed*, 81 Cal. 145.

Collateral Interest. — It is no objection to the bill that the plaintiff has an interest, in respect of other property which is not in the suit but might be litigated, that one party rather than the other should succeed in the interpleader in order to promote or establish his chance of success when a contest should arise as to such other property. Such interest may be termed an interest in the question, but not in the particular suit. *Oppenheim v. Wolf*, 3 Sandf. Ch. (N. Y.) 571.

1. *Wing v. Spaulding*, 64 Vt. 86.

2. *Bridesburg Mfg. Co.'s Appeal*, 106 Pa. St. 275.

3. *Crane v. Burntrager*, 1 Ind. 165; *Mount Holly, etc., Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Morristown First Nat. Bank v. Bininger*, 26 N. J. Eq. 345; *Shaw v. Coster*, 8 Paige (N. Y.) 339, *affirming* 2 Edw. Ch. (N. Y.) 405; *Fulton Bank v. Chase*, (Supreme Ct.) 6 N. Y. Supp. 126; *American Tel., etc., Co. v. Day*, 52 N. Y. Super. Ct. 128; *Dodge v. Lawson*, 22 Civ. Pro. Rep. (N. Y. Super. Ct.) 112; *Hatfield v. McWhorter*, 40 Ga. 269; *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472.

In *Salisbury Mills v. Townsend*, 109 Mass. 115, a bill of interpleader was maintained to determine to which of two parties claiming to hold shares of stock in the plaintiff corporation a dividend which was then due belonged, but not to determine the question whether the corporation was liable to one of the parties who claimed to have been defrauded of his stock. It was said that the dividend which was the specific fund in controversy was not

f. **PLAINTIFF NOT FAVORING OR COLLUDING WITH EITHER CLAIMANT.** — A plaintiff in a bill of interpleader must not have lent himself in any way to further the claim of either party to the fund in controversy, or to aid one in obtaining the possession

affected by the question whether the plaintiffs were so liable, but must be treated as a fund in which they had no beneficial interest, and which was claimed by the two defendants; but that the question whether the corporation by its own wrongful act had made itself liable to the owner of the stock could not be tried upon that bill. See also *Sohier v. Burr*, 127 Mass. 221.

Plaintiff Disobeying Injunction. — In *Morgan v. Fillmore*, 18 Abb. Pr. (Buffalo Super. Ct.) 217, an order had been granted in supplementary proceedings against a debtor to examine the plaintiff relative to his indebtedness to the debtor, and enjoining him from paying or arranging the indebtedness until further order from the court in the premises. The examination disclosed an indebtedness from the plaintiff, and subsequently he was induced by the debtor's fraudulent representations to give him a note for the amount due, which had since been transferred to another person who claimed the amount and, in an interpleader suit by the plaintiff, was joined as a defendant with a receiver of the original debtor's property who claimed the same sum under the order appointing him. It was held that there was no ground for an interpleader. "If the plaintiff had obeyed the injunction," said the court, "there would have been no necessity for this action," and inasmuch as the necessity had been occasioned by the plaintiff's own wrongful act the court would not interfere.

A Plaintiff Liable for Conversion cannot interplead a party making the charge with others claiming adversely to him, under whom the plaintiff acted. *American Tel., etc., Co. v. Day*, 52 N. Y. Super. Ct. 128.

In *U. S. v. Vietor*, 16 Abb. Pr. (N. Y. Supreme Ct.) 153, the real plaintiff had been sued by one of the defendants for detaining certain negotiable bonds which the plaintiff had received from him for inspection. It was alleged that the state of Texas also claimed the bonds, but as the plaintiff had become a wrongdoer by declining to return them to the other defendant when demanded, he was unable to maintain the suit.

A Sheriff Who Has Committed a Trespas by levying an execution upon the property of the wrong person cannot maintain a bill of interpleader against the owner and the execution creditor. *Quinn v. Green*, 1 Ired. Eq. (36 N. Car.) 229, where the court said: "Slingsby v. Boulton, 1 Ves. & B. 334, was a bill of interpleader by a sheriff, similar to the present, and on the motion for an injunction Lord Eldon inquired for an instance of such a bill by a sheriff, and none being cited, he declared the sheriff to be concluded from stating a case of interpleader, because in such a bill the plaintiff always admits a title against himself in all the defendants. He said, a person cannot file such a bill who is obliged to state that as to some of the defendants the plaintiff is a wrongdoer."

In *Morristown First Nat. Bank v. Bininger*, 26 N. J. Eq. 345, the court said: "A sheriff, where conflicting claims are made to property seized by him under execution, is never permitted to maintain an interpleader; first, because there can be no privity between him and the person claiming adversely to the judgment debtor, and secondly, because he owes no duty to such person, but if his claim is true, the sheriff, as to him, is a trespasser." *Shaw v. Coster*, 8 Paige (N. Y.) 339, affirming 2 Edw. Ch. (N. Y.) 405, supports the same doctrine and is the leading case in this country upon the subject. The court distinguishes *Nash v. Smith*, 6 Conn. 421, where a constable's bill of interpleader was sustained, by saying: "In that case neither of the defendants in the bill of interpleader claimed title to the property adversely to Silliman, against whom the process in the hands of the constable was issued. The constable therefore had no interest adverse to the claim of either party, as each had put into his hands process against the same property; the one claiming it as the individual property of Silliman, and the other as the partnership property of Silliman and Cook."

See, for instances of bills of interpleader properly filed by sheriffs, *supra*, II. 3. *b. Privity of Title Between Claimants.*

thereof to the exclusion of the other.¹ An indemnity from either claimant destroys the character of impartiality and entitles the other to a dismissal of the bill.² Where a defendant's answer is filed by the same solicitor who drew the bill, it creates a strong presumption of collusion.³

g. PLAINTIFF NOT LIABLE TO BOTH CLAIMANTS. — The office of the bill is not to protect a party against a double liability, but against a double vexation in respect of one liability.⁴

h. NO INDEPENDENT LIABILITY INCURRED TO ONE CLAIMANT — **General Rule.** — Interpleader will not lie if the plaintiff has incurred some personal obligation to either of the defendants, independent of the title or the right to possession, because such defendant would in that event have a claim against him which could not be settled in a litigation with the other defendant.⁵

1. *Marvin v. Ellwood*, 11 Paige (N. Y.) 374, where the court said: "A person who is in possession of a fund which is claimed by two different parties, standing in the same relation to him in respect to such fund, may indeed receive an indemnity which is tendered to him by either, and may pay over the fund to the person giving such indemnity. But upon doing so his right to file a bill of interpleader is, of course, determined. And a simultaneous offer to both claimants, to pay over the fund to either who will fully indemnify him and save the expense of filing an interpleading bill, would not be considered collusion in case both neglected or refused to give him such indemnity. If both consented to give such indemnity, he could safely receive it from either. For the giving of the indemnity would relieve him from the necessity of filing a bill of interpleader, and the question of collusion would never arise."

2. *Statham v. Hall, T. & R.* 30. And so, it seems, does a promise to pay the debt to either party. See opinion in *Crawshay v. Thornton*, 2 Myl. & C. 19.

In *Michener v. Lloyd*, 16 N. J. Eq. 38, where the bill was dismissed on the ground of collusion, the court said that the plaintiffs "are, as the evidence shows, indemnified by * * * one of the contesting claimants to the fund. The bill is obviously filed, if not at his instance, yet in his interest and for his benefit. His answer is a mere echo to the charges and allegations of the bill."

3. *Quinn v. Patton*, 2 Ired. Eq. (37 N. Car.) 48. See also, for cases establishing collusion, *Kerr v. Union Bank*,

18 Md. 396; *Mount Holly, etc., Turnpike Co. v. Ferree*, 17 N. J. Eq. 117. And as to necessity of affidavit of no collusion, see *infra*, II. 5. *d. Affidavit Denying Collusion.*

For Essential Averments and objections at the hearing on the ground of collusion, see *infra*, II. 8. *a. Objections at the Hearing.*

4. "If the circumstances of the case show that the plaintiff is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleading suit that the plaintiff shall be liable to one only of the claimants, and the relief which the court affords him is against the vexation of two proceedings on a matter which may be settled in a single suit." *Crawford v. Fisher*, 1 Hare 436, Cond. Ch. R. 441, quoted in *Greene v. Mumford*, 4 R. I. 313.

The same principle was recognized in *McCormick v. Supreme Council*, 6 N. Y. App. Div. 175, where it was held, however, under the facts of the case, that there was not a double liability.

Where it appeared that a trust fund created by will was lawfully taxed in one town for the amount thereof out of which issued the income by way of annuities payable, according to the direction of the will, to residents of that town, and also lawfully taxed in another town for the amount of the fund the income of which was payable to residents of that town, it was held that the trustee could not maintain an interpleader bill against the tax collectors of both towns. *Greene v. Mumford*, 4 R. I. 313.

5. *Alabama.* — *Kyle v. Mary Lee Coal, etc., Co.*, 112 Ala. 606.

Nor does the fact that the plaintiff contends that his personal agreement was obtained by the fraud or misrepresentation of the claimant make a case of exception to this rule.¹

i. PLAINTIFF IN POSSESSION OF THE FUND. — A bill of interpleader can be filed only by one in possession or control of the fund or thing in dispute.² If he has paid or delivered it to one

California. — Pfister v. Wade, 56 Cal. 43.

Illinois. — Ryan v. Lamson, 44 Ill. App. 204; Mitchell v. Northwestern Mfg., etc., Co., 26 Ill. App. 295.

Massachusetts. — National L. Ins. Co. v. Pingrey, 141 Mass. 411.

Michigan. — Sprague v. Soule, 35 Mich. 35.

Minnesota. — Cullen v. Dawson, 24 Minn. 66.

Mississippi. — Whitney v. Cowan, 55 Miss. 626.

New York. — Cady v. Potter, 55 Barb. (N. Y.) 463; Cromwell v. American L. & T. Co., 57 Hun (N. Y.) 149; Oppenheim v. Wolf, 3 Sandf. Ch. (N. Y.) 571.

Pennsylvania. — Bechtel v. Sheaffer, 117 Pa. St. 555.

Vermont. — French v. Robrchar, 50 Vt. 43; Holmes v. Clark, 46 Vt. 22.

United States. — Wells v. Miner, 25 Fed. Rep. 533; Standley v. Roberts, 59 Fed. Rep. 836.

England. — Crawshay v. Thornton, 2 Myl. & C. 1.

Compare Nash v. Smith, 6 Conn. 421.

Waiver of Objection. — But this objection applies rather as against the plaintiff than between the defendants. If urged and established by either of the defendants it will produce a dismissal of the bill, but it loses much of its force where the defendants, without objection, consent to interplead and permit a decree discharging the plaintiff. Whitney v. Cowan, 55 Miss. 626.

Illustrations. — A deposited a quantity of iron with B & Co., who were wharfingers, and afterwards directed them to deliver it to C. The latter applied to B & Co. to know the particulars of the iron held by them on his account; and B & Co. then wrote a letter to C, saying that in compliance with his request they annexed a note of the landing-weights of the iron transferred into his name by, and now held by, them (B & Co.) at his (C's) disposal. B & Co. subsequently received notice from D that the iron belonged to him, and that it had been deposited with A as an agent for sale, and that he had, without

authority, pledged it to C. B & Co. then filed a bill of interpleader against C and D. It was held on demurrer that after B & Co.'s letter to C they could not maintain a bill of interpleader against him. Lord Cottenham remarked that "if what has taken place amounts to an independent contract [between the wharfingers and the assignee of the original depositor], it is one which cannot be decided between the parties in this suit." Crawshay v. Thornton, 2 Myl. & C. 1. The case is cited with approval in Pfister v. Wade, 56 Cal. 47, where an interpleader complaint was dismissed on the ground of an independent liability incurred by the plaintiff to one of the defendants.

A garnishee who has answered the process by admitting indebtedness and suffered judgment cannot maintain a bill of interpleader in respect of the debt, even though he may have thus incurred liability under a mistake. Mitchell v. Northwestern Mfg., etc., Co., 26 Ill. App. 295.

Liability Must Be Independent. — In Wells v. Miner, 25 Fed. Rep. 533, a party deposited a check in a bank and took a certificate of deposit payable to himself or order on return of the certificate properly indorsed. The indorsee of this certificate before maturity claimed the money, and the maker of the check asserted title to the certificate by reason of the fact that the check was obtained from him by fraud. It was held that the bank was a mere stakeholder, and under no liability independent of the certificate, and that it might properly cause the claimants to interplead.

Promise Without Consideration. — In Drake v. Woodford, (Supreme Ct.) 11 N. Y. Supp. 512, the court held that there was a proper case for interpleader although the plaintiff had promised one of the defendants to pay the fund to him, it appearing that the promise was without consideration.

1. Standley v. Roberts, 59 Fed. Rep. 836.

2. Mount Holly, etc., Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Martin v.

of the claimants, his right to file a bill of interpleader is thereby determined.¹

j. PLAINTIFF IGNORANT OF CLAIMANTS' RIGHTS — CLAIMANTS' RIGHTS UNCERTAIN. — A bill of interpleader will lie only where the plaintiff standing in the position of a stakeholder is ignorant of the rights of the different claimants,² or where there is some doubt, at least, as to which of them is entitled to the fund, so that he cannot safely pay it to either.³

Maberry, 1 Dev. Eq. (16 N. Car.) 169, where the court said: "In such bills the equity of the plaintiff is to be indemnified in the delivery of property, of which he is in possession, and to which he claims no right. The plaintiff not having the possession is unable to do the only act for which an indemnity is given." See also, as illustrating the same principle, Sprague v. West, 127 Mass. 471; Hechmer v. Gilligan, 28 W. Va. 750; Hathaway v. Foy, 40 Mo. 540. The rule seems to have been ignored in Webster v. Hall, 60 N. H. 7.

Bill by Administrator Against Distributees in Possession. — Where an administrator has never reduced the assets into possession, but they are in possession of some of the distributees who claim adversely to him, a bill by him against the distributees, praying that they may interplead, is improper. Martin v. Maberry, 1 Dev. Eq. (16 N. Car.) 169.

1. Marvin v. Ellwood, 11 Paige (N. Y.) 365. *Contra*, in Nash v. Smith, 6 Conn. 421, it was held that if the plaintiff has paid over the money to one of the defendants under a claim of right, this will not preclude him from sustaining the bill.

2. A bill to compel parties claiming a particular fund to interplead and settle the question of right to the fund between themselves will not lie where the plaintiff is fully advised of the grounds of their claims, as well as the nature and extent of his liability to each, for the reason, as stated in Morgan v. Fillmore, 18 Abb. Pr. (Buffalo Super. Ct.) 217, that "being thus in possession of the requisite knowledge, it devolved upon himself to determine to which of the claimants he would pay." Trigg v. Hitz, 17 Abb. Pr. (N. Y. Supreme Ct.) 436; Shaw v. Coster, 8 Paige (N. Y.) 339; Delaware, etc., R. Co. v. Corwith, 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 312; Mohawk, etc., R. Co. v. Clute, 4 Paige (N. Y.) 384;

Pfister v. Wade, 56 Cal. 43; Parker v. Barker, 42 N. H. 78; Hechmer v. Gilligan, 28 W. Va. 750.

In Pfister v. Wade, 56 Cal. 51, it was held that under the facts of the case the plaintiff could have no such reasonable doubt as to the law arising therefrom as to justify a resort to a bill of interpleader.

Thus a vendee of goods cannot allege ignorance of a fact about which the law does not permit him to be ignorant, viz., the right of the vendor to recover the purchase money, in order to give apparent jurisdiction in an action of interpleader. Trigg v. Hitz, 17 Abb. Pr. (N. Y. Supreme Ct.) 436.

3. *Alabama.* — Crass v. Memphis, etc., R. Co., 96 Ala. 447.

California. — Pfister v. Wade, 56 Cal. 51.

Georgia. — National Bank v. Augusta Cotton, etc., Co., 99 Ga. 286.

New Hampshire. — Parker v. Barker, 42 N. H. 78.

New Jersey. — Blair v. Porter, 13 N. J. Eq. 267; Briant v. Reed, 14 N. J. Eq. 271; Dodd v. Bellows, 29 N. J. Eq. 127.

New York. — Dry Dock M. E. Mission Church v. Carr, 2 Barb. (N. Y.) 60; Sulzbacher v. National Shoe, etc., Bank, 52 N. Y. Super. Ct. 269; Baltimore, etc., R. Co. v. Arthur, 90 N. Y. 234; Bassett v. Leslie, 123 N. Y. 396; Mohawk, etc., R. Co. v. Clute, 4 Paige (N. Y.) 384; Marvin v. Ellwood, 11 Paige (N. Y.) 365; Nassau Bank v. Yandes, 44 Hun (N. Y.) 59; Mars v. Albany Sav. Bank, 64 Hun (N. Y.) 424.

Rhode Island. — Koppinger v. O'Donnell, 16 R. I. 417.

Reasonable Doubt — Conflicting Decisions Creating Doubt. — According to the old rule, the stakeholder was entitled to be removed beyond the shadow of risk in paying over the money where antagonists' rights were asserted. That view was sustained by the opinion of the court in Atkinson v. Mauks, 1 Cow. (N. Y.) 705, where the court said in substance that where a party had for-

k. PLAINTIFF WITHOUT LACHES — INTERPLEADER AFTER JUDGMENT. — It is essential that the plaintiff shall make known his condition as a stakeholder by bringing suit within a reasonable time after being advised of the double claim against the fund.¹

After Judgment at Law. — It is partly upon the foregoing principle that, in a bill of interpleader, the right of either defendant to the fund should not have been previously determined by a judgment at law against the plaintiff.²

bidden a stakeholder to pay over money to another, and threatened him with a suit, the stakeholder was not bound to exercise any judgment upon the subject. But "the rule now is that a *reasonable* doubt must exist in order to justify the bringing of an action of interpleader, and that any doubt is not sufficient, as was said in the case" last cited. *Per* Van Brunt, P. J., in *Nassau Bank v. Yandes*, 44 Hun (N. Y.) 59.

In *Dorn v. Fox*, 61 N. Y. 264, the court said: "The rule requiring that in actions of interpleader the plaintiffs should be in doubt as to which of the claimants is in the right must be construed in a reasonable manner. It of course excludes all cases where the rights of parties are clearly settled. On the other hand, so long as a principle is still under discussion, * * * it would seem fair to hold that there was sufficient doubt and hazard to justify the protection which is afforded by the beneficent action of interpleader." The concluding sentence of the foregoing quotation was cited with approval in *Crane v. McDonald*, 118 N. Y. 648, where conflicting decisions of the courts were held to create a doubt sufficient to sustain an action of interpleader, the court declaring furthermore that "if the doubt rests upon a question of fact that is at all serious, it is obvious that the debtor cannot safely decide it for himself, because it might be decided the other way upon an actual trial."

It cannot be contended that one of the defendants was so clearly entitled to the fund that the plaintiff could not, in legal contemplation, be in doubt, where the trial court decided against the claim of the defendant, even though on appeal that decision was reversed. *Mercantile Safe Deposit Co. v. Huntington*, 89 Hun (N. Y.) 465. See, for other cases of reasonable doubt, *Fitch v. Brower*, 42 N. J. Eq. 300; *Schell v. Lowe*, 75 Hun (N. Y.) 43.

1. *Dodds v. Gregory*, 61 Miss. 351. See also *McDevitt v. Sullivan*, 8 Cal. 592; *Cheever v. Hodgson*, 9 Mo. App. 565; *Union Bank v. Kerr*, 2 Md. Ch. 460.

2. *Cheever v. Hodgson*, 9 Mo. App. 565; *Union Bank v. Kerr*, 2 Md. Ch. 460; *French v. Robrhard*, 50 Vt. 43; *Holmes v. Clark*, 46 Vt. 22; *Mitchel v. North-western Mfg., etc., Co.*, 26 Ill. App. 295; *Carroll v. Parkes*, 1 Baxt. (Tenn.) 269; *Dodds v. Gregory*, 61 Miss. 351; *McKinney v. Kuhn*, 59 Miss. 186, where the court said: "It is well settled, both by reason and authority, that one who asks the interposition of a court of equity to compel others, claiming property in his hands, to interplead, must do so before putting them to the test of trials at law. *Yarborough v. Thompson*, 3 Smed. & M. (Miss.) 291; *Haseltine v. Brickey*, 16 Gratt. (Va.) 116; *Cornish v. Tanner*, 1 Y. & J. 333. The remedy by interpleader is afforded to protect the party from the annoyance and hazard of two or more actions touching the same property or demand; but one who, with a knowledge of all the facts, neglects to avail himself of the relief, or elects to take the chances for success in the actions at law, ought to submit to the consequences of defeat. To permit an unsuccessful defendant to compel the successful plaintiffs to interplead, is to increase instead of to diminish the number of suits; to put upon the shoulders of others the burden which he asks may be taken from his own." See, for an exception to the rule, *Lozier v. Van Saun*, 3 N. J. Eq. 325.

After Decree of Surrogate Court. — Where an executor allows a decree of the Surrogate Court to be entered, directing the payment of a fund in the executor's hands and awarding execution, without advising the court of the fact that there are adverse claims, so that they may be adjusted by a proper order, he cannot maintain a bill of

4. Parties to the Bill.—The Plaintiff is, of course, the debtor or person in possession of the fund or other thing in dispute.¹

The Defendants are the parties who prefer the claims and are supposed to have the capacity of enforcing them.²

5. Frame of the Bill—*a.* THE ESSENTIAL AVERTMENTS. — The bill must show that there are proper persons *in esse* capable of interpleading and setting up opposite claims.³ The bill must

interpleader against the claimants. *Baker v. Brown*, 64 Hun (N. Y.) 627.

Fraud or Accident.—But any fact which clearly proves it to be against conscience to execute a judgment at law, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented from doing so by fraud or accident unmixed with fault on his part, may authorize a court of equity to interfere. *Cheever v. Hodgson*, 9 Mo. App. 565.

1. Bill by Officer of Corporation.—The treasurer of an incorporated benefit association cannot file a bill of interpleader to have the several claimants of a death benefit set up their respective claims; in such a case the bill can be filed only by the corporation itself. *Hechmer v. Gilligan*, 28 W. Va. 750.

Bill by Attorney of Plaintiff.—In *Provident Sav. Ins. v. White*, 115 Mass. 112, it appeared that the bill was not filed by the plaintiff corporation for its protection, but by its attorney of record, at the expense and for the benefit of one of the two persons claiming the fund after the other had recovered judgment in an action at law brought by him against this plaintiff, in defense of which the same attorney had pleaded the right of the first. The court held that to maintain a bill of interpleader under such circumstances would contravene the general principles of equity, as well as the twenty-seventh rule in chancery in that court. 104 Mass. 573.

2. Conley v. Alabama Gold L. Ins. Co., 67 Ala. 472; *McDevitt v. Sullivan*, 8 Cal. 592.

One Who Makes No Claim and has no interest is not a proper defendant. *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515.

Persons Without Direct Interest.—In a bill of interpleader by the maker of a note to determine whether he shall pay it to one or the other of the defendants, a person from whom one of the defendants purchased the note is not a

necessary party, although the other defendant claims that he had no title to the note which was transferred. *Gill v. Cook*, 42 Vt. 140.

Where there is a fund due to an insolvent bank, and the holder, a bank, brings an interpleader suit against the respective claimants, the proper defendants to such suit are the receiver of the insolvent bank, the attaching creditors, and the sheriff who has attached for them, but not the bill-holders or check-holders of such bank, because these latter have no lien upon the fund either as assignees in equity or otherwise. *Finlay v. American Exch. Bank*, 11 How. Pr. (N. Y. Supreme Ct.) 468.

On Bill by Mortgagor.—A mortgagor brought a bill of interpleader alleging that one of the defendants demanded the money under a power of attorney executed by the mortgagee, and that the mortgagee was insane when she executed the power of attorney, for which reason the other defendant, the mortgagee's daughter, had forbidden payment of the money to the attorney. The court held that even if the bill could be maintained at all, which point was left undecided, the mortgagee herself was a necessary party. *Blake v. Garwood*, 42 N. J. Eq. 276.

Where an Injunction Is Prayed for, one who would not be a necessary party for the purpose of interpleading may be a proper party in order to make an order of injunction effective. *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525.

Objections on Appeal.—The defendants to a bill of interpleader will not be permitted to object on appeal that a third person was not made a defendant also, where the want of such a party could not in any manner affect their rights. *Gibson v. Goldthwaite*, 7 Ala. 281.

3. Where a bill was brought founded on a rumor that there was issue by a person, which issue was suggested to be entitled to the estate in question, and praying that if there was any such

contain such averments in respect to the possession of the plaintiff as to show that he is entitled to maintain the bill.¹ It should state distinctly the nature and character of the conflicting claims;²

person he might interplead with the defendant, the bill was held to be of novel impression and fatally defective. *Metcalf v. Hervey*, 1 Ves. 248.

1. *Stone v. Reed*, 152 Mass. 179, an action by a treasurer of a corporation against the corporators and a creditor of the corporation to compel them to interplead as to the ownership of certain bonds. In sustaining a demurrer the court said: "Assuming that if he held the bonds as a stakeholder he would have a right to require the defendants to interplead, as in *Cobb v. Rice*, 130 Mass. 231, the bill must show what his relation to the bonds is, and that it is such as to entitle him to the relief. The only direct allegation in that respect is 'that said bonds came into the hands of this plaintiff.' This is consistent with a tortious possession, or with a possession as bailee or agent of one of the parties defendant. The absence of a direct allegation of the character of the plaintiff's possession of the bonds might be cured if there were allegations in the bill which afforded an inference that his possession was that of a stakeholder, or such as to entitle him to maintain a bill of interpleader. Upon reference to the allegations of the bill, it appears that no inference can be drawn from them in regard to the character of the plaintiff's possession of the bonds, unless one which shows that he has no title to the relief sought."

2. *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472; *Snodgrass v. Butler*, 54 Miss. 45; *McEwen v. Troost*, 1 Sneed (Tenn.) 186; *National Bank v. Augusta Cotton, etc., Co.*, 99 Ga. 286. See also *Warnock v. Harlow*, 96 Cal. 298; *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525.

Specific Statement. — The claims of the defendants should be specifically set forth so that they may appear to be of the same nature and character, and the fit subject of a bill of interpleader. *Story*, Eq. Pl., § 293; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384; *Varrian v. Berrien*, 42 N. J. Eq. 1, where the bill was dismissed on motion because, although it stated that one of the defendants claimed an interest in the fund, it did not state what that interest was, nor how it was obtained, whether by assignment or otherwise.

Must Show a Claim. — The bill must show that each of the defendants made a claim to the debt or duty concerning which the plaintiff desires to be relieved. *Blue v. Watson*, 59 Miss. 619; *Starling v. Brown*, 7 Bush (Ky.) 164.

Averment on Information. — An allegation that the plaintiff is "informed" of a certain claim of right by one of the defendants, but that the plaintiff "is uncertain as to this point," is fatally defective. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82.

Privity of Claims. — The bill must show that all the adverse titles or claims to the thing or debt are dependent on or derived from a common source. *Kyle v. Mary Lee Coal, etc., Co.*, 112 Ala. 606.

Degree of Certainty. — The plaintiff "only sets out the claim as exhibited or made to him, and cannot be supposed to do it with as much accuracy as the claimants themselves would do. It is enough for him to satisfy the court that there are opposing claims, against which he is in equity entitled to protection until they are settled, so that he can pay with safety." *Lozier v. Van Saun*, 3 N. J. Eq. 329.

Remedy for Uncertainty in Allegations. — *Under the Codes*, if the allegation in the complaint as to the nature of the title and claim of a defendant is not sufficiently full and clear, the remedy for the defect is by a motion to make the complaint more definite and certain by amendment. *Baltimore, etc., R. Co. v. Arthur*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 147; *Van Zandt v. Van Zandt*, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 448. See also article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246. Demurrer seems not to be the proper remedy. *Van Zandt v. Van Zandt*, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 448.

Too Much Precision in Allegations. — In *Shaw v. Coster*, 8 Paige (N. Y.) 339, Chancellor Walworth says that if a bill states a case which shows that one defendant is entitled to the duty, and the other is not, both may demur; the one because the plaintiff has a defense at law against him, the other because the plaintiff has no legal or equitable defense against him. Therefore he

and admit, or at least not deny, title in either of the claimants;¹ and show that the plaintiff is ignorant of the rights of the parties who are called upon to interplead,² or that there is some doubt, in point of law or fact, to which claimant the debt or duty belongs,³ and that the plaintiff disclaims any personal interest in the thing in controversy⁴ by stating his own rights so as to negative any

warns plaintiffs in bills of this kind of the danger of stating affirmatively the facts on which the legal rights of the defendants depend, since the foundation of the relief asked is that the plaintiff, from ignorance of the rights and from doubts of the facts, is unable to ascertain to which of the defendants he is to account. To the same point see *Briant v. Reed*, 14 N. J. Eq. 271. And in *Barker v. Swain*, 4 Jones Eq. (57 N. Car.) 220, there were affirmative statements in the bill sufficient to show that in truth neither of the defendants had a right to the fund, and the bill was dismissed on demurrer. See also *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384; *Blake v. Garwood*, 42 N. J. Eq. 276. In *Bell v. Hunt*, 3 Barb. Ch. (N. Y.) 391, the plaintiff's counsel was evidently cognizant of the rule of pleading in this behalf, and his bill was so framed as to withstand a demurrer.

1. *Killian v. Ebbinghaus*, 110 U. S. 568; *Hellman v. Schneider*, 75 Ill. 422; *McHenry v. Hazard*, 45 Barb. (N. Y.) 657; *Illingworth v. Rowe*, 52 N. J. Eq. 360; *Orient Ins. Co. v. Reed*, 81 Cal. 145; *East India Co. v. Edwards*, 18 Ves. Jr. 377.

2. *Parker v. Barker*, 42 N. H. 78; *Shaw v. Coster*, 8 Paige (N. Y.) 339; *Morgan v. Fillmore*, 18 Abb. Pr. (Buffalo Super. Ct.) 217; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384; *Pfister v. Wade*, 56 Cal. 43; *Illingworth v. Rowe*, 52 N. J. Eq. 360.

The Mere Allegation of Ignorance is of no avail where the facts stated in the complaint make it entirely clear that the plaintiff knows he is legally liable to one of the defendants. *Trigg v. Hitz*, 17 Abb. Pr. (N. Y. Supreme Ct.) 436.

But the allegation is sufficient where it does not appear expressly that the right of one party or the other making the claim is wholly unfounded. *Badeau v. Tylee*, 1 Sandf. Ch. (N. Y.) 270.

3. *Parker v. Barker*, 42 N. H. 78; *Briant v. Reed*, 14 N. J. Eq. 271; *Illingworth v. Rowe*, 52 N. J. Eq. 360; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384; *Blake v. Garwood*, 42 N. J. Eq. 276; *Bell v. Hunt*, 3 Barb. Ch. (N. Y.) 391; *East India Co. v. Edwards*, 18 Ves. Jr. 377; *Orient Ins. Co. v. Reed*, 81 Cal. 145; *Illingworth v. Rowe*, 52 N. J. Eq. 360; *McHenry v. Hazard*, 45 Barb. (N. Y.) 657; *Hellman v. Schneider*, 75 Ill. 422; *Killian v. Ebbinghaus*, 110 U. S. 568.

hawk, etc., R. Co. v. Clute, 4 Paige (N. Y.) 384; *Redfield v. Genesee County*, Clarke Ch. (N. Y.) 42; *Baltimore, etc., R. Co. v. Arthur*, 90 N. Y. 234; *Shaw v. Coster*, 8 Paige (N. Y.) 339; *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447; *National Bank v. Augusta Cotton, etc., Co.*, 99 Ga. 286; *Koppinger v. O'Donnell*, 16 R. I. 417.

The complaint is demurrable if it appears from the averments therein that one of the claimants is clearly entitled to the debt or thing claimed to the exclusion of the other. *Bassett v. Leslie*, 123 N. Y. 396. Or that the plaintiff is legally liable to both claimants. *Greene v. Mumford*, 4 R. I. 313.

4. *Alabama*. — *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472; *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447.

California. — *Pfister v. Wade*, 56 Cal. 43.

Illinois. — *Curtis v. Williams*, 35 Ill. App. 518.

Indiana. — *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515.

Mississippi. — *Anderson v. Wilkinson*, 10 Smed. & M. (Miss.) 601; *Blue v. Watson*, 59 Miss. 619; *Hyman v. Cameron*, 46 Miss. 727.

New Jersey. — *Williams v. Matthews*, 47 N. J. Eq. 196; *Illingworth v. Rowe*, 52 N. J. Eq. 360.

New York. — *Redfield v. Genesee County*, Clarke Ch. (N. Y.) 42; *Shaw v. Coster*, 8 Paige (N. Y.) 339.

Pennsylvania. — *Bridesburg Mfg. Co.'s Appeal*, 106 Pa. St. 275.

Tennessee. — *McEwen v. Troost*, 1 Sneed (Tenn.) 186.

Vermont. — *Wing v. Spaulding*, 64 Vt. 83; *Horton v. Baptist Church, etc.*, 34 Vt. 309.

United States. — *Killian v. Ebbinghaus*, 110 U. S. 568.

Compare *Consociated Presb. Soc. v. Staples*, 23 Conn. 544.

The bill should show that plaintiff is indifferent between the claimants. *Killian v. Ebbinghaus*, 110 U. S. 568; *Cromwell v. American L. & T. Co.*, 57 Hun (N. Y.) 149; *Kyle v. Mary Lee Coal, etc., Co.*, 112 Ala. 606.

such interest; ¹ and lastly the bill must contain an offer to bring the money or thing into court. ²

6. PRAYER — That Defendants Interplead. — The prayer of the bill should be that the defendants may set forth their several titles, and may interplead and settle and adjust their demands between themselves. ³

Prayer for Injunction. — The bill also generally prays an injunction to restrain the proceedings of the claimants, or either of them, at law until the right is determined, ⁴ in which case there must be a

1. *Williams v. Matthews*, 47 N. J. Eq. 196; *Story Eq. Pl.*, § 292.

Sufficiency of Averment. — There need not be a direct affirmative and positive assertion in the bill that the plaintiff has no interest in the subject-matter of litigation. It is sufficient that he states his own position in such a way as necessarily to negative any interest of his own. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82.

Summary Statement of Essential Averments. — "The nature of the allegations in every bill of interpleader are: 1st, that two or more persons have preferred a claim against the complainant; 2d, that they claim the same thing; 3d, that the complainant has no beneficial interest in the thing claimed; and 4th, that he cannot determine, without hazard to himself, to which of the defendants the thing of right belongs. The complainant must also bring or offer to bring the money or thing claimed into court, so that he cannot be benefited by delay in payment." *Redfield v. Genesee County*, *Clarke Ch.* (N. Y.) 42; *Atkinson v. Manks*, 1 *Cow.* (N. Y.) 703; *Crane v. McDonald*, 118 N. Y. 648; *Bassett v. Leslie*, 123 N. Y. 396; *Travelers' Ins. Co. v. Healey*, 86 *Hun* (N. Y.) 524; *Gibson v. Goldthwaite*, 7 *Ala.* 281.

2. *Parker v. Barker*, 42 N. H. 78; *Daniel v. Fain*, 5 *Lea* (Tenn.) 258; *M'Garrah v. Prather*, 1 *Blackf.* (Ind.) 299; *Starling v. Brown*, 7 *Bush* (Ky.) 164; *McDevitt v. Sullivan*, 8 *Cal.* 592; *Bassett v. Leslie*, 123 N. Y. 396; *Williams v. Wright*, 20 *Tex.* 499. See also *Ketcham v. Brazil Block Coal Co.*, 88 *Ind.* 515; *Pfister v. Wade*, 69 *Cal.* 133; *Van Zandt v. Van Zandt*, 17 *Civ. Pro. Rep.* (N. Y. Supreme Ct.) 448; *McHenry v. Hazard*, 45 *Barb.* (N. Y.) 657; *Mohawk, etc., R. Co. v. Clute*, 4 *Paige* (N. Y.) 384.

Contra. — *Meux v. Bell*, 6 *Sim.* 175; *Blue v. Watson*, 59 *Miss.* 619.

Compare Snodgrass v. Butler, 54 *Miss.* 45.

Where Claims Differ in Amount. —

"When the claims of the different defendants differ in amount the plaintiff should offer to bring into court the largest sum claimed." *Bridesburg Mfg. Co.'s Appeal*, 106 *Pa. St.* 275, *citing Mohawk, etc., R. Co. v. Clute*, 4 *Paige* (N. Y.) 384.

Where Land Is the Subject of Controversy, the better practice is that the plaintiff should make out conveyances duly executed, purporting to convey the premises according to the several claims alleged in the bill, and should aver the preparation and execution of them, and his readiness and an offer to deliver the same in court for the use of such of the grantors named therein as may be adjudged entitled. *Farley v. Blood*, 30 N. H. 360.

3. *Story Eq. Pl.*, § 297.

The plaintiff cannot claim affirmative relief against any of the claimant defendants, but can only ask leave of the court to pay the money or deliver the property to the one to whom it rightfully belongs, in order that he may thereafter be protected against the claims of all. *St. Louis L. Ins. Co. v. Alliance Mut. L. Ins. Co.*, 23 *Minn.* 7.

4. *Mitford, Eq. Pl.* (Tyler's ed.), p. 147; *Story Eq. Pl.*, § 297. See generally, for proceeding on injunctions, article INJUNCTIONS, vol. 10, p. 869.

The Common Form of the Prayer is given in *Van Heythuysen's Equity Draftsman*, p. 209, in a case of rent. It prays "that they [the defendants] may severally set forth and discover what right or title they and each of them claim or have in and to the said moiety of the said premises; and how they and each of them derive and make out the same, and that they may set forth to which of them the said rent and arrears of rent doth or do of right belong, or is or are payable, or ought to be paid, and may interplead and settle, and adjust their said demands between themselves. Your orator being ready and

distinct prayer for the process of injunction.¹

No Other Specific Relief. — In a bill of interpleader, strictly so called, the plaintiff should seek no relief other than as above mentioned against either of the defendants.²

For General Relief. — The prudent pleader should not omit the prayer for general relief.³

c. VERIFICATION. — Where the bill prays for an injunction it should conform to the general rule which requires injunction bills to be verified.⁴

d. AFFIDAVIT DENYING COLLUSION. — In bills of interpleader an affidavit is always required of the plaintiff⁵ that he does not collude with either of the defendants,⁶ and if the bill is filed by

willing, and hereby offering to pay the said rent and arrears of rent to such of the said confederates, to whom the same shall appear to belong, being indemnified. And that your orator may be at liberty to bring the same into this honorable court, which your orator doth hereby offer to do, for the benefit of such of the several parties who shall appear to be entitled thereto. And that the said several defendants, and each and every of them, may be restrained by the injunction of this honorable court from all proceedings at law against your orator for the said rent and arrears of rent and for further relief, etc."

1. *Union Bank v. Kerr*, 2 Md. Ch. 460, holding that although the bill prays for relief by way of injunction, it cannot be granted if the bill does not pray for the process. See generally article INJUNCTIONS, vol. 10, p. 869.

2. *Curtis v. Williams*, 35 Ill. App. 518; *Crass v. Memphis, etc.*, R. Co., 96 Ala. 447; *Bedell v. Hoffman*, 2 Paige (N. Y.) 199; *Killian v. Ebbinghaus*, 110 U. S. 568; *Illingworth v. Rowe*, 52 N. J. Eq. 360.

Whether the rule stated in the text obtains in *Connecticut, quare*. *Consociated Presb. Soc. v. Staples*, 23 Conn. 544.

3. See *infra*, II. 9. *Retaining the Bill for Other Relief*; and article BILLS IN EQUITY, vol. 3, p. 335.

4. See article INJUNCTIONS, vol. 10, p. 869.

5. **By Solicitor.** — The affidavit of the plaintiff's solicitor is not ordinarily sufficient. *Wood v. Lyne*, 4 De G. & Sm. 16.

Where There Are Several Plaintiffs all must join in the affidavit, or if not, it must be satisfactorily shown in the affidavit why all do not join. *Braithwaite's Pr.* 27.

6. *Alabama.* — *Gibson v. Goldthwaite*, 7 Ala. 281.

Delaware. — *Hastings v. Cropper*, 3 Del. Ch. 165.

Indiana. — *Nofsinger v. Reynolds*, 52 Ind. 218.

Kentucky. — *Starling v. Brown*, 7 Bush (Ky.) 164; *Tobin v. Wilson*, 3 J. J. Marsh. (Ky.) 63; *Biggs v. Kouns*, 7 Dana (Ky.) 405.

Mississippi. — *Whitney v. Cowan*, 55 Miss. 626; *Blue v. Watson*, 59 Miss. 619; *Snodgrass v. Butler*, 54 Miss. 45.

New Hampshire. — *Farley v. Blood*, 30 N. H. 354.

New Jersey. — *Mount Holly, etc., Turnpike Co. v. Ferree*, 17 N. J. Eq. 117.

New York. — *Shaw v. Coster*, 8 Paige (N. Y.) 339.

Tennessee. — *Daniel v. Fain*, 5 Lea (Tenn.) 258.

Vermont. — *Wing v. Spaulding*, 64 Vt. 83.

West Virginia. — *Hechmer v. Gilligan*, 28 W. Va. 750.

See also *Providence Bank v. Wilkinson*, 4 R. I. 507.

"The Object of Such an Affidavit, it is said, is to prevent this proceeding from being resorted to for the purpose of giving an advantage to one claimant over the other." *Gibson v. Goldthwaite*, 7 Ala. 281.

In Connecticut the affidavit of the absence of collusion has never been required, and this is conceded to be a departure from the regular practice elsewhere. *Consociated Presb. Soc. v. Staples*, 23 Conn. 544; *Nash v. Smith*, 6 Conn. 421.

Averment in the Bill. — In *Nofsinger v. Reynolds*, 52 Ind. 218, the court said: "We do not find that it was necessary in chancery to deny in the bill the existence of collusion." But if the

an officer on behalf of the company, he must annex a like affidavit, and add that to the best of his knowledge and belief the company does not collude with the defendant.¹

6. Amendment of Bill. — If the bill does not allege all the facts requisite to sustain it as a bill of interpleader, the defect may be cured by amendment;² and the omission of an offer to bring the fund into court,³ or failure to annex an affidavit negating collusion,⁴ may be rectified in like manner.

7. Defendant's Pleadings, and Proceedings Before Hearing —

a. DEMURRER OR MOTION TO DISMISS — Grounds of Demurrer. — If it appears upon the face of the bill that the case is not proper for interpleader, demurrer will lie;⁵ and the absence of an offer

bill itself is verified and contains a sufficient averment of no collusion, it would seem to be unnecessary to annex a separate affidavit. It appears that such a practice was adopted by the pleader, and without adverse criticism, in *Curtis v. Williams*, 35 Ill. App. 518; *Fahie v. Lindsay*, 8 Oregon 474.

1. *Bignold v. Audland*, 11 Sim. 28; *Hechmer v. Gilligan*, 28 W. Va. 750.

2. *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472; *Briant v. Reed*, 14 N. J. Eq. 277; *Baker v. Brown*, 64 Hun (N. Y.) 627; *Bassett v. Leslie*, (Supreme Ct.) 10 N. Y. Supp. 483, and *Cromwell v. American L. & T. Co.*, 57 Hun (N. Y.) 149, sustaining a demurrer with leave to amend. *Hastings v. Cropper*, 3 Del. Ch. 165. See also *Kyle v. Mary Lee Coal, etc., Co.*, 112 Ala. 606; *Orient Ins. Co. v. Reed*, 81 Cal. 145; *Crane v. McDonald*, (Supreme Ct.) 2 N. Y. St. Rep. 150; and, generally, article AMENDMENTS, vol. 1, p. 458.

Bringing in New Party. — It seems that the bill cannot be amended so as to bring in as another defendant a party whose claim to the fund was unknown to the plaintiff when he brought the suit. *Michigan, etc., Plaster Co. v. White*, 44 Mich. 25.

3. *Williams v. Wright*, 20 Tex. 503; *Van Zandt v. Van Zandt*, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 448, where a demurrer was sustained with leave to amend.

4. *Crass v. Memphis, etc., R. Co.*, 96 Ala. 454; *Hastings v. Cropper*, 3 Del. Ch. 165.

5. *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447; *National Bank v. Augusta Cotton, etc., Co.*, 99 Ga. 286; *Hellman v. Schneider*, 75 Ill. 422; *Browning v. Watkins*, 10 Smed. & M. (Miss.) 482; *Cheever v. Hodgson*, 9 Mo. App. 565; *Barker v. Swain*, 4 Jones Eq. (57 N.

Car.) 220; *Quinn v. Patton*, 2 Ired. Eq. (37 N. Car.) 48; *Parker v. Barker*, 42 N. H. 78; *Williams v. Matthews*, 47 N. J. Eq. 196; *Carroll v. Parkes*, 1 Baxt. (Tenn.) 269; *Lincoln v. Rutland, etc., R. Co.*, 24 Vt. 639. See also *Providence Bank v. Wilkinson*, 4 R. I. 507.

Amplified Statement of Rule. — If the plaintiff states a case in his bill which shows that one of the defendants is entitled to the debt or duty, both defendants may demur; the one upon the ground that the plaintiff has a perfect defense at law against his claim, and the other on the ground that the plaintiff has neither a legal nor an equitable defense to his claim, and has therefore no right to call upon him to interplead with a third person who claims without right. *Shaw v. Coster*, 8 Paige (N. Y.) 348; *Parker v. Barker*, 42 N. H. 78; *Briant v. Reed*, 14 N. J. Eq. 271; *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447; *Starling v. Brown*, 7 Bush (Ky.) 164; *Sprague v. West*, 127 Mass. 471, where defendants' claims were not in privity; *Stone v. Reed*, 152 Mass. 179, where there was no sufficient averment of the nature or of the plaintiff's possession; *Holmes v. Clark*, 46 Vt. 22, where the defendant had incurred an independent liability to one of the defendants.

In Code Practice the objection may be taken by demurrer for want of sufficient facts to constitute a cause of action. *U. S. Trust Co. v. Wiley*, 41 Barb. (N. Y.) 477; *Baker v. Brown*, 64 Hun (N. Y.) 627; *Cromwell v. American L. & T. Co.*, 57 Hun (N. Y.) 149, where the plaintiff incurred an independent liability to one of the defendants; *Bassett v. Leslie*, 123 N. Y. 396, *affirming* (Supreme Ct.) 10 N. Y. Supp. 483, where one of the defendants was clearly entitled to the debt to the ex-

to bring the fund into court,¹ or the omission to annex to the bill an affidavit negating collusion,² are also grounds of demurrer.

Motion to Dismiss. — In some jurisdictions motions to dismiss for want of equity perform the same office as demurrers.³

b. PLEA. — Matter in bar of the suit may properly be set up by plea.⁴

c. ANSWER. — The defendant may by answer deny the allegations in the bill, or may set up distinct facts in bar of the suit.⁵

clusion of the other; *Morgan v. Fillmore*, 18 Abb. Pr. (Buffalo Super. Ct.) 217, where the plaintiff was fully advised as to his liability to the different claimants; *McDonald v. Allen*, 37 Wis., 108, where it appeared that there was an adequate remedy at law.

Motion to Make More Specific. — If the allegations are merely deficient in certainty or fullness, the defendant, instead of demurring, should move that the plaintiff be required to make them more definite and certain by amendment. *Baltimore, etc., R. Co. v. Arthur*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 147; *Van Zandt v. Van Zandt*, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 448. See also article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

Demurrer by One, Answer by Another. — If, upon the demurrer of either defendant, it appears that neither of the defendants has any right to the fund, the bill must be dismissed, although another defendant answers. *Barker v. Swain*, 4 Jones Eq. (57 N. Car.) 220.

Demurrer Too Broad. — Where a demurrer to the whole bill points out a demurrable defect, it must be overruled if the bill is good as respects several of the other defendants. The demurrer should be confined to the objectionable part of the bill. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82. See also *Hatfield v. McWhorter*, 40 Ga. 269.

Leave to Amend May Be Given on Sustaining a Demurrer. — *Bassett v. Leslie*, (Supreme Ct.) 10 N. Y. Supp. 483; *Baker v. Brown*, 64 Hun (N. Y.) 627. See also *Williams v. Wright*, 20 Tex. 499; *Conley v. Alabama Gold L. Ins. Co.*, 67 Ala. 472; and article AMENDMENTS, vol. 1, p. 458; and *supra*, II. 6. *Amendment of Bill*.

Upon Demurrer Overruled a pro confesso cannot be taken against the defendant, and a decree to interplead be rendered, until he has had an opportunity to answer. *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447.

Retaining Bill for Other Relief. — A general demurrer to the whole bill will be overruled, although the bill may not be sufficient as a pure bill of interpleader, where the bill shows that the plaintiff is entitled to other equitable relief. *Hatfield v. McWhorter*, 40 Ga. 269. See *infra*, II. 9. *Retaining the Bill for Other Relief*.

1. *Snodgrass v. Butler*, 54 Miss. 45 [but see *contra*, *Blue v. Watson*, 59 Miss. 619]; *Parker v. Barker*, 42 N. H. 78; *M'Garrah v. Prather*, 1 Blackf. (Ind.) 299; *Williams v. Wright*, 20 Tex. 499, holding that the objection can be taken only by special demurrer.

Contra. — *Nash v. Smith*, 6 Conn. 421.

2. *Snodgrass v. Butler*, 54 Miss. 45; *Blue v. Watson*, 59 Miss. 619; *Gibson v. Goldthwaite*, 7 Ala. 281; *Mount Holly, etc., Turnpike Co. v. Ferree*, 17 N. J. Eq. 117. See also *Biggs v. Kouns*, 7 Dana (Ky.) 405. *Contra*, *Nash v. Smith*, 6 Conn. 421; *Consociated Presb. Soc. v. Staples*, 23 Conn. 544, no affidavit being required in *Connecticut* practice.

In *Nofsinger v. Reynolds*, 52 Ind. 218, the court said: "As a demurrer under the code can be sustained for specified causes only, and as the want of verification of a pleading is not one of them, we conclude that the objection of want of affidavit in such case [denying conclusion] is not cause of demurrer."

3. See *Kyle v. Mary Lee Coal, etc., Co.*, 112 Ala. 606; *Varrian v. Berrien*, 42 N. J. Eq. 1. See article DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823.

4. *French v. Robrcharde*, 50 Vt. 43, where a plea setting up facts which showed that the plaintiff had an interest in the controversy was sustained and the bill dismissed.

5. *Williams v. Matthews*, 47 N. J. Eq. 196; *Wakeman v. Kingsland*, 46 N. J. Eq. 113; *Hall v. Baldwin*, 45 N.

d. CROSS-BILL. — In a strict interpleader suit a cross-bill has no legitimate place, as a defendant is not entitled to any affirmative relief against the plaintiff.¹

e. REPLICATION AND PREPARING CAUSE FOR HEARING. — Where the defendants or either of them deny the allegations in the bill, or set up distinct facts in bar thereof, the plaintiff must file a replication,² give rules to produce witnesses, and close the proofs in the usual manner before the cause is heard.³ But if the defendants admit the facts on which the right to file the bill of interpleader rests, and set up no defense which requires the taking of testimony on either side, it seems to be sufficient for the plaintiff to file a replication to the answers, and then to set down the cause for hearing without waiting until the cause is ripe for a decision as between the defendants.⁴

f. BRINGING THE MONEY INTO COURT. — If the fund is not brought into court upon filing the bill the court may order the plaintiff to bring it in upon the application of either of the

J. Eq. 858; *Richards v. Salter*, 6 Johns. Ch. (N. Y.) 445; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 520.

"The mere allegations of a bill, however strong, do not authorize a decree that the parties interplead. They may deny in their answers (and sustain by proof their denial) every averment upon which the bill rests for relief as a bill of interpleader." *Crass v. Memphis, etc.*, R. Co., 96 Ala. 447.

Where the Bill is Demurrable, if the defendant answers instead of demurring and the bill is finally dismissed, he will recover only such costs as he would have been entitled to on a demurrer sustained. *Quinn v. Patton*, 2 Ired. Eq. (37 N. Car.) 48; *Shaw v. Coster*, 8 Paige (N. Y.) 339.

Cannot Ask Specific Relief. — If an answer prays for specific relief against the plaintiff that part of it will be stricken out on motion. *Williams v. Matthews*, 47 N. J. Eq. 196, *citing* *Wakeman v. Kingsland*, 46 N. J. Eq. 113.

1. *Sammis v. L'Engle*, 19 Fla. 800; *Wakeman v. Kingsland*, 46 N. J. Eq. 113, where the cross-bill was stricken out on motion of the plaintiff.

2. *City Bank v. Bangs*, 2 Paige (N. Y.) 570. See also *Cullen v. Dawson*, 24 Minn. 66.

In *Atkinson v. Manks*, 1 Cow. (N. Y.) 696, the cause was brought to a hearing on a bill and answer only, but whether this was done by consent of parties or otherwise does not appear.

Waiver of Irregularity. — If no replication is filed, but the parties proceed to a hearing on the merits without objection, the irregularity is waived. *Cobb v. Rice*, 130 Mass. 231. See also article HEARING, vol. 10, p. 8.

3. *City Bank v. Bangs*, 2 Paige (N. Y.) 570; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 520; *Statham v. Hall*, T. & R. 30.

"When the answer denies the facts upon which the bill depends as a bill of interpleader, the plaintiff is put to his proof before the case is ready for a decree as to whether the respondents should be required to interplead." *Crass v. Memphis, etc.*, R. Co., 96 Ala. 447.

In *Jones v. Gilham*, Cooper 49, the plaintiff filed a replication to the answers and served subpoenas to rejoin, according to the English practice as stated in *Dick*, 291, note.

It also appears from the English reports that the testimony is sometimes taken as to the rights of the defendants between themselves, previous to a decree to interplead. *Brymer v. Buchanan*, 1 Cox 425; *Bolton v. Williams*, 4 Bro. C. C. 297.

"It is admissible that the whole controversy between the parties to the action, including as well the issues between the plaintiff and the defendants as the issues between the defendants, be submitted upon one trial." *Cullen v. Dawson*, 24 Minn. 66.

4. *City Bank v. Bangs*, 2 Paige (N. Y.) 570.

defendants.¹ The court may refuse to allow the plaintiff to proceed until this is done,² and will not ordinarily act upon a prayer for injunction until the money is brought in, or at least bond and security given for its ultimate payment according to the decree.³

8. Hearing and Decree on the Bill—*a.* **OBJECTIONS AT THE HEARING.**—A defendant may object at the hearing, before a decree of interpleader, that the case is not one proper for requiring the defendants to interplead, even though the objection were not taken in the pleadings or other prior proceedings.⁴ But it

1. *Nash v. Smith*, 6 Conn. 421; *Pepoon v. White*, 2 Code Rep. (N. Y. Supreme Ct.) 109; *Blue v. Watson*, 59 Miss. 619; *Shaw v. Coster*, 8 Paige (N. Y.) 339.

2. *Blue v. Watson*, 59 Miss. 619.

3. *Biggs v. Kouns*, 7 Dana (Ky.) 405.

4. **Interest of Plaintiff, Collusion, etc.**—In *Wing v. Spaulding*, 64 Vt. 83, the court said: "It is claimed that the objection of interest in the orator cannot be made now, but should have been made at an earlier stage of the case, before answer and trial on the merits. But in the absence of a decree of interpleader we think the objection can be taken at the hearing. How it would be if such a decree had been made, we have no occasion to determine. * * * In *Toulmin v. Reid*, 14 Beav. 499, 21 L. J. N. S. Ch. 391, Sir John Romilly, Master of the Rolls, held that it is open to a defendant in an interpleader suit to show at the hearing that the case is not one proper for requiring the defendants to interplead, and that he is not precluded by not objecting by demurrer nor on motion to pay the money into court. He says that otherwise, assuming the case to be one not proper for a bill of interpleader the orator would have nothing to do but to suppress part of the facts, or to misstate them in such a way that the bill would not be demurrable. It is true that the bill in that case was not dismissed, but it was because no one asked to have it dismissed. *Statham v. Hall*, T. & R. 30, was a bill to compel the defendants to interplead in respect of a bond that had been deposited with the plaintiff for safe keeping. On the part of some of the defendants evidence was offered that plaintiff retained the bond under an indemnity from the other defendants. It was objected by the plaintiff that the evidence was not admissible, and in support of the objection it was argued that no evidence could be admitted on a bill of this description to

affect the plaintiff, and the question of indemnity was not in issue between the parties. But the evidence was admitted as forming a material feature of the case, and the case was afterwards argued on the merits and the bill dismissed with costs. In *Yates v. Tisdale*, 3 Edw. Ch. (N. Y.) 71, the bill was answered, and instead of taking the usual course of practice applicable to bills of interpleader, replications were filed and proofs taken, and the case fully heard on the merits. The vice-chancellor held it allowable practice to object at the hearing to the propriety of filing the bill, and considered and adjudged that question. In *Mount Holly, etc., Turnpike Co. v. Ferree*, 17 N. J. Eq. 117, no demurrer was filed and the answers were addressed solely to the question of right raised by the bill. No objection was made as to the propriety of the remedy. Evidence was taken and the question elaborately discussed on its merits. On final hearing objection was first made to the form of the remedy. Supposing that the failure to file a demurrer and the acquiescence of the defendants had cured the difficulty, and that the rights of all parties could be finally determined by the decree, the chancellor prepared an opinion on the merits, holding the right to be clearly with the defendant *Ferree*, but on reflection he became satisfied that no final decree of that character could be made, and that it was not a case for interpleader at all, because the evidence afforded strong ground for presuming that there was collusion between the complainant and one of the defendants; and for that reason the bill was dismissed with costs." See also, as to objection for collusion, *Michener v. Lloyd*, 16 N. J. Eq. 38.

After Decree of Interpleader.—In *Fahie v. Lindsay*, 8 Oregon 474, it was averred in a sworn complaint that there was no collusion between the plaintiff and either of the defendants, and it was

cannot be objected for the first time at the hearing that the bill is not accompanied by an affidavit negating collusion,¹ or that the bill contained no offer to bring the fund into court,² or that no replication was filed to the defendant's answer.³

b. DECREE—Dismissal of Plaintiff.—At the hearing if the defendants agree that the bill is properly filed,⁴ or the fact appears by the pleadings and proofs, the usual decree is that upon bringing the money or other thing into court, the plaintiff be dismissed with costs⁵ and that the defendant interplead.⁶ That settles the case so far as the plaintiff is concerned,⁷ and

held that after an order requiring the defendants to interplead evidence to prove collusion could not be received.

1. *Biggs v. Kouns*, 7 Dana (Ky.) 405; *Cobb v. Rice*, 130 Mass. 231.

It was said in *Gibson v. Goldthwaite*, 7 Ala. 281, that if the defendants submit to answer the bill without objecting that the plaintiff has not negated collusion by affidavit annexed to his bill, neither of them can at the hearing or on error object that it was irregularly exhibited; that "as the affidavit was intended for their benefit, and to prevent injury or inconvenience to the defendant who has the superior right, they may dispense with it, and their answers amount to an implied waiver."

2. *Cobb v. Rice*, 130 Mass. 231.

3. *Cobb v. Rice*, 130 Mass. 231.

4. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100; *Oppenheim v. Wolf*, 3 Sandf. Ch. (N. Y.) 571.

5. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100; *Yates v. Tisdale*, 3 Edw. Ch. (N. Y.) 71; *Bedell v. Hoffman*, 2 Paige (N. Y.) 199; *Thomson v. Ebbets*, Hopk. (N. Y.) 272; *Balchen v. Crawford*, 1 Sandf. Ch. (N. Y.) 380; *St. Louis L. Ins. Co. v. Alliance Mut. L. Ins. Co.*, 23 Minn. 7; *Sammis v. L'Engle*, 19 Fla. 800. See *infra*, II. 11. a. *Costs*.

No Affirmative Relief can be given to the plaintiff in a strict bill of interpleader. *Bedell v. Hoffman*, 2 Paige (N. Y.) 199; *Illingworth v. Rowe*, 52 N. J. Eq. 360; *Newhall v. Kastens*, 70 Ill. 156; *Wakeman v. Kingsland*, 46 N. J. Eq. 113.

It is error, however, to dismiss the bill, even without prejudice, where it shows that the plaintiff has a right to the ordinary decree rendered upon a bill which is properly filed. *Alley v. Adams County*, 76 Ill. 101.

Answer of One Defendant as Evidence Against the Other.—See *Balchen v. Crawford*, 1 Sandf. Ch. (N. Y.) 380;

State Ins. Co. v. Gennett, 2 Tenn. Ch. 100; *Crane v. McDonald*, 118 N. Y. 648.

6. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100; *Willison v. Salmon*, 45 N. J. Eq. 257; *Bedell v. Hoffman*, 2 Paige (N. Y.) 199; *Rowe v. Hoagland*, 7 N. J. Eq. 131.

Separate Decree of Interpleader.—Although it is better practice to enter a separate decree or order of interpleader, it is sufficient if the decree actually entered amounts to the same thing. *People's Sav. Bank v. Look*, 95 Mich. 7.

The Decree to Interplead Is Interlocutory and therefore subject to revision and correction, and it may, before final decree, be reviewed as having been improvidently and prematurely passed. *Barth v. Rosenfeld*, 36 Md. 604. See also article DECREES, vol. 5, p. 946.

Delay and Collusion.—Where one of the defendants answers, disclaiming interest, any improper delay in preparing the cause for hearing will authorize the other defendant who has answered to apply for the money if there is any fraudulent purpose or collusion. *Michigan, etc., Plaster Co. v. White*, 44 Mich. 25, *citing* *Hyde v. Warren*, 19 Ves. Jr. 322.

7. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100; *Willison v. Salmon*, 45 N. J. Eq. 257; *Supreme Council, etc., v. Bennett*, 47 N. J. Eq. 39; *Andrews v. Halliday*, 63 Ga. 263; *George v. Pilcher*, 28 Gratt. (Va.) 299, holding, however, that the plaintiff is not wholly out of the case until he has rendered the debt, duty, or other thing required of him as a condition precedent to his discharge. See also *Horton v. Baptist Church, etc.*, 34 Vt. 309.

After the plaintiff has been dismissed and defendants ordered to interplead, the plaintiff is altogether out of the suit and cannot thereafter participate in the litigation between the defendants, nor

is usually accomplished in *England* by motion.¹

If the Bill Is Dismissed, it should be without prejudice to the rights of the plaintiff in any future litigation with either of the defendants,² and the court does not decide the right to the fund in dispute.³

Decree Between Defendants. — If the case between the defendants is ripe for a decision, the court will decide it and make a final decree settling the conflicting claims of the defendants at once.⁴

Directing Action, Issue, or Reference. — If the case is not ripe for decision, the court upon dismissing the plaintiff will direct an action or an issue or a reference to a master, as may be best suited to the nature of the case,⁵ or the court

object to any ruling or decision made in the action affecting alone their rights as between themselves. *St. Louis L. Ins. Co. v. Alliance Mut. L. Ins. Co.*, 23 Minn. 7.

He cannot take part in the argument of the questions involved between the defendants. *Houghton v. Kendall*, 7 Allen (Mass.) 72; *Provident Sav. Inst. v. White*, 115 Mass. 112; *Andrews v. Halliday*, 63 Ga. 263.

1. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100.

Before the Hearing. — In *Washington L. Ins. Co. v. Lawrence*, 28 How. Pr. (N. Y. Supreme Ct.) 435, it was held that on a bill of interpleader under the former chancery practice, or an action of interpleader under the code practice, the plaintiff was not entitled on motion to an order granting the relief prayed for until the time to answer had expired and all the defendants had been defaulted. *Aymer v. Gault*, 2 Paige (N. Y.) 284. See also *Perkins v. Trippe*, 40 Ga. 225.

2. *Shaw v. Coster*, 8 Paige (N. Y.) 339.

3. *Marvin v. Ellwood*, 11 Paige (N. Y.) 365, holding that the plaintiff may proceed by motion or by such steps as he may be advised to obtain the money brought into court.

4. *Alabama.* — *Gibson v. Goldthwaite*, 7 Ala. 281.

Arkansas. — *Temple v. Lawson*, 19 Ark. 148.

Indiana. — *Nofsinger v. Reynolds*, 52 Ind. 218.

Minnesota. — *Cullen v. Dawson*, 24 Minn. 66.

New Jersey. — *Rowe v. Hoagland*, 7 N. J. Eq. 131; *Kirtland v. Moore*, 40 N. J. Eq. 106; *Condict v. King*, 13 N. J. Eq. 375; *Hendrickson v. Shotwell*, 1 N. J. Eq. 595.

New York. — *City Bank v. Bangs*, 2 Paige (N. Y.) 570.

Ohio. — *Goddard v. Leech, Wright* (Ohio) 476.

Vermont. — *Brattleboro First Nat. Bank v. West River R. Co.*, 46 Vt. 633.

Upon Admission or Pro Confesso. —

"Where the right of one defendant is admitted by the answer of the other, or the bill is taken as confessed as to one, the court settles the rights of the parties at once, and makes a final decree as to those rights and as to the disposition of the fund in controversy." *City Bank v. Bangs*, 2 Paige (N. Y.) 570 [citing *Hodges v. Smith*, 1 Cox 357]. See also *Richards v. Salter*, 6 Johns. Ch. (N. Y.) 447; *Pillow v. Aldridge*, 4 Humph. (Tenn.) 287; *Badeau v. Rogers*, 2 Paige (N. Y.) 209; *Michigan, etc., Plaster Co. v. White*, 44 Mich. 25.

Where the bill is taken for confessed as to one defendant the plaintiff cannot dispute the claim of the other defendant, who interpleads and sets up his claim, nor object to a decree in his favor. *Cogswell v. Armstrong*, 77 Ill. 139.

5. *Alabama.* — *Gibson v. Goldthwaite*, 7 Ala. 281.

Arkansas. — *Temple v. Lawson*, 19 Ark. 148.

Florida. — *Sammis v. L'Engle*, 19 Fla. 800, where a reference was ordered.

Indiana. — *Crane v. Burntrager*, 1 Ind. 167; *Nofsinger v. Reynolds*, 52 Ind. 218.

New Jersey. — *Condict v. King*, 13 N. J. Eq. 375, directing a reference to master; *Kirtland v. Moore*, 40 N. J. Eq. 106; *Hall v. Baldwin*, 45 N. J. Eq. 858.

New York. — *Pepoon v. White*, 2 Code Rep. (N. Y. Supreme Ct.) 109, where a reference was ordered; *Redfield v. Genesee County, Clarke Ch.* (N. Y.) 42.

may find the facts for itself.¹

9. Retaining the Bill for Other Relief, or the Same Relief on Other Grounds. — Where the bill is defective as a strict bill of interpleader it may be retained, and under the prayer for general relief² the court may grant the proper equitable relief to which the allegations of the bill show that the plaintiff is entitled.³ Thus

Ohio. — *Goddard v. Leech*, Wright (Ohio) 476.

Tennessee. — *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100.

Vermont. — *Brattleboro First Nat. Bank v. West River R. Co.*, 46 Vt. 633.

In *Bleeker v. Graham*, 2 Edw. Ch. (N. Y.) 647, an action at law already commenced against the plaintiff by one of the defendants was allowed to proceed, but to be defended by the other defendant, and judgment not to be rendered on the verdict, nor execution issued until the further hearing of the cause in chancery upon the *postea*.

"Or the court may leave it to the defendants to prepare the case between them as they may be advised, which would be the effect of a general order to interplead." *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100.

In *Farley v. Blood*, 30 N. H. 354, the questions of fact were referred to a master, but the court said: "Perhaps in this state, if an action be not ordered and there be facts in dispute, it may be the right of either party to have an issue framed, embracing the merits of the case, and to have it sent to the court below for trial by the jury, if application be seasonably made to the court for that purpose." *Citing Marston v. Brackett*, 9 N. H. 336; *Tappan v. Evans*, 11 N. H. 311; *Dodge v. Griswold*, 12 N. H. 573.

Issues to the Jury. — *Under the Codes* the general rule is that interpleader suits are of exclusive equitable cognizance, and if issues of fact are submitted to a jury, the verdict thereon is merely advisory to the court as in ordinary chancery practice. *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515.

A jury trial is not a matter of right unless by statutory or constitutional provision. *Grand Lodge, etc., v. Elsner*, 26 Mo. App. 108.

Cross-Complaint and Answer. — In *Nofsinger v. Reynolds*, 52 Ind. 218, and *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 521, the issues between the defendants were made by a cross-complaint and answer thereto, and submitted to a jury.

Proceeding by Bill or by Action. — In *City Bank v. Bangs*, 2 Paige (N. Y.) 570, the defendants admitted that the case was proper for an interpleader, and one of them asked that this be done by filing a bill for that purpose, and that he be the plaintiff therein, but the court said: "In this stage of the suit an issue or a reference will, in general, be the most cheap and efficacious mode of settling the controversy between the defendants, and the expense of an action at law or of an original bill, filed under the direction of this court, can seldom be necessary." See also *Goddard v. Leech*, Wright (Ohio) 476.

In *Balchen v. Crawford*, 1 Sandf. Ch. (N. Y.) 380, the parties were directed to interplead in the court of chancery and to proceed by bill, which the court thought to be more suitable to the circumstances.

On a Reference to a Master the court will give the defendants the benefit of a discovery as against each other, if they, or either of them, desire it. *City Bank v. Bangs*, 2 Paige (N. Y.) 570.

Accounting by Successful Defendant. — Defendants who fail in establishing any right to the fund are not entitled to an account from the defendant whose claims are allowed, of the amount and origin of those claims. *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268.

1. *Goddard v. Leech*, Wright (Ohio) 476, where, however, the court directed a reference to a master, which was said to be the most usual course and the most convenient.

2. See generally article **BILLS IN EQUITY**, vol. 3, p. 335.

3. *Hollister v. Lefevre*, 35 Conn. 456; *New York, etc., R. Co. v. Haws*, 56 N. Y. 175; *Blair v. Porter*, 13 N. J. Eq. 267, where the bill had been pending for several years, and the court was loath to dismiss the bill and leave the parties "with nothing settled but liability for costs, to commence litigation anew;" *Martin v. Maberry*, 1 Dev. Eq. (16 N. Car.) 171, where the plaintiff had an equity "growing out of the motion to dismiss the bill at this

such a bill may be treated as a bill in the nature of interpleader¹ where its allegations make a case appropriate to that remedy.²

10. Final Decree Between Defendants. — Where the court has properly acquired jurisdiction of the cause as between the defendants, it is not bound to award the fund or other thing in dispute wholly to him who has the legal title, but may so shape its decree as to do complete equity between the parties.³

11. Costs — *a.* **ON SUSTAINING THE BILL** — **Plaintiff Proceeding in Good Faith.** — If the plaintiff has properly brought the suit and his conduct has been fair, upon dismissing him his costs up to that time will ordinarily be awarded to him out of the funds in his

late period after the defendant has submitted to the jurisdiction of the court;" *Leddel v. Starr*, 20 N. J. Eq. 274, where a bill by an executor was retained for the purpose of settling his account, all the parties interested being before the court; *Ladd v. Chase*, 155 Mass. 417, and *Stevens v. Warren*, 101 Mass. 564, where the court took jurisdiction as of a bill by an administrator seeking the instruction and protection of the court. But it was not retained as against a demurrer where it was not filed for the substantial purpose of obtaining the aid and direction of the court. *Blue v. Watson*, 59 Miss. 619.

In *Saratoga County v. Deyoe*, 77 N. Y. 219, the court said: "It may not be a case of interpleader strictly, or which meets all the definitions of a bill of peace, nor a case which could be maintained solely as one for the cancellation of written instruments, but it combines to a greater or less extent, elements of jurisdiction in each of these cases, and the action, we think, may be sustained without a violation of principle, and without interfering with the substantial rights of the defendants."

In *Finlay v. American Exch. Bank*, 11 How. Pr. (N. Y. Supreme Ct.) 468, the court said: "This bill has not all the essential features of a bill of interpleader, for the amount of the fund is not ascertained with sufficient certainty to enable it now to be brought into court, and allow the plaintiff to be discharged from the further proceedings in the suit. But with the understanding which was entered into in that respect on the trial, the amount of the fund can be hereafter settled, and the bill is thus so far in the nature of an interpleader suit that the court can take jurisdiction of the case and settle the equities between all of the parties."

In *Hatfield v. McWhorter*, 40 Ga. 269, the court said: "Although the complainant cannot maintain his bill as a bill of interpleader, yet, as there are other grounds for equitable relief in regard to the partnership claims, in the adjustment of which a court of equity can afford more adequate relief than a court of law, and that court having first taken jurisdiction of the subject-matter in controversy between the parties, it will be allowed to retain it for the purpose of doing full and complete justice between them, and a general demurrer to the whole bill was properly overruled."

Retained Only for Equitable Relief. — Where the bill cannot be sustained as a bill of interpleader, and there are no averments which disclose any other grounds of equity jurisdiction, it cannot be retained for the purpose of granting relief which can be obtained in an action of ejectment. *Killian v. Ebbinghaus*, 110 U. S. 568.

1. See *infra*, IV. *Bills in the Nature of Interpleader*.

2. *Consociated Presb. Soc. v. Staples*, 23 Conn. 544, where the plaintiff called upon the court for relief in first settling for him the amount of his indebtedness to the defendants. *Redfield v. Genesee County, Clarke Ch.* (N. Y.) 42; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384.

3. *Whitney v. Cowan*, 55 Miss. 626, where the court said: "The court may, at the final hearing, having the fund in its hands or under its control, fasten upon it, either in whole or in part, any equitable lien or trust which one of the parties may have established, though the proprietary legal title and ownership belongs to the other."

Decree upon Stipulation. — The court may decree that the fund be divided according to an agreement of the parties. *Webster v. Hall*, 60 N. H. 7.

hands, when there are any such that can be made available,¹ or against some of the parties made defendants in the bill.² And in reference to the question who among the defendants shall pay, the rule is that the defendant who improperly raises the double claim, making the bill of interpleader necessary, shall pay the costs of the plaintiff and of the defendant who is the successful party.³

Plaintiff Guilty of Bad Faith. — If the plaintiff instituted the suit in

1. *Connecticut.* — Consociated Presb. Soc. v. Staples, 23 Conn. 544.

Michigan. — Wayne County Sav. Bank v. Airey, 95 Mich. 520.

Maryland. — Barth v. Rosenfeld, 36 Md. 604.

New Hampshire. — Farley v. Blood, 30 N. H. 373.

New Jersey. — Rahway Sav. Inst. v. Drake, 25 N. J. Eq. 220; Wakeman v. Kingsland, 46 N. J. Eq. 113.

New York. — Badeau v. Rogers, 2 Paige (N. Y.) 209; Bedell v. Hoffman, 2 Paige (N. Y.) 199; City Bank v. Bangs, 2 Paige (N. Y.) 570; Aymer v. Gault, 2 Paige (N. Y.) 284; Balchen v. Crawford, 1 Sandf. Ch. (N. Y.) 380; Oppenheim v. Wolf, 3 Sandf. Ch. (N. Y.) 571; Peepoon v. White, 2 Code Rep. (N. Y. Supreme Ct.) 109; Schuyler v. Hargous, 28 How. Pr. (N. Y. Super. Ct.) 245; Yates v. Tisdale, 3 Edw. Ch. (N. Y.) 71; Leonard v. Jamison, 2 Edw. Ch. (N. Y.) 136; Bleeker v. Graham, 2 Edw. Ch. (N. Y.) 647; Canfield v. Morgan, Hopk. (N. Y.) 224; Thomson v. Ebbets, Hopk. (N. Y.) 272; Atkinson v. Manks, 1 Cow. (N. Y.) 710; Richards v. Salter, 6 Johns. Ch. (N. Y.) 445.

Tennessee. — State Ins. Co. v. Gennett, 2 Tenn. Ch. 100.

Vermont. — Brattleboro First Nat. Bank v. West River R. Co., 46 Vt. 633.

England. — Hendry v. Key, Dick. 291.

Lien for Costs. — The plaintiff may be allowed a lien on the fund for his costs if he has acted honestly and promptly. *Paris v. Gilham*, Cooper 56; *Michigan*, etc., *Plaster Co. v. White*, 44 Mich. 25.

2. *Farley v. Blood*, 30 N. H. 373.

In *Aldridge v. Mesner*, 6 Ves. Jr. 418, it was said that "if there was no fund in court, costs would be given against the party who occasioned" the suit.

3. *Michigan.* — *Michigan*, etc., *Plaster Co. v. White*, 44 Mich. 25.

New Hampshire. — *Farley v. Blood*, 30 N. H. 374.

New York. — *Richards v. Salter*, 6 Johns. Ch. (N. Y.) 445; *Winfield v. Bacon*, 24 Barb. (N. Y.) 154; *Thomson v. Ebbets*, Hopk. (N. Y.) 272. See also *Atkinson v. Manks*, 1 Cow. (N. Y.) 710.

Virginia. — *Beers v. Spooner*, 9 Leigh (Va.) 153.

England. — *Martinius v. Helmuth*, 2 Ves. & B. 412, note; *Dowson v. Hardcastle*, 2 Cox 278; *Edensor v. Roberts*, 2 Cox 280; *Hodges v. Smith*, 1 Cox 357; *Fairbrother v. Prattent*, 5 Price 303; *Aldridge v. Thompson*, 2 Bro. C. C. 149; *Cowtan v. Williams*, 9 Ves. Jr. 107; *Aldridge v. Mesner*, 6 Ves. Jr. 418.

Counsel Fees and Expenses. — Where a lottery company filed a bill of interpleader against conflicting claimants to a ticket which had drawn a prize, and the court, holding that the bill was properly brought, ordered the money to be paid over by the company to the defendants, who had compromised their differences, the lottery company was allowed counsel fees for bringing the suit. The court said: "In the case before us a mere stakeholder, without fault himself, in possession of a fund claimed entire by contending parties, * * * brings the same into court, thereby promoting the litigation and securing the due application of the property. From the nature of the contending claims and the circumstances of the case, he incurs expense and counsel fees in bringing the fund into court. There is no equity in compelling him to bear these charges. On the contrary, the parties who have benefited thereby should bear them. And this we understand to be in accord with the principles laid down in the case of *Trustees v. Greenough*, 105 U. S. 535." *Louisiana State Lottery Co. v. Clark*, 16 Fed. Rep. 20.

In *Glaser v. Priest*, 29 Mo. App. 1, the court said that the plaintiff, "if entitled to maintain the suit, * * * was entitled to have his reasonable expenses therein charged as costs in the case; such is the practice in equity." *Adams Eq.* 206. And such has always been the practice in this state."

In *New Jersey*, by the Laws of 1893, c. 136, § 1, it is provided "that in all cases in which the court of chancery shall decree interpleader, as between the defendants to a bill of interpleader,

bad faith,¹ or delayed the cause by collusive conduct,² costs may be granted against him in favor of the defendant to whom the fund is decreed.

Obtained on Motion or at the Hearing. — When the right to compel the defendants to interplead is not disputed, the plaintiff may obtain his costs on motion.³ When the right is disputed, costs will not be given to the plaintiff before the hearing.⁴

b. ON DISMISSAL OF BILL. — Where a bill of interpleader is dismissed as improperly filed, the defendants are entitled to their costs,⁵ unless under special circumstances.⁶

the said court shall award to the complainant a counsel fee commensurate with the services of his counsel in the cause, to be taxed in the bill of costs, and collected therewith."

Where a bill is so ambiguous as to render it necessary for the executor to file a bill of interpleader to ascertain which of two persons is entitled to a legacy, costs as between solicitor and client of all the parties will be ordered to be paid out of the general estate of the testator. *Morse v. Stearns*, 131 Mass. 389.

In *German Exch. Bank v. Excise Com'rs*, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 394, which was found to be a proper case for interpleader, the plaintiff was allowed to pay the money into court, deducting therefrom a reasonable allowance for its costs and counsel fees.

The rule that the plaintiff in a proper case has his costs out of the fund, and that these costs eventually fall upon the defendant who was in the wrong, will not be departed from so as to deprive the plaintiff of his costs, because the defendant who was in the wrong is outside the jurisdiction of the court. *Canfield v. Morgan*, Hopk. (N. Y.) 224.

Contra. — In *Temple v. Lawson*, 19 Ark. 148, the court held that it was improper to allow attorney's fees to the successful plaintiff in an interpleader suit, where there was no fraud on the part of the defendant; citing *Dunlop v. Hubbard*, 19 Ves. Jr. 205, where the chancellor said he did not recollect a single instance where an interpleader has been allowed his attorney's fees.

Costs, but Not Out of the Fund. — In *Badeau v. Rogers*, 2 Paige (N. Y.) 209, where it appeared that the bill was properly filed as to one of the defendants — a *pro confesso* against him being deemed sufficient to establish the fact that he had made an unjust claim upon the fund — but unnecessarily filed against the other defendant, the plain-

tiff was granted relief against the former, together with costs against him personally, but not out of the fund.

Defendant Having Reasonable Grounds for Claim. — In *People's Sav. Bank v. Wilcox*, 15 R. I. 258, the fund was ordered to be paid to one of the defendants, but the other defendant having had a reasonable ground for making his claim, which depended upon a difficult question of law, no costs were given against him.

1. *St. Louis L. Ins. Co. v. Alliance Mut. L. Ins. Co.*, 23 Minn. 7.

2. *Michigan, etc., Plaster Co. v. White*, 44 Mich. 25.

3. *Jones v. Gilham*, Cooper 49.

4. **Application After Decree.** — Applications for costs should be made at the hearing or before the decree; as after the decree has passed and become final as to the party, the court has no power to make him any allowance for costs. *Temple v. Lawson*, 19 Ark. 148; *Jones v. Gilham*, Cooper 49.

Reservation for Further Directions. — The decree directing the defendants to interplead and discharge the defendant provides for costs to the latter. All further directions as to costs are to be reserved. *Balchen v. Crawford*, 1 Sandf. Ch. (N. Y.) 380.

5. *Shaw v. Coster*, 8 Paige (N. Y.) 339, affirming 2 Edw. Ch. (N. Y.) 405; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Quinn v. Patton*, 2 Ired. Eq. (37 N. Car.) 48; *Dodd v. Bellows*, 29 N. J. Eq. 127; *Michener v. Lloyd*, 16 N. J. Eq. 42.

Costs as Between Solicitor and Client. — In *Dungey v. Angove*, 2 Ves. Jr. 313, which was a case of fraudulent collusion, the plaintiff and his solicitor were ordered to pay the defendant to a bill of interpleader, which was dismissed, all his expenses as between solicitor and client.

6. **Where Defendant Answers Instead of Demurring.** — In *Shaw v. Coster*, 8

12. Removal of Cause to Federal Court. — Under the Acts of Congress for removal of causes from state to federal courts,¹ an interpleader suit in which the plaintiff and one of the defendants are citizens of the same state cannot be removed to a federal court until the plaintiff has been dismissed,² and has fully rendered the debt, duty, or other thing required of him by the decree dismissing him.³

III. CODE COMPLAINTS OF INTERPLEADER — 1. Coextensive with Bills of Interpleader. — A code complaint of interpleader will lie upon the same grounds as those which sustain a bill of interpleader in chancery.⁴

2. Concurrent with Statutory Interpleader. — The remedy by

Paige (N. Y.) 339, it appeared upon the face of a bill of interpleader that it was not a proper case for such a bill, and the defendants, instead of demurring, put in answers and went to a hearing upon pleadings and proofs, insisting in their answers, however, that the bill was improperly filed. The chancellor, upon a dismissal of the bill, allowed the defendants only the costs to which they would have been entitled if they had demurred, and the bill had been dismissed upon the allowance of the demurrers. The same principle was alluded to as sound in *Quinn v. Patton*, 2 Ired. Eq. (37 N. Car.) 48.

Where One Defendant Colludes with Plaintiff. — Upon dismissal of the bill, costs will not be awarded in favor of a defendant who seems to have been in collusion with the plaintiff. Thus in *Quinn v. Patton*, 2 Ired. Eq. (37 N. Car.) 48, where the bill was dismissed, costs were given to one of the defendants, but with regard to the other defendant the court said: "Costs would likewise be given to the other defendants but for the fact that they are represented by the same solicitor who drew the bill; from which it is inferred that those parties and the plaintiff were at a good understanding, and did not deem the controversy between them very serious." So in *Marvin v. Ellwood*, 11 Paige (N. Y.) 365, no costs were given as between one of the defendants and the plaintiff, who were in plain collusion.

Where Defendants Obtained Advice of Court. — In *Greene v. Mumford*, 4 R. I. 313, the court seems to have inferred that the suit was collusive partly from the circumstance that the defendants answered a bill which would have been plainly bad on demurrer. At any rate,

the bill having served the turn of all the parties by eliciting the opinion of the court on the points of law raised, no costs were given to either party upon its dismissal.

Plaintiff's Interest Known to but Undisclosed by One Defendant. — Where a decree of interpleader was reversed on appeal, and the plaintiff's bill ordered to be dismissed on the ground of the plaintiff's interest, no costs were given in the appellate court to one of the defendants, who knew of the plaintiff's interest but did not disclose it. *Wing v. Spaulding*, 64 Vt. 83.

1. 14 Stat. at L., p. 306; 14 Stat. at L., p. 558; Judiciary Act, 1789, §§ 11, 12.

2. *Leonard v. Jamison*, 2 Edw. Ch. (N. Y.) 136.

3. *George v. Pilcher*, 28 Gratt. (Va.) 299, holding that until then he continues to be a substantial and necessary party, and, being a citizen of the same state as one of the defendants, the cause cannot be removed upon petition of that defendant, although the other defendant is a citizen of a different state. See *Sewing Mach. Co.'s Case*, 18 Wall. (U. S.) 553.

4. Therefore, consult the preceding part of this article, the code cases being there cited indiscriminately with cases in chancery. For cases conspicuously illustrating the substantive identity of complaints of interpleader and bills of interpleader, see *Crane v. McDonald*, 118 N. Y. 648; *Beck v. Stephani*, 9 How. Pr. (N. Y. Supreme Ct.) 193; *DuBois v. Union Dime Sav. Inst.*, 89 Hun (N. Y.) 382; *Board of Education v. Scoville*, 13 Kan. 17; *Cullen v. Dawson*, 24 Minn. 66; *Carrico v. Tomlinson*, 17 Mo. 499; *Freeland v. Wilson*, 18 Mo. 380; *Fahie v. Lindsay*, 8 Oregon 474.

action of interpleader is concurrent with and not superseded by statutory remedies afforded to a defendant in an action at law whereby he may obtain an order substituting another claimant as defendant.¹

3. Pleadings, Hearing, and Decree. — The rules of pleading and practice incidental to bills of interpleader and to code complaints of interpleader differ so little from each other that what has been said in respect of the first² may be considered as applicable to both,³ except where a distinction has been specifically pointed out.⁴

4. Costs. — See *supra*, II. 11. *Costs*.

IV. BILLS IN THE NATURE OF INTERPLEADER — 1. Object of the Bill. — In a bill of interpleader the plaintiff asks only that he may be at liberty to pay the money or deliver the property to the one to whom it of right belongs, and be protected against the claims of both.⁵ But a bill in the nature of a bill of interpleader will lie by a party in interest, to ascertain and establish his own rights, where there are other conflicting rights between third persons.⁶

1. *Board of Education v. Scoville*, 13 Kan. 17, an excellent case on this subject, as the plaintiff's interpleader action and the action at law against him were pending at the same time. *Beck v. Stephani*, 9 How. Pr. (N. Y. Supreme Ct.) 193; *Nofsinger v. Reynolds*, 52 Ind. 218. See also *Crane v. McDonald*, 118 N. Y. 648; *Barry v. Mutual L. Ins. Co.*, 53 N. Y. 536. Compare *Wenstrom Electric Co. v. Bloomer*, 85 Hun (N. Y.) 389.

2. See the divisions of this article.

3. See, for sample instances of parallel practice, *Washington L. Ins. Co. v. Lawrence*, 28 How. Pr. (N. Y. Supreme Ct.) 435; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; *Nofsinger v. Reynolds*, 52 Ind. 218.

4. In the preceding part of this article which treats of bills of interpleader, it will be observed that code and chancery cases are intermingled, but that occasional points of difference between the code and chancery pleading and practice are referred to in the notes.

5. See *supra*, II. 1. *Definition*.

6. *Darden v. Burns*, 6 Ala. 362; *Saratoga County v. Seabury*, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 461; *Heath v. Hurless*, 73 Ill. 323; *Nofsinger v. Reynolds*, 52 Ind. 218; *Blue v. Watson*, 59 Miss. 619; *Groves v. Sentell*, 153 U. S. 465; *Orr Water Ditch Co. v. Larcombe*, 14 Nev. 53. See also *Daniel v. Fain*, 5 Lea (Tenn.) 258.

"In strict actions of interpleader legal rights are only enforced; in

actions in the nature of interpleader equitable relief in addition is sometimes given, and that seems to be the whole of the distinction." *New England Mut. L. Ins. Co. v. Odell*, 50 Hun (N. Y.) 279.

Use of the Remedy Illustrated — To Redeem, etc. — A bill in the nature of interpleader is a proper remedy where the plaintiff is a mortgagor seeking to redeem, and there are conflicting claims to the mortgage money. *Koppinger v. O'Donnell*, 16 R. I. 417; *Bedell v. Hoffman*, 2 Paige (N. Y.) 199. See also *Badeau v. Rogers*, 2 Paige (N. Y.) 209; *Crane v. McDonald*, (Supreme Ct.) 2 N. Y. St. Rep. 150.

To Remove Liens. — The owner of a house may file a bill in the nature of interpleader against the builder and a person who has furnished material, to have it determined who is entitled to the balance due under the contract, and for a decree that upon paying the same all right of lien against the house and land shall become extinct. *Illingworth v. Rowe*, 52 N. J. Eq. 360. See also *Newhall v. Kastens*, 70 Ill. 156.

To Obtain Legal Title. — Where a purchaser of land takes possession and makes permanent improvements before acquiring title by deed and before the payment of the purchase money, and then a dispute arises as to whether the title of his vendor is not void as against the creditors of the person who conveyed to his vendor, he may file a bill in the nature of interpleader to have it

2. Conditions Essential to Maintenance of Bill. — The bill cannot be maintained where the plaintiff alleges that neither of the defendants has any right or title to or any interest in the subject-matter of the action,¹ nor unless the relief sought is equitable relief.² But it is not essential that there should be a legal doubt as to the plaintiff's rights.³

3. Frame of the Bill. — The bill differs from a strict bill of interpleader in that no affidavit negating collusion is required.⁴

Prayer. — The bill should pray that the defendants may interplead, and that the court may adjudge to whom the money or other property belongs.⁵

4. Decree. — The decree must be consistent with the allegations and prayer of the bill, and the issues submitted by the answers.⁶

5. Costs. — On a bill in the nature of interpleader costs are in the discretion of the court,⁷ and are not necessarily given to the

determined to whom he shall pay the purchase money, and what, on payment thereof, shall be done to invest him with a good title to the land. *Parks v. Jackson*, 11 Wend. (N. Y.) 450. This case was distinguished in *Carrico v. Tomlinson*, 17 Mo. 499, where it was held that a purchaser of land could not enforce the specific performance of his contract by a bill in the nature of an interpleader, bringing in all those who claimed title to the land and requiring them to interplead.

Trustees Seeking Directions. — Where there are conflicting claims to a trust estate, the trustee, by filing a bill in the nature of a bill of interpleader, to which those who claim to have an interest in the trust estate are made parties, can ask the direction of the court as to the proper mode of administering the trust, and can also be protected in the disposal of the property in his hands. *Fairbanks v. Belknap*, 135 Mass. 182.

But a party in interest under a trust cannot maintain a bill in the nature of interpleader against the trustee and an adverse claimant under the trust. *Sprague v. West*, 127 Mass. 471.

To Determine Liability for Tax. — In *Dorn v. Fox*, 61 N. Y. 264, it was held that where warrants for the collection of taxes upon a farm lying in each of two adjoining towns were placed in the hands of the respective town collectors, an action in the nature of a bill of interpleader could be maintained by the owner against the two collectors for the purpose of determining in which town his farm was properly taxed. See also *Thomson v. Ebbets, Hopk.* (N. Y.) 272, where actions were brought by

taxpayers to compel the collectors of different towns in which the plaintiff was taxed for the same property to interplead. *Redfield v. Genesee County, Clarke Ch.* (N. Y.) 42; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 385.

1. *McHenry v. Hazard*, 45 Barb. (N. Y.) 657; *Hellman v. Schneider*, 75 Ill. 422.

"There can be no bill of interpleader, or bill in the nature of a bill of interpleader, when the defendants contest and litigate with the plaintiff himself as to the validity and allowance of a claim set up by himself." *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447. See also *Blue v. Watson*, 59 Miss. 619.

2. *Killian v. Ebbinghaus*, 110 U. S. 568.

3. *Dorn v. Fox*, 61 N. Y. 264.

4. *Koppinger v. O'Donnell*, 16 R. I. 417.

5. *Dorn v. Fox*, 61 N. Y. 264.

6. *Heath v. Hurless*, 73 Ill. 323.

7. In *Bedell v. Hoffman*, 2 Paige (N. Y.) 199, speaking of a bill in the nature of interpleader to redeem and be let into possession of mortgaged premises, the court said: "And in a case where the complainant had been obliged to resort to such a suit in consequence of the conflicting claims of the defendants, he was allowed his costs, contrary to the usual practice in suits to redeem. *Goodrick v. Shotbolt*, Prec. Ch. 333. Costs in such cases, however, rest in the discretion of the court, and are not a matter of right; and where the complainant is in full possession of the mortgaged premises; and cannot be dispossessed by an action at

plaintiff, though his bill be sustained.¹

V. CODE COMPLAINTS IN THE NATURE OF INTERPLEADER. — The remedy by complaint in the nature of interpleader is essentially the same as that by bill in equity in the nature of interpleader,² which has been heretofore discussed.³

VI. STATUTORY INTERPLEADER BY SUBSTITUTION OF CLAIMANT. — See article RIGHT OF PROPERTY, TRIAL OF.

law in favor of either of the parties claiming the mortgage money, the party who has offered to receive the amount due and give an adequate indemnity ought not to be charged with the complainant's costs, if in the end it appears he was in the right."

Counsel Fees in filing the bill were denied in *Daniel v. Fain*, 5 Lea (Tenn.) 258, and *Groves v. Sentell*, 153 U. S. 465.

1. *Bedell v. Hoffman*, 2 Paige (N. Y.) 199. See also *Redfield v. Genesee County*, Clarke Ch. (N. Y.) 42.

2. *Carrico v. Tomlinson*, 17 Mo. 499, where the court said: "Nothing is now a cause of action which was not so before the introduction of the code, nor is anything now a defense which was not so previously."

3. See *supra*, IV. *Bills in the Nature of Interpleader*.

INTERPRETATION OF PLEADINGS.

See article *CONSTRUCTION OF PLEADINGS*, vol. 4, p. 741.

INTERPRETERS.

See article *EXAMINATION OF WITNESSES*, vol. 8, p. 95;
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See articles *ADMIRALTY*, vol. 1, pp. 255, 285; *BILLS IN EQUITY*, vol. 3, p. 344; *CONTEMPT*, vol. 4, pp. 786, 796; *DEFAULTS*, vol. 6, p. 75; *DEPOSITIONS*, vol. 6, p. 487; *GARNISHMENT*, vol. 9, p. 820; and the subsequent articles in this work in connection with which questions relating to interrogatories may arise.

INTERSTATE COMMERCE.

By S. B. FISHER.

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I. PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION

— 1. *Jurisdiction of the Commission.* — The jurisdiction of the Interstate Commerce Commission is strictly statutory and cannot be extended over other subjects than those defined by the act under which such commission is organized.¹ Under the provision

1. *Matter of Express Companies*, 1 Interstate C. C. Rep. 369.

Every ground of the commission's jurisdiction as defined by the statute "relates directly or indirectly to the transportation of persons and freight by carriers at fair and reasonable rates and with absolute impartiality as to facilities and accommodations." *Traders', etc., Union v. Philadelphia, etc., R. Co.*, 1 Interstate Com. Rep. 371.

In *Mattingly v. Pennsylvania Co.*, 3 Interstate C. C. Rep. 592, it was held that the provisions of the Act to Regulate Commerce must be understood to regulate all the commerce subject to the exclusive jurisdiction of Congress, including the agents and instrumentalities employed and commodities carried, with only such limitations as are found in the act itself.

Commerce between Points in Same State Passing through Another State. — Commerce between points in the same

state, but which in being conducted from one point to another passes through another state, is interstate commerce, and subject to regulations by the provisions of the Act to Regulate Commerce. *New Orleans Cotton Exchange v. Cincinnati, etc., R. Co.*, 2 Interstate C. C. Rep. 375.

Merchandise Intended to be Transported to Another State by Second Carrier. — The fact that merchandise offered to a carrier for transportation from one point to another in the same state is intended to be further transported by a second carrier into another state does not make such first transportation interstate commerce, or render the carrier subject to the control of the commission in respect thereto, even though such first carrier may be informed of the ultimate destination of the merchandise. *Missouri, etc., Railroad Tie, etc., Co. v. Cape Girardeau, etc., R. Co.*, 1 Interstate C. C. Rep. 30. See also, to the

of the Act to Regulate Commerce authorizing the Interstate Commerce Commission to institute an inquiry on its own motion in the same manner and to the same effect as though complaint had been made, neither complaint nor complainant is necessary to give the commission jurisdiction.¹ The jurisdiction of the commission as usually exercised is limited to the decision of complaints for alleged violations of the law upon hearing of the parties interested; it will not express opinions upon an *ex parte* statement of fact where there has been no complaint of any violation of the law.²

2. Parties — Complaint Concerning Single Carrier. — Where a complaint for the violation of the Interstate Commerce Law concerns only an act or omission by a single carrier, such carrier only need be made a party.³

Complaint Concerning Several Carriers or Lines. — Where, however, the complaint relates to matters in which two or more carriers, doing business under a common control or arrangement for a continuous carriage or shipment, are interested, all such carriers must be made parties.⁴ When the subject-matter of the complaint involves substantially the same alleged violations of the Interstate Commerce Law by several carriers, or lines operated separately, such carriers or lines may be embraced by the complainant in the same proceeding.⁵

same effect, *New Jersey Fruit Exchange v. Central R. Co.*, 2 Interstate C. C. Rep. 142.

Foreign Carriers. — The Interstate Commerce Commission has jurisdiction of foreign carriers engaged in the transportation of passengers and property for a continuous carriage or shipment from places in the United States to places in adjacent foreign countries. *Matter of Acts, etc., of Grand Trunk R. Co.*, 3 Interstate C. C. Rep. 89.

Jurisdiction as to Receivers. — The fact that a receiver has been appointed for a railroad company does not affect the jurisdiction of the commission. *Board of Trade v. Alabama Midland R. Co.*, 4 Interstate Com. Rep. 348.

And prior leave of a court which has appointed a receiver of a railroad company is not necessary to entitle a shipper to complain against such receiver in a proceeding before the commission or to give the commission jurisdiction in such proceeding. *Evans v. Union Pac. R. Co.*, 6 Interstate C. C. Rep. 523.

1. *Florida R. Commission v. Savannah, etc., R. Co.*, 5 Interstate C. C. Rep. 13, 136; *Matter of Acts, etc., of Grand Trunk R. Co.*, 3 Interstate C. C. Rep. 89.

Penal Actions and Criminal Prosecutions.

— The Interstate Commerce Commission has no jurisdiction in suits for penalties nor in criminal prosecutions. *Report of Interstate Commerce Commission*, 3 Interstate C. C. Rep. 431.

2. *Matter of Railway Conductors' Petition*, 1 Interstate C. C. Rep. 8; *Matter of Southern Pac. R. Co.*, 1 Interstate C. C. Rep. 6; *Matter of Iowa Barbed Steel Wire Co.*, 1 Interstate C. C. Rep. 17; *Matter of St. Louis Millers' Assoc.*, 1 Interstate C. C. Rep. 20; *Matter of Disabled Soldiers, etc.*, 1 Interstate C. C. Rep. 28; *Missouri, etc., Railroad Tie, etc., Co. v. Cape Girardeau, etc., R. Co.*, 1 Interstate C. C. Rep. 30.

3. See Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1; *Hurlburt v. Lake Shore, etc., R. Co.*, 2 Interstate Com. Rep. 81.

4. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1; *Hurlburt v. Lake Shore, etc., R. Co.*, 2 Interstate Com. Rep. 81; *Allen v. Louisville, etc., R. Co.*, 1 Interstate Com. Rep. 888; *Riddle v. Pittsburgh, etc., R. Co.*, 1 Interstate Com. Rep. 773.

5. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1;

Intervention. — All persons or carriers, although not made formal parties, may, if they have an interest in a question pending before the commission, apply for leave to intervene and be heard upon the questions involved.¹

Interest of Complainant. — A complaint by a party having no apparent interest in the transaction will not be entertained,² but one may complain upon public grounds of a violation of the law amounting to a public grievance.³

3. Complaints—*a.* **MUST BE BY PETITION.** — Complaints of any acts or omissions by any common carrier in violation of the provisions of the Interstate Commerce Law must be made by petition,⁴ briefly stating the facts claimed to constitute a violation.⁵

b. **VERIFICATION.** — The petition must be verified by the petitioner, or by some officer or agent of the corporation or other organization making the complaint, to the effect that the averments of the petition are true to the knowledge or belief of the affiant.⁶

c. **MUST BE SUPPORTED BY EVIDENCE.** — No order can be made against a railroad company on a complaint which is not supported by evidence.⁷ In such case, the complaint will be dismissed for want of proof.⁸

d. **NAMES OF PARTIES.** — The name of the party or parties complained against must be set forth in full;⁹ and the address of the petitioner, and the name and address of his attorney or counsel, if any, should be indorsed upon the complaint.¹⁰

Bates v. Pennsylvania R. Co., 3 Interstate C. C. Rep. 435; *Michigan Congress Water Co. v. Chicago, etc., R. Co.*, 2 Interstate Com. Rep. 428; *New Orleans Cotton Exchange v. Cincinnati, etc., R. Co.*, 2 Interstate Com. Rep. 289; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 2 Interstate Com. Rep. 102.

1. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1; *Spartanburg Board of Trade v. Richmond, etc., R. Co.*, 2 Interstate Com. Rep. 193.

2. *Ottinger v. Southern Pac. R. Co.*, 1 Interstate Com. Rep. 607.

3. *Boston, etc., R. Co. v. Boston, etc., R. Co.*, 1 Interstate C. C. Rep. 158.

4. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1.

5. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1; *White v. Michigan Cent. R. Co.*, 3 Interstate C. C. Rep. 281, where it was held that an averment in the complaint, that the respondents were interstate carriers subject to the Act to Regulate Commerce, was not of itself sufficient

to warrant an inference, under a motion to dismiss the complaint for insufficiency, that wheat delivered at their elevators was for interstate commerce.

6. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1.

Affidavits — Where Taken. — An affidavit to a petition, complaint, or answer may be taken before any officer of the United States or of any state or territory who is authorized to administer oaths. 1 Int. Com. Rep., app. 1, rule 12, p. 842.

7. *Holbrook v. St. Paul, etc., R. Co.*, 1 Interstate C. C. Rep. 102.

8. *Fulton v. Chicago, etc., R. Co.*, 1 Interstate C. C. Rep. 104; *Harding v. Chicago, etc., R. Co.*, 1 Interstate C. C. Rep. 104; *Leonard v. Union Pac. R. Co.*, 1 Interstate Com. Rep. 627; *Rice v. St. Louis South Western R. Co.*, 4 Interstate Com. Rep. 321; *Loud v. South Carolina R. Co.*, 5 Interstate C. C. Rep. 529.

9. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1.

10. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1.

e. AMENDMENT.— Upon the application of a petitioner, the commission may, in its discretion, allow an amendment to the petition,¹ and as a rule the commission is liberal in its allowance of such amendments,² but it will not allow an amendment which would in effect be making a new case.³ An amendment to the complaint is not necessary in order to introduce evidence which would have been admissible under the complaint as originally filed.⁴

4. Method of Demurring.— If the carrier complained against deems the complaint insufficient to show a breach of legal dealing, it may, instead of filing an answer, serve notice on the complainant for a hearing of the case on the complaint, thereby admitting the facts stated in the complaint.⁵ A copy of such notice must also be filed with the commission.⁶

5. Answer—*a.* CONTENTS, AND EFFECT OF FAILURE TO ANSWER.— The party complained against must answer the complaint within the time prescribed by the commission,⁷ either admitting or denying the material allegations of the complaint and setting forth any additional facts claimed to be material.⁸

In Case of a Failure to Answer the commission may take such proof of the charge as it deems reasonable and proper, and make such order thereon as the circumstances of the case appear to demand.⁹

If the Respondent Makes Satisfaction Before Answering, the written acknowledgment thereof must be filed with the commission, and may be set forth in the answer; if, however, the satisfaction is made after the filing and service of the answer, a supplemental answer setting forth the facts of satisfaction may be filed and served.¹⁰

***b.* VERIFICATION.**— The answer must be verified in the same manner as the complaint.¹¹

1. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1.

2. Delaware State Grange, etc., *v.* New York, etc., R. Co., 2 Interstate C. C. Rep. 309; Riddle *v.* Baltimore, etc., R. Co., 1 Interstate Com. Rep. 701, 1 Interstate C. C. Rep. 372; Reynolds *v.* Western New York, etc., R. Co., 1 Interstate C. C. Rep. 347.

3. Delaware State Grange, etc., *v.* New York, etc., R. Co., 2 Interstate Com. Rep. 187, 2 Interstate C. C. Rep. 309.

In Reynolds *v.* Western New York, etc., R. Co., 1 Interstate Com. Rep. 685, a complaint stating that the road had been previously in the hands of a receiver, who was now president, was allowed to be amended so as to show the existence of the receivership, which it appeared on hearing was still in existence.

4. Delaware State Grange, etc., *v.* New York, etc., R. Co., 2 Interstate C. C. Rep. 309.

5. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1; Oregon Short Line R. Co. *v.* Northern Pac. R. Co., 2 Interstate Com. Rep. 639.

6. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. 1.

7. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. li.

8. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. li.

9. Rules of Practice before the Commission, 1 Int. Com. Rep., app. 1, rule 8, p. 842; Tecumseh Celery Co. *v.* Cincinnati, etc., R. Co., 4 Interstate Com. Rep. 318.

10. Rules of Practice before the Commission, 2 Int. Com. Rep. app. 4, p. li.

11. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. li.

c. **AMENDMENT.** — As in the case of complaints, an amendment may be allowed to an answer, in the discretion of the commission.¹

6. Replication. — The rules of practice issued by the Interstate Commerce Commission not only do not provide for a replication to the answer, but in effect, though not in terms, exclude it.²

7. Service of Papers. — Copies of notice or other papers must be served upon the opposing parties, either personally or by mail; and where the party has appeared by attorney, service upon such attorney shall be deemed sufficient service upon the party.³

8. Depositions. — Where a case is at issue upon petition and answer, each party may take depositions of witnesses in the manner provided by statute,⁴ and transmit the same to the secretary of the commission, without obtaining any authority from the commission for that purpose.⁵

9. Hearing — Time and Place. — When issue has been joined by the service of the answer, the time and place will be assigned by the commission for hearing the same.⁶ The place for such hearing is at the office of the commission, unless otherwise ordered.⁷

The Granting of Adjournments and Extensions of Time upon the application of parties rests within the discretion of the commission.⁸

If, at the Hearing, the Defendant Avers Its Purpose to Comply with the Law, it must be presumed that it will do so, and the commission must act upon such an assumption until it is evidenced that such purpose is not being carried out.⁹

Stay of Proceedings. — All cases before the commission will be stayed until final determination of other similar suits at the same

1. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. li.

2. Oregon Short Line R. Co. v. Northern Pac. R. Co., 2 Interstate Com. Rep. 639.

3. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. l.

4. Rev. Stat. U. S., §§ 863, 864.

5. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. li.

6. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. li.

7. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. li.

Hearing Ordered at Point Immediately Affected. — In Delaware State Grange v. New York, etc., R. Co., 2 Interstate Com. Rep. 187, a case which involved local rates was ordered to be heard before the commission at a central point in the region immediately affected by the rates under consideration.

Publication of Notice of Hearing. — In the Matter of Chicago, etc., R. Co., 2 Interstate Com. Rep. 55, 137, where a railroad company was called upon to justify its rate sheets at a public hear-

ing, notice was ordered to be published of such hearing, in order that other competing carriers and the public generally might be afforded an opportunity to attend.

8. 1 Int. Com. Rep., app. 1, rule 7, p. 842.

Dilatory Motions Not Favored. — In Associated Wholesale Grocers v. Missouri Pac. R. Co., 1 Interstate Com. Rep. 321, it was stated by the commission that "it is the desire of the commission that the practice and proceedings in cases before us shall be in the simplest form possible consistent with justice, and that, without dilatory motions, pleas in abatement, or other interlocutory proceedings, the matter in question may be brought to an issue at the earliest practicable day, when a final hearing may be had forthwith, and all proper questions will then be entertained, whether jurisdictional or going to the merits of the controversy."

9. Holbrook v. St. Paul, etc., R. Co., 1 Interstate Com. Rep. 323.

time pending in the courts for the enforcement of an order of the commission, where such order, if enforced, will probably remove all grounds for complaint in the cases under consideration.¹

10. Submission of Proposed Findings.—When a case is finally submitted to the commission it is the right of either party to submit proposed findings of fact, which findings must embrace only the material facts supposed to be established by the testimony.²

11. Stipulation as to Facts.—Parties to proceedings before the commission may, by stipulation duly signed and filed, agree upon such facts as they deem to be involved in the controversy, and such statement shall be recorded and used as evidence.³

12. Dismissal and Discontinuance.—When a copy of the defendant's answer and notice of the time of hearing have been sent to the complainant, but the latter has not appeared, it will be assumed that he is satisfied with the answer and the case will be dismissed.⁴ So, also, where there is no evidence of any overt act of misconduct on the part of the defendant which could support any judgment by the commission or any mandatory order, the complaint must be dismissed.⁵ Where rates complained of in a petition are reduced before the hearing, such petition will be dismissed.⁶ Where, in the absence of proof, it is impossible to say that if all the facts were before the commission a charge complained of as excessive could not be justified, the case must be dismissed without prejudice.⁷

A Motion to Dismiss a Complaint for Insufficiency may be made at the hearing although an answer has been filed, as such fact will not be deemed an admission of the sufficiency of the complaint.⁸

13. Rehearing—In General.—Either party desiring a rehearing must make an application within the time prescribed after a decision has been filed and made public in any case decided by the commission.⁹

Petition.—Such application must be by petition, stating the findings of fact and conclusions of law supposed to be erroneous;¹⁰ otherwise the application will be denied.¹¹ Where a petition is

1. Southern Paint, etc., Co. v. Lake Erie, etc., R. Co., 6 Interstate C. C. Rep. 284.

2. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. li.

3. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. li.

4. Jackson v. St. Louis, etc., R. Co., 1 Interstate C. C. Rep. 184.

5. Holbrook v. St. Paul, etc., R. Co., 1 Interstate Com. Rep. 323.

6. Fulton v. Chicago, etc., R. Co., 1 Interstate Com. Rep. 375; Harding v. Chicago, etc., R. Co., 1 Interstate Com. Rep. 375.

7. Leonard v. Union Pac. R. Co., 1 Interstate Com. Rep. 627.

8. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. li.

9. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. lii.

10. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. lii; Myers v. Pennsylvania Co., 3 Interstate C. C. Rep. 130; Proctor v. Cincinnati, etc., R. Co., 4 Interstate C. C. Rep. 443; *In re* Produce Exchange, 2 Interstate Com. Rep. 412.

11. Myers v. Pennsylvania Co., 3 Interstate C. C. Rep. 130.

for a rehearing for the purpose of further testimony, it should indicate the nature of the additional testimony,¹ and should be verified.²

Application by One Not a Party. — After the hearing and determination of a complaint, no party to the proceeding having applied for a rehearing, a rehearing will not be granted at the instance of one who was not a party to the original proceeding.³

Consideration of Petition. — The application for a rehearing will be carefully considered by the commission, and where it appears possible that any argument of counsel might change the result, it will be granted.⁴ If, upon a rehearing of the case, the additional evidence introduced would justify a finding contrary to that in the original hearing, the original order may be vacated.⁵

Reopening Case Without Application. — Where the motion to be decided is one of public interest the commission may reopen the case for further investigation without an application for the purpose and without previous notice to either party.⁶

14. Orders. — Where matters complained of are cured at any stage of the proceedings before the final opinion is rendered by the commission, so as to conform to the relief prayed for, the commission will make no order and render no opinion.⁷ Where

1. *Rice v. Western New York, etc., R. Co.*, 3 Interstate C. C. Rep. 87.

Must Not Be Cumulative. — The additional testimony which the petition states is intended to be introduced must not be merely cumulative. Rules of Practice before the Commission, 2 Int. Com. Rep., app. 4, p. lii.

2. *Rice v. Western New York, etc., R. Co.*, 2 Interstate Com. Rep. 496.

3. *In re Produce Exchange*, 2 Interstate Com. Rep. 412.

4. *Riddle v. Pittsburgh, etc., R. Co.*, 1 Interstate C. C. Rep. 490.

5. *Bates v. Pennsylvania R. Co.*, 3 Interstate Com. Rep. 296. See also *Matter of Produce Exchange*, 2 Interstate C. C. Rep. 588.

Refusal of Federal Court to Enforce Order. — The commission may, upon the rehearing of the case, modify its original order, even though a federal court has refused to enforce such order against the party affected. *Page v. Delaware, etc., R. Co.*, 6 Interstate C. C. Rep. 548, where it was said, in the opinion of the commission, that "the commission is not a court; it is a special tribunal continually engaged, in an administrative and semi-judicial capacity, in investigating railway rates and practices the propriety of which may be and often is affected by changes in commercial and transportation con-

ditions; and it is not precluded from rehearing a particular case and amending or modifying its original order therein by the refusal of a Circuit Court of the United States to enforce such order against the carriers affected thereby — especially when the reasons assigned for such refusal do not relate to the principal question in controversy and are consistent with an approval of the amended or modified order."

Amendment of Final Order Several Years After Rendition. — In *Rice v. Western New York, etc., R. Co.*, 6 Interstate C. C. Rep. 455, it was held that "as to reparation now demanded for damages claimed to have resulted from practices found unlawful by said decision, we think it would be unwise, as a matter of practice, and also unjust to the defendant, to amend the final order entered herein nearly four years ago and promptly obeyed by that company, so as to subject the carrier to further requirements in favor of these complainants in respect of violations which were corrected under said order."

6. *Rice v. Western New York, etc., R. Co.*, 2 Interstate Com. Rep. 496.

7. *Manufacturers', etc., Union v. Minneapolis, etc., R. Co.*, 1 Interstate Com. Rep. 630. 1 Interstate C. C. Rep. 227; *Lincoln Board of Trade v. Union Pac. R. Co.*, 2 Interstate Com. Rep.

an investigation by the commission has been finished as to some matters, but not as to others, it may make an order *pendente lite* as to the matters in which the investigation has been concluded, and the case may be retained for further consideration as to the matters in which it is unfinished.¹

15. Reparation. — Prior to the amendment of March 2, 1889, of the sixteenth section of the Act to Regulate Commerce, it was held that since the statute provided for no trial by jury in the courts to enforce the awards of the commission in controversies such as were triable at common law, the commission could award no reparation for past damages.² The section as amended, however, now provides, in cases involving right to jury trial, for proceedings to enforce the commission's orders on the law side of the court, and for a trial and judgment as at common law.³

16. Report — Necessity for Report. — In a complaint before the commission, the latter is required to make a report in writing in respect thereto, which report shall include the findings of fact upon which the conclusions of the commission are based, and in any judicial proceeding had thereunder such findings are to be deemed *prima facie* evidence as to each and every fact found.⁴

Essentials of Report. — It is not sufficient that the report of the commission should be made up of mere conclusions, either of law or fact, but it should show what the issues of the case are and what facts it finds in regard to such issues.⁵

101, 2 Interstate C. C. Rep. 229; Harris v. Duval, 2 Interstate Com. Rep. 514, 3 Interstate C. C. Rep. 128; New Orleans Cotton Exchange v. Louisville, etc., R. Co., 3 Interstate Com. Rep. 523, 4 Interstate C. C. Rep. 694.

It is contemplated by the statute that when complaint of exorbitant rates is made the carrier may change its rates before the hearing so as to remedy the matter complained of, if it shall see proper to do so; in which case, if there is no complaint against the modified rates, and there is nothing to show that they are unreasonable, the complaint will be dismissed. *Fulton v. Chicago*, etc., R. Co., 1 Interstate Com. Rep. 375, 1 Interstate C. C. Rep. 104.

Obnoxious Tariff Abandoned. — No order will be made where a tariff complained of was abandoned by the carrier a long time before the complaint was made and shortly after it had been put in force. *Rawson v. Newport News*, etc., Co., 2 Interstate Com. Rep. 626, 3 Interstate C. C. Rep. 266.

No Opinion Will Be Expressed in Such Case, even if the parties request it. *Pennsylvania Co. v. Louisville*, etc.,

R. Co., 2 Interstate Com. Rep. 603, 3 Interstate C. C. Rep. 223.

1. *Matter of Carriage of Persons*, etc., by Boston, etc., R. Co., 5 Interstate C. C. Rep. 69.

2. *Council v. Western*, etc., R. Co., 1 Interstate C. C. Rep. 339; *Heck v. East Tennessee*, etc., R. Co., 1 Interstate C. C. Rep. 495, 1 Interstate Com. Rep. 775; *Riddle v. New York*, etc., R. Co., 1 Interstate C. C. Rep. 594, 1 Interstate Com. Rep. 787; *Rawson v. Newport News*, etc., Co., 3 Interstate C. C. Rep. 266.

3. Act of March 2, 1889, § — ; *Macloon v. Chicago*, etc., R. Co., 5 Interstate C. C. Rep. 84; *Rawson v. Newport News*, etc., Co., 3 Interstate C. C. Rep. 266.

4. Interstate Commerce Commission v. Louisville, etc., R. Co., 5 Interstate Com. Rep. 656.

5. Interstate Commerce Commission v. Louisville, etc., R. Co., 5 Interstate Com. Rep. 656. In the opinion in this case the following language was used: "The report should make suitable reference to the evidence adduced in regard to any particular questions

17. Effect of Decision of Commission as a Precedent.—In making a decision upon a question of fact in respect to traffic of one section of the country, the commission does not thereby necessarily lay down a principle for application in other sections of the country where the nature of the traffic is so different as to require altogether different rulings.¹

II. PROCEEDINGS IN UNITED STATES COURTS—1. Generally.—Compliance with the Interstate Commerce Law may be enforced in two ways: One by civil proceedings in federal courts to compel obedience to “the lawful order or requirement” of the commission; the other by the imposition of criminal penalties for infractions of the law.²

2. Civil Actions — a. TO ENFORCE ORDERS OF COMMISSION — Jurisdiction.—The right to ask the federal court to enforce an order of the Interstate Commerce Commission arises under a law of the United States relating to a subject-matter over which Congress has exclusive control; and this is sufficient to sustain the court’s jurisdiction, regardless of the citizenship of the parties.³

Who May Institute Proceedings.—Upon the refusal or neglect to perform any lawful order of the commission, the commission, or any person interested in such order, may apply by a petition to the Circuit Court of the United States, alleging such disobedience.⁴

where there is a conflict in the proof, showing how the commission settles the disputed fact, or, if the evidence in regard to any issue is undisputed, state that fact. In other words, the report should give the parties to be affected, as well as the court, in any judicial proceeding afterwards instituted, definite and distinct information as to what was found as facts and the commission’s opinion thereon, such as would be necessary to make a judicial opinion sufficient and satisfactory for the purpose of ordinary litigation.”

Cumulative or Immaterial Evidence.—The opinion in *Riddle v. Pittsburgh*, etc., R. Co., 1 Interstate C. C. Rep. 490, contains the following: “In every case before us our findings upon the evidence relate only to the ascertainment of all the material facts necessary to fairly and justly present the merits of the controversy, and * * * to such facts as arise from immaterial or irrelevant evidence we give * * * no place in our reports and opinions.”

1. *Matter of Relative Tank*, etc., Rates on Oil, 2 Interstate C. C. Rep. 365.

2. Fifth Annual Report of Interstate Commerce Commission, 3 Interstate Com. Rep. 763.

3. *Kentucky*, etc., *Bridge Co.* v.

Louisville, etc., R. Co., 37 Fed. Rep. 567; *Little Rock*, etc., R. Co. v. *East Tennessee*, etc., R. Co., 47 Fed. Rep. 771. See also *Interstate Commerce Commission v. Lehigh Valley R. Co.*, 49 Fed. Rep. 177; *Interstate Commerce Commission v. Atchison*, etc., R. Co., 50 Fed. Rep. 295; *U. S. v. Jellico Mountain Coke*, etc., Co., 3 Interstate Com. Rep. 626.

Court May Not Modify or Change Order.—The Circuit Court has no power to modify or change the order of the commission; its jurisdiction is limited and can go no further than to grant or refuse compulsory obedience to the lawful orders of the commission. *Detroit*, etc., R. Co. v. *Interstate Commerce Commission*, 74 Fed. Rep. 803. See also *Interstate Commerce Commission v. Louisville*, etc., R. Co., 73 Fed. Rep. 409.

Jurisdiction in Cases Growing Out of Interstate Commerce.—The fact that a given subject, like interstate commerce, is beyond the state legislative control does not *ipso facto* prevent the courts of the state from exercising jurisdiction over cases which grow out of this commerce. *Murray v. Chicago*, etc., R. Co., 62 Fed. Rep. 24, 4 Interstate Com. Rep. 806.

4. 25 U. S. Stat. at L. 859, amending

Nature of Remedy.— A suit brought in the United States Circuit Court to enforce an order of the commission is an original and independent proceeding, in which the commission's report is *prima facie* evidence of the matters of fact therein stated. The court is not confined to a mere re-examination of the case as held and reported by the commission, but hears and determines the case *de novo*, upon proper pleadings and proof, the latter including not only the *prima facie* facts reported by the commission, but all such further testimony as either party may introduce bearing upon the matters in controversy.¹

Necessary Parties.— In a proceeding to enforce the order of the commission against a single carrier, it is not necessary that another carrier making the forbidden rate jointly with the defendant be made a party.²

Appeal.— The Judiciary Act of March 3, 1891, repealed section 16 of the Act to Regulate Commerce as amended by the Act of March 2, 1889, as to the allowance of an appeal to the Supreme Court direct when the matter in question exceeds two thousand dollars, and an appeal must now be taken in such cases to the Circuit Court of Appeals, and not directly to the Supreme Court.³

b. ACTIONS TO RECOVER DAMAGES — Jurisdiction.— Suits to recover damages sustained in consequence of the violation of the Interstate Commerce Law must be brought in the federal court.⁴

section 16 of the Act to Regulate Commerce. See also Report of Interstate Commerce Commission, 3 Interstate C. C. Rep. 431.

Institution of Proceedings by District Attorney.— Upon the request of the commission it is the duty of any district attorney to whom the commission may apply to institute in the proper court, and to prosecute under the direction of the attorney-general of the United States, all necessary proceedings for the enforcement of the provisions of the Act to Regulate Commerce. (Amendment of Feb. 10, 1891, to the 12th section of the original Act.) *U. S. v. Missouri Pac. R. Co.*, 65 Fed. Rep. 903.

1. *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 56 Fed. Rep. 925. See also *Interstate Commerce Commission v. Lehigh Valley R. Co.*, 49 Fed. Rep. 177; *Interstate Commerce Commission v. Atchison, etc., R. Co.*, 50 Fed. Rep. 295; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567.

2. *Interstate Commerce Commission v. Texas, etc., R. Co.*, 52 Fed. Rep. 187 [4 Interstate Com. Rep. 114, *affirmed* in 57 Fed. Rep. 948, 4 Inter-

state Com. Rep. 408], where the court said: "If the order made by the commission was a lawful one, I see no reason why the defendant should not be compelled to obey it, notwithstanding the Southern Pacific Company is not at present pursued. If the defendant is violating a proper order of the commission, it should be restrained from doing so; and it cannot escape upon the objection that another wrongdoer is also violating it."

3. *Interstate Commerce Commission v. Atchison, etc., R. Co.*, 149 U. S. 264.

4. *Van Patten v. Chicago, etc., R. Co.*, 74 Fed. Rep. 981; *Parsons v. Chicago, etc., R. Co.*, 167 U. S. 447.

Jurisdiction of State Courts.— A party who seeks damages alleged to have been sustained in consequence of a violation by a common carrier of the Interstate Commerce Law, as the act provides for redress by procedure either before the commission or by suit before the federal court, cannot bring suit before the state court, which is without jurisdiction to enforce the right, but is relegated exclusively to the commission or the federal court; otherwise, the party would have a third alternative or

Complaint.—In such suits it must be alleged and proved not only that there has been a violation of the law by the defendant, but also that it has worked an injury to the plaintiff.¹

3. Criminal Proceedings—*a. GENERALLY.*—By the tenth section of the Act to Regulate Commerce, the violations of the provisions of the act by any common carrier subject to such provisions, or, where such carrier is a corporation, by any agent of such corporation, will constitute a misdemeanor for which an indictment will lie.² Thus an indictment will lie for the giving of any undue or unreasonable preference or advantage to any particular person, firm, or corporation;³ for granting free transportation to one passenger while denying it to another;⁴ for carrying passengers at less than lawful rates;⁵ for falsely billing for transportation;⁶ for false weighing;⁷ or for obtaining less than regular or schedule rates.⁸

b. INDICTMENT OF AGENTS.—In an indictment against a defendant as agent for a violation of the Interstate Commerce Law, it is sufficient to show that the offense was committed under color of his agency, and it is not necessary to allege that the unlawful act was done under the direction or authority of the company.⁹

mode of redress not contemplated by the act, by which he is restricted to one of two remedies. *Copp v. Louisville, etc., R. Co.*, 43 La. Ann. 511, 46 Am. & Eng. R. Cas. 634.

1. *Parsons v. Chicago, etc., R. Co.*, 167 U. S. 447.

2. Fifth Annual Report of Interstate Commerce Commission, 3 Interstate Com. Rep. 763; *U. S. v. Tozer*, 37 Fed. Rep. 635, 2 Interstate Com. Rep. 422.

3. *U. S. v. Tozer*, 37 Fed. Rep. 635, 2 Interstate Com. Rep. 422, holding that the indictment is sufficient if it charges with sufficient certainty that one shipper has been given advantage or another subjected to disadvantage, and it is not necessary to allege that it was "under substantially similar circumstances and conditions," as provided by section 4 of the act, relating to long and short hauls.

4. *U. S. v. Cleveland, etc., R. Co.*, 3 Interstate Com. Rep. 290, 294.

5. *U. S. v. Egan*, 3 Interstate Com. Rep. 459.

6. *U. S. v. Edmondson*, 3 Interstate Com. Rep. 639; *U. S. v. Mott*, 3 Interstate Com. Rep. 583.

7. *U. S. v. Edmondson*, 3 Interstate Com. Rep. 382; *U. S. v. Mott*, 3 Interstate Com. Rep. 583.

8. *U. S. v. Stimson*, 3 Interstate Com. Rep. 636; *U. S. v. Robertson*, 3 Interstate Com. Rep. 636; *U. S. v. Muller*, 3 Interstate Com. Rep. 376; *U. S. v. Wyckoff*, 3 Interstate Com. Rep. 731; *U. S. v. Fermenich*, 3 Interstate Com. Rep. 731; *U. S. v. Swift*, 3 Interstate Com. Rep. 731; *U. S. v. Long*, 3 Interstate Com. Rep. 380.

9. *U. S. v. Tozer*, 37 Fed. Rep. 635, 2 Interstate Com. Rep. 422.

In *U. S. v. Michigan Cent. R. Co.*, 43 Fed. Rep. 26, it was held that where a company and several of its agents are indicted for billing goods so as to give the shipper a rebate under pretense of collecting a certain charge for the connecting carrier, and it appears that the arrangement was made by the company's general freight agent (one of the defendants), the fact that a local freight agent (another defendant), who made out the bills, thought there was something unusual about the shipments, is not sufficient to make him criminally liable.

INTERVENTION.

By S. B. FISHER.

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CROSS-REFERENCES.

See in general the articles *INTERPLEADER*, *ante*, p. 444; *RIGHT OF PROPERTY, TRIAL OF*; and the references in the General Index to this work.

I. DEFINITION. — Intervention is the act or proceeding by which one on his own motion becomes a party to a suit pending between others.¹

II. JURISDICTION. — A demand in intervention must be presented to the court in which the main action lies, and must follow that jurisdiction although such court has not original jurisdiction of the claim in intervention.² The fact that the intervener and one of the parties to the suit are citizens of the same state is no objection, where the suit is in a federal court.³ Where a petition for intervention is filed, the applicant thereby submits himself to the jurisdiction of the court⁴ to the same extent as in the case of an original action. He assumes the position of plaintiff against those who are called upon to answer his complaint in intervention, and is subject to all the rules which regulate pleading and practice between plaintiffs and defendants in similar cases.⁵

III. WHO MAY INTERVENE — **1. Generally** — *a. UNDER STATUTES* — **In Actions to Recover Property.** — In a few states the right of

1. Anderson's Law Dict., tit. Intervention.

Intervention, in civil law, is the act by which a third party demands to be received as a party in a suit pending between other persons. Black's Law Dict., tit. Intervention.

Distinguished from Interpleader. — "Intervention is a civil law term, a pleading familiar in that system. It is the act by which a person not originally a party 'comes between them,' claiming an interest in the subject-matter, and interposes his claim, which is generally adverse to one or both of the original litigants. * * * The bill of interpleader rests upon the fundamental principle that the complainant is the mere holder of a stake which is to be contested for by the other parties, he standing wholly indifferent between them. If the complainant seeks relief in the premises against either party, or asserts a right or claim against either or both of them, it would be fatal to his bill." Hyman v. Cameron, 46 Miss. 727. See generally article INTERPLEADER, *ante*, p. 444.

2. Hoover v. York, 30 La. Ann. 752.

3. Krippendorf v. Hyde, 110 U. S. 284; Clarke v. Mathewson, 12 Pet. (U. S.) 164.

Removal from State to Federal Court. — In Hack v. Chicago, etc., R. Co., 23 Fed. Rep. 356, a necessary party to the cause was excluded, and was not allowed to file a cross-bill and answer, or to present a motion and bond to remove the cause to the federal court. It was held that the federal court would treat such person as if he were a party and determine the motion for removal accordingly. See, however, in this connection, Iowa Homestead Co. v. Des Moines Nav., etc., Co., 8 Fed. Rep. 97, in which it was held that where a controversy between citizens of one state is united with one between the plaintiff and a citizen of a different state, such union not being due to the plaintiff, the federal court has no jurisdiction.

4. Bowdoin College v. Merritt, 59 Fed. Rep. 6. See also Arnold v. Weimer, 40 Neb. 216; Arnold v. Globe Invest. Co., 40 Neb. 225.

5. Braithwaite v. Aken, 3 N. Dak. 365. See also Continental Nat. Bank v. Weems, 69 Tex. 489.

In a Suit in Equity where a person has been allowed to intervene, he is thenceforth treated as an original party thereto. French v. Gapen, 105 U. S. 525.

a third party to intervene, so far as it is regulated by statute, is confined to actions for the recovery of real or personal property,¹ and the applicant must have an interest in the object of the suit in which he desires to intervene. The fact that he has an interest in the thing which is the subject of controversy will not be sufficient.²

Party Having an Interest Generally.—In many of the other states, however, any person having an interest in the matter in litigation, in the success of either party, or who has an interest adverse to both parties, may intervene.³ The numerous definitions of the

1. North Carolina Code Civ. Pro., § 159; Bates's Annot. Ohio Stat. (1897), § 5014; Shannon's Annot. Code Tenn. (1896), § 4496; Rev. Stat. Indiana (1881), § 272.

As to intervention in actions for the recovery of property, see further article RIGHT OF PROPERTY, TRIAL OF.

In New York, "where a person not a party to the action has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment." N. Y. Code Civ. Pro., § 452. See Kelsey v. Murray, 18 Abb. Pr. (N. Y. Supreme Ct.) 294; Chapman v. Forbes, 123 N. Y. 532; Davies v. Fish, 47 Hun (N. Y.) 314; Christman v. Thatcher, 48 Hun (N. Y.) 446; Quigley v. Quigley, 45 Hun (N. Y.) 23; Glenville Woolen Co. v. Ripley, 6 Robt. (N. Y.) 530; Haas v. Craighead, 19 Hun (N. Y.) 396; Zundel v. Tacke, 47 Hun (N. Y.) 239; Tallman v. Hollister, 9 How. Pr. (N. Y. Supreme Ct.) 508; Dayton v. Wilkes, 5 Bosw. (N. Y.) 655; Judd v. Young, 7 How. Pr. (N. Y. Supreme Ct.) 79; Hornby v. Gordon, 9 Bosw. (N. Y.) 656; Waring v. Waring, 3 Abb. Pr. (N. Y. Supreme Ct.) 246; Ladd v. Stevenson, 112 N. Y. 325; Schuyler v. Hargous, 3 Robt. (N. Y.) 673; Earle v. Hart, 20 Hun (N. Y.) 75.

Under section 122 of the old Code, which differed slightly in phraseology from the section of the Code Civ. Pro. above quoted, it was held that an action to recover moneys claimed to be due could not be considered as an action for the recovery of personal property, and therefore third parties could not ask to be brought in as parties to such action. Kelsey v. Murray, 18 Abb. Pr. (N. Y. Supreme Ct.) 294; Judd v. Young, 7 How. Pr. (N. Y. Supreme Ct.) 79; Tall-

man v. Hollister, 9 How. Pr. (N. Y. Supreme Ct.) 508.

In an Action for Divorcement would seem that a co-respondent cannot intervene, or, if he can, he will not be permitted to do so when guilty of laches in making his application. Quigley v. Quigley, 45 Hun (N. Y.) 23. See also Burke v. Burke, 5 Misc. Rep. (N. Y. Super. Ct.) 319.

In Massachusetts Pub. Stat. 1882, p. 664, § 31 provides that, in actions to recover deposits in savings banks, "if it appears that the same fund is claimed by another party than the plaintiff * * * the court * * * may order the proceedings to be amended by making such claimants parties defendant thereto." Underwood v. Boston Five Cents Sav. Bank, 141 Mass. 305.

2. Asheville Div. No. 15 v. Aston, 92 N. Car. 588; Chapman v. Forbes, 123 N. Y. 532; Kelsey v. Murray, 18 Abb. Pr. (N. Y. Supreme Ct.) 294; Haynes v. Rizer, 14 Lea (Tenn.) 246.

Thus a claimant to lands in dispute between other parties to a suit who is not interested in that controversy, but claims by a different title, may not intervene. Asheville Div. No. 15 v. Aston, 92 N. Car. 588.

Nor may an assignee for creditors intervene in an attachment proceeding brought against his assignor before the assignment is recorded. His right must be asserted in an independent suit. Haynes v. Rizer, 14 Lea (Tenn.) 246.

Intervention by Cestui Que Trust.—In an action brought against trustees to recover property alleged not to be a part of the trust, a *cestui que trust* may intervene. Haas v. Craighead, 19 Hun (N. Y.) 396.

3. Cal. Code Civ. Pro., § 387; Comp. Laws Dakota (1887), § 4886; Rev. Stat. Idaho (1887), § 4111. In these states it is provided that any person having an

interest which will be sufficient to entitle a party to intervene are, however, by no means consistent.¹

interest in the matter in litigation, in the success of either party, or an interest against both, may, before the trial, intervene in an action or proceeding. To the same effect see Colo. Code Civ. Pro., c. 1, § 22; Iowa Code (1897), §§ 3594, 3596; Minn. Stat. (1894), § 5273; Mont. Code Civ. Pro., § 589; Comp. Stat. Neb. (1897), § 5638; Gen. Stat. Nev. (1885), § 3621, 3624; Comp. Laws N. Mex. (1884), §§ 1890-1892; Rev. Stat. Utah (1898), § 2925; Hill's Annot. Wash. Code Pro. (1891), §§ 156, 157.

California. — Robinson v. Crescent City Mill, etc., Co., 93 Cal. 316; Speyer v. Ihmels, 21 Cal. 281; Stich v. Dickinson, 38 Cal. 608; Brooks v. Hager, 5 Cal. 281; Horn v. Volcano Water Co., 13 Cal. 62; Yuba County v. Adams, 7 Cal. 37; Gradwohl v. Harris, 29 Cal. 150; Davis v. Eppinger, 18 Cal. 379.

Colorado. — Henry v. Travelers' Ins. Co., 16 Colo. 179; Wood v. Denver City Water Works Co., 20 Colo. 253; Morey v. Lett, 18 Colo. 128; Limberg v. Higginbotham, 11 Colo. 316.

Dakota. — Smith v. Gale, 144 U. S. 509.

Iowa. — Des Moines Ins. Co. v. Lent, 75 Iowa 522; Taylor v. Adair, 22 Iowa 279; Dunham v. Greenbaum, 56 Iowa 303; Brown v. Bryan, 31 Iowa 556; Young v. Tucker, 39 Iowa 596; Richards v. Lyon County, 69 Iowa 612; Conley v. Zerber, 74 Iowa 699.

Minnesota. — Smith v. St. Paul, 65 Minn. 295.

Nebraska. — Kansas, etc., R. Co. v. Fitzgerald, 33 Neb. 137; Commercial Nat. Bank v. State Bank, 33 Neb. 292.

New Mexico. — Union Trust Co. v. Atchison, etc., R. Co., (N. Mex. 1895) 43 Pac. Rep. 701.

In Louisiana and Texas third parties have always had the right to intervene in any suit. Garland's Rev. Code La. (1894), § 389 *et seq.*; Whitman v. Willis, 51 Tex. 425; Pool v. Sanford, 52 Tex. 621, where the court says: "We have no statute providing for the right of intervention, but our practice on this subject * * * is probably derived through the ecclesiastical courts of England and the modifications of the civil law as found in the state of Louisiana, and rests upon the principle that a party should be permitted to do that voluntarily which, if known, a court of equity would require to be done."

In Iowa and California the statutes governing the right of intervention have been liberally construed, and many innovations have been made upon the systems in use in other states; and this liberality of construction seems to be productive of great benefit, inasmuch as it allows the settling of controversies in a single action. As illustrative of the principles of the new system of procedure in these states, see Taylor v. Adair, 22 Iowa 279; Stich v. Dickinson, 38 Cal. 608; Horn v. Volcano Water Co., 13 Cal. 62.

In Missouri and Indiana, also, the courts have, though to a less extent, relaxed the strictness of their construction of the statutes authorizing proceedings in intervention. Carter v. Mills, 30 Mo. 432; Summers v. Hutson, 48 Ind. 228.

1. *California.* — "The interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. The provisions of our statute are taken substantially from the Code of Procedure of Louisiana. * * * To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation." Horn v. Volcano Water Co., 13 Cal. 70.

Minnesota. — The opinion, quoted in the preceding paragraph, was referred to with approval in Bennett v. Whitcomb, 25 Minn. 148. In Lewis v. Harwood, 28 Minn. 428, the court said: "The broad interpretation given to the statute relating to intervention in California may, we think, be said, as intimated in Speyer v. Ihmels, 21 Cal. 281, to rest on the doctrine of *stare decisis* rather than on the natural strength and meaning of the language as ably expounded in Horn v. Volcano Water Co., 13 Cal. 70."

Louisiana. — In Brown v. Saul, 4 Martin N. S. (La.) 434, it was held that a person must have an interest that is direct and closely connected with the object in dispute, founded on some

In Attachment Proceedings. — In a few states, one who disputes the validity of an attachment, or claims the property attached, or an interest therein, or lien thereon, may intervene.¹

b. IN EQUITY — The General Rule. — In equity, although no one is entitled to be made or to become a party to the suit who has not an interest in its object,² it is the usual practice to permit

right, claim, or lien, either conventional or legal, to be allowed to intervene. In *Boyd v. Heine*, 4 La. Ann. 393, it was held that it is only necessary to have an interest in the success of either party to authorize an intervention.

In *Texas* the rule laid down in *Pomeroy's Remedies and Remedial Rights*, § 430, has been adopted. This rule is to the effect that "the intervener's interest must be such that if the original action had never been commenced and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name, to the extent at least of a part of the relief sought; or, if the action had first been brought against him as defendant, he would have been able to defeat the recovery, in part at least. His interest may be either legal or equitable." *Pool v. Sanford*, 52 Tex. 621. See also *Del Rio Bldg., etc., Assoc. v. King*, 71 Tex. 729.

1. "Any person other than the defendant may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or any attached debt, present his petition, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded; and the petitioner's claim shall be in a summary manner investigated. The court may hear the proof or order a reference, or may impanel a jury to inquire into the facts. If it is found that the petitioner has title to, a lien on, or any interest in, such property, the court shall make such order as may be necessary to protect his rights. The costs of such proceedings shall be paid by either party at the discretion of the court." Annot. Code of Iowa (1897), § 3928. To the same effect see Gen. Stat. Kansas (1897), c. 95, § 39; Kentucky Code, § 29.

In *Tuttle v. Wheaton*, 57 Iowa 304, it was held that though such person has replevied the goods, he may, notwithstanding, intervene under the statute.

In *Loving v. Edes*, 8 Iowa 427, it was held that when realty is attached, one claiming to be the owner cannot intervene. *Contra*, under *Kentucky Code*, § 29.

A mortgagee thereon may intervene. *Bodwell v. Heaton*, 40 Kan. 36.

Creditors who claim under a deed of trust made by the defendant in the attachment, after service upon him, have such an interest as will authorize their intervention under the *Kentucky* statute. *Bamberger v. Halberg*, 78 Ky. 376.

In *Columbia Bank v. Overstreet*, 10 Bush (Ky.) 148, it is held that a claimant, having acquired the legal title to the property attached, may, by intervention, recover the property by showing either the invalidity of the attachment or that it had been dissolved after levy by operation of law.

2. *Krippendorf v. Hyde*, 110 U. S. 276.

In the federal courts the general rule is that "persons who are not parties to a suit have no standing in court to enable them to file a petition in said suit. If they have any occasion to ask any relief in relation to the matters involved in said suit, or to the proceedings therein, they must file an original bill. * * * Strangers to a cause cannot be heard therein either by petition or motion, except in certain cases arising from necessity, as where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like. * * * Creditors who are allowed to prove debts, and persons belonging to a class on whose behalf a suit is brought, are regarded as *quasi* parties, and of course may have a standing in court." *Per Bradley, J.*, in *Anderson v. Jacksonville, etc., R. Co.*, 2 Woods (U. S.) 628. To the same effect see *Drake v. Goodridge*, 6 Blatchf. (U. S.) 151; *Shields v. Barrow*, 17 How. (U. S.) 130; *Page v. Holmes Burglar Alarm Tel. Co.*, 18 Blatchf. (U. S.) 118.

Suits in Personam. — A person who has no interest, in a legal sense, in the subject-matter of a suit *in personam*,

strangers to the litigation who claim an interest in the subject-matter to intervene and assert their titles on their own behalf.¹

A Party Having a Beneficial Interest in the Decree sought to be obtained has a right to intervene by petition filed for that purpose.²

Persons Who Belong to a Class Represented in the Suit may be heard on petition or motion.³

and who is not a party to it, cannot compel the plaintiff to make him a party. *Coleman v. Martin*, 6 Blatchf. (U. S.) 119, where the court said: "In a suit *in rem*, where a court has jurisdiction over the *res*, and its decree affects the interest in the *res* of all persons who have any interest in the *res*, a person who has a claim upon or other interest in the *res* is allowed to intervene and be heard for his own interest in the *res*. The theory of this is, that the person, by his interest in the *res*, has an interest, in a legal sense, in the subject-matter of the controversy. But in a suit *in personam* a person not a party to the suit can have no interest, in a legal sense, in a personal claim made, in the suit, against a defendant therein, unless it is necessary that such person, not a party, should be made a party, in order to properly enforce such claim."

1. *Krippendorf v. Hyde*, 110 U. S. 276; *French v. Gapen*, 105 U. S. 509.

In *Billings v. Aspen Min., etc., Co.*, 51 Fed. Rep. 338, it was held error to refuse a petition by the representative of a deceased daughter of the alien to become a party complainant, since the decree should be in such shape as to settle the rights of all parties claiming under such alien.

Mortgagees. — In *Everett v. Edwards*, 149 Mass. 588, it was held that mortgagees of real estate may be properly admitted as parties defendant to a suit in equity by the result of which their security might be impaired.

Apparent Owner of Subject-Matter. — In *Barner v. Bayless*, 134 Ind. 600, it was held that no error can be assigned on appeal in permitting the apparent owner of the subject-matter of the suit to intervene, where no exception or objection was taken in the court below.

Parties Having Interest in Funds in Custody of Court. — Where a person has an interest in a fund which is in the custody or under the control of the court, and he desires to secure its proper administration and distribution, he may intervene for that purpose.

Ex p. *Printup*, 87 Ala. 148; *Carlin v. Jones*, 55 Ala. 630.

Claimant to Title of Property Held by Receiver. — One who claims the title to property which is in the hands of a receiver may intervene. *Pelham v. Newcastle*, 3 Swanst. 290.

In *Cutting v. Florida R., etc., Co.*, 45 Fed. Rep. 444, it was held that leave to intervene was properly denied where the intervener claimed the equitable title to land of a railroad company which had been excepted by the orders appointing the receiver, and had never come into his possession.

A Judgment Creditor, having levied on his debtor's property after the same has come into the possession of a receiver appointed in a foreclosure suit, which is claimed by the creditor to have been brought collusively for the purpose of defeating his recovery, may, upon disclaiming any purpose of interfering with the receiver's possession, be allowed to intervene in the foreclosure suit. *Farmers' L. & T. Co. v. Toledo, etc., R. Co.*, 43 Fed. Rep. 223.

Intervention by United States. — The United States will generally be allowed to intervene summarily, or by a supplemental information or bill, for protecting property rights involved in a pending suit in equity. *Florida v. Georgia*, 17 How. (U. S.) 478, *cited in* *Potter v. Beal*, 50 Fed. Rep. 860.

2. *Robertson v. Baker*, 11 Fla. 231.

3. *Anderson v. Jacksonville, etc., R. Co.*, 2 Woods (U. S.) 628; *Fidelity Trust, etc., Co. v. Mobile St. R. Co.*, 53 Fed. Rep. 850; *Forbes v. Memphis, etc., R. Co.*, 2 Woods (U. S.) 323; *Ogilvie v. Knox Ins. Co.*, 2 Black (U. S.) 539; *Myers v. Fenn*, 5 Wall. (U. S.) 205; *Central R., etc., Co. v. Pettus*, 113 U. S. 116; *George v. St. Louis Cable, etc., R. Co.*, 44 Fed. Rep. 117; *Trustees v. Greenough*, 105 U. S. 527; *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 303; *Hallett v. Hallett*, 2 Paige (N. Y.) 432.

As, for instance, mortgage creditors represented by the trustees of the mortgage, who are regarded as *quasi* par-

Beneficiaries of a Trust will also be allowed to intervene to protect their own interests in suits affecting the trust property, as for instance in suits by or against trustees,¹ but only where the trustee is alleged to have acted in bad faith, or has failed or refused properly to represent their interest.²

Parties in Privity. — One having an interest in the event of a suit, and who is in privity with the person sued, may on petition be allowed to intervene and defend.³

Party Without Privity or Interest. — Where, however, a person is not in direct privity with a party to the suit, or has no direct interest in the event thereof, he is not entitled to intervene.⁴

ties. *Anderson v. Jacksonville, etc., R. Co., 2 Woods (U. S.) 628.*

Petition as Substitute for Bill of Revivor. — In *Massachusetts* other parties standing in like relation to the suit,* such as executors, administrators, etc., are permitted to intervene by a petition which is thus made a substitute for a bill of revivor. *Murray v. Dehon, 102 Mass. 11; Pingree v. Coffin, 12 Gray (Mass.) 288.*

1. *Ex p. Printup, 87 Ala. 148; Birdsong v. Birdsong, 2 Head (Tenn.) 289; Saylor v. Saylor, 3 Heisk. (Tenn.) 525; Carter v. New Orleans, 19 Fed. Rep. 659; Williams v. Morgan, 111 U. S. 684; Farmers' L. & T. Co. v. Missouri, etc., R. Co., 21 Fed. Rep. 264; Fidelity Trust, etc., Co. v. Mobile St. R. Co., 53 Fed. Rep. 851.*

2. *Richards v. Chesapeake, etc., R. Co., 1 Hughes (U. S.) 28; Skiddy v. Atlantic, etc., R. Co., 3 Hughes (U. S.) 320; Clyde v. Richmond, etc., R. Co., 55 Fed. Rep. 445; Mississippi, etc., R. Co. v. Howard, 7 Wall. (U. S.) 392; Wetmore v. St. Paul, etc., R. Co., 1 McCrary (U. S.) 466; Farmers' L. & T. Co. v. Kansas City, etc., R. Co., 53 Fed. Rep. 182; Kerrison v. Stewart, 93 U. S. 155; Richter v. Jerome, 123 U. S. 238. See also Burbank v. Burbank, 152 Mass. 254.*

Intervention by Stockholders. — Where any fraud has been perpetrated by the directors of a company, by which the property or interest of the stockholders is affected, the stockholders have a right to come in as parties to the suit against the company and ask that their property shall be relieved from the effect of such fraud. *Bayliss v. Lafayette, etc., R. Co., 8 Biss. (U. S.) 193.*

In *Bronson v. La Crosse, etc., R. Co., 2 Wall. (U. S.) 283*, it was held that while stockholders who have been allowed to put in answers in the name

of a corporation cannot be regarded as answering for the corporation itself, yet in a special case, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant for the purpose of protecting, from unfounded and illegal claims against the company, his own interest and the interest of such other stockholders as choose to join him in the defense. See also *Forbes v. Memphis, etc., R. Co., 2 Woods (U. S.) 323; Central Trust Co. v. Marietta, etc., R. Co., 48 Fed. Rep. 14; Blackman v. Central R., etc., Co., 58 Ga. 189.* As holding that such intervention should not be allowed, see *Ex p. Printup, 87 Ala. 148.*

3. In *Melick v. Melick, 17 N. J. Eq. 156*, it was held that where a bill is exhibited against an executor, involving the interests of the residuary legatee, and the executor is disqualified by his situation from representing the interests and protecting the rights of the legatee, such legatee may be admitted to defend the bill in person; and no answer being sought against the legatee, the bill need not be amended to make him formally a defendant.

In *Standard Oil Co. v. Southern Pac. Co., 42 Fed. Rep. 295*, a railroad company, being sued for infringement of a patent upon a certain kind of car, denied that it owned such cars, or any interest in the patent, and alleged that it acted only as a common carrier. It was held that the party owning the cars might, upon petition, intervene and defend.

4. *Thomas Huston Electric Co. v. Sperry Electric Co., 46 Fed. Rep. 75; Ex p. Mensing, 55 Fed. Rep. 17.*

In *Thomas Huston Electric Co. v. Sperry Electric Co., 46 Fed. Rep. 75*, all

Stranger Seeking to Litigate with Plaintiff. — A court of equity cannot, in the absence of statute or rule, on the application of a stranger, make him a party to a pending suit, without the consent of the plaintiff, for the purpose of allowing such party to litigate with the plaintiff the right or title of the latter to any relief whatever. A party cannot be made a defendant on his own application.¹

that could be inferred from the matters stated in the petition was that the petitioner had a common interest with the defendant in defeating the suit, because if successful in that suit the complainant might sue the petitioner. The petition was held to have been properly denied.

In *Ex p. Mensing*, 55 Fed. Rep. 17, it was held that after an execution has been issued in a suit and a levy and sale has been made of certain lands, a party claiming to be the true owner cannot intervene to move to set aside such execution, there being no privity between the petitioner and the party against whom it has issued.

Purchaser of Property in Hands of Receiver. — One who has purchased a railroad in the hands of a receiver cannot object to the refusal of the court to allow him to be made plaintiff in a case prepared by the receiver against another railroad, when this would result in reopening the litigation. *Ritchie v. Cincinnati, etc., R. Co.*, (Ky. 1893) 21 S. W. Rep. 641.

Claim by Stranger of Money Paid into Court. — A petition filed by a stranger to the suit, claiming money paid into court in the cause, is properly dismissed. His proceedings should be by bill. *Esterbrook Steel Pen Mfg. Co. v. Ahern*, 31 N. J. Eq. 3.

Assignees of Parties' Interests in Fund. — In *Massachusetts* it was held that "persons who hold assignments of the interest of parties in a fund in court, or liens upon it, have been permitted in equity to appear as claimants, but creditors who have acquired neither an assignment of nor a lien on the fund have never * * * been permitted to intervene, and to admit them would interfere with the final determination of causes, and would convert suits in which money has been deposited in court into proceedings for the benefit of creditors of one or more of the parties." *Per Field, J.*, in *Tuck v. Manning*, 150 Mass. 211.

1. *Renfro v. Goetter*, 78 Ala. 313; *Drake v. Goodridge*, 6 Blatchf. (U. S.) 151.

In *Renfro v. Goetter*, 78 Ala. 311, the court said: "Generally, a complainant may elect whom he will make parties, and with whom he will litigate, under the rules governing proper and necessary parties. Whenever, during the progress of the cause, it is disclosed or made known that an absent person is a necessary party in order that an effective decree may be rendered, or that a decree cannot be rendered without affecting such person's rights, it is competent for the court to order that the complainant amend so as to make him a party, and, on failure or refusal, to dismiss his bill; but the court cannot make a party without action taken by the complainant. When a person not a party to a pending suit, between whom and the complainant there is no privity, but who has a claim or lien on the property — a new and independent claim — or is interested in the subject-matter of the suit, desires, for his own protection, to present his new claim, to assert his independent rights, and raise new issues, he must do so by a formal bill containing appropriate allegations — an original bill in the nature of a cross-bill, or of a supplemental bill, as the case may authorize." See also *Cowles v. Andrews*, 39 Ala. 125; *Carow v. Mowatt*, 1 Edw. Ch. (N. Y.) 9; *Anderson v. Jacksonville, etc., R. Co.*, 2 Woods (U. S.) 628; *Stretch v. Stretch*, 2 Tenn. Ch. 140.

In *Ex p. Printup*, 87 Ala. 148, it was held that by the general rule of practice in courts of equity, third persons cannot be allowed to come in as parties to a pending suit on their own motion, or by petition, against the objection of the complainant; but are required to propound their interests by original bill in the nature of a cross-bill, or in the nature of a supplemental bill.

In *Drake v. Goodridge*, 6 Blatchf. (U. S.) 151, it is said that no such practice is known in equity as making a person a defendant to a suit on his own application, or as compelling a plaintiff to join as coplaintiff a person not a party, on the application of such person.

Intervention by Consent. — Where persons have petitioned to intervene, it is always in the power of the court to make them defendants with the consent of the original parties.¹

2. Existence of Another Remedy. — The fact that a party has another remedy does not affect his right to intervene.² On the other hand, the right of a party to intervene is not such an adequate remedy as will prevent his application to a court of equity to enjoin the suit in a proper case.³

3. Exercise of Right Optional. — Although one has the right to intervene in a suit between other parties, he cannot be compelled to do so.⁴

4. Compliance with Statutory Requirements. — One who attempts to intervene in an action pending between other parties without bringing himself within the provision of the statute allowing such intervention is a mere interloper, who acquires no rights by his unauthorized interference, unless objection thereto is waived. His pleadings are unknown to the law and can have no legal effect.⁵

1. *French v. Gapen*, 105 U. S. 525; *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 464.

2. Any interest is sufficient to authorize a party to intervene. The fact that he has another means of protecting that interest is immaterial. *Coffey v. Greenfield*, 55 Cal. 382.

In *Whitman v. Willis*, 51 Tex. 422, it was held that where the right to personal property levied upon is involved in a suit, it is, as a general rule, the proper practice to require a claimant to resort to the statutory remedy for trial of the right of property. See article RIGHT OF PROPERTY, TRIAL OF.

3. *Mann v. Flower*, 26 Minn. 479, holding that where a stranger desires to enjoin an action in a court where he seeks his remedy, he must do so by a separate proceeding.

Where, however, he desires to enjoin the execution of process by the sheriff, he may apply by petition in the original cause for an order. *Platto v. Deuster*, 22 Wis. 482; *Endter v. Lennon*, 46 Wis. 299. See also *Smith v. American L. Ins., etc., Co.*, *Clarke Ch. (N. Y.)* 307; *Lane v. Clark, Clarke Ch. (N. Y.)* 309.

4. *Lannes v. Courege*, 31 La. Ann. 74; *Le Blanc v. Dashiell*, 14 La. 274; *Hazard v. Agricultural Bank*, 11 Rob. (La.) 326.

In an action relating to land, between devisees of a testator and parties deriving title from the executor, the executor

may not be compelled to intervene. *Bennett v. Kiber*, 76 Tex. 385.

5. *Des Moines Ins. Co. v. Lent*, 75 Iowa 522.

Such Petition Not Lis Pendens. — Thus where one creditor sues to set aside a fraudulent conveyance, another creditor who comes in and alleges that the conveyance is also fraudulent as to him, and asks for similar relief, is not an intervener, but a mere interloper, and therefore his petition gives no constructive notice under the doctrine of *lis pendens*. *Des Moines Ins. Co. v. Lent*, 75 Iowa 522.

Where There Is No Privity of contract between the plaintiff and an intervener in a suit, and the matter of complaint or cause of action sought to be enforced by the latter against the defendant is a contract between such intervener and the defendant, distinct from that which is the subject of litigation between the plaintiff and defendant, the petition of the intervener cannot be maintained. *Burditt v. Glasscock*, 25 Tex. Supp. 45.

Failure of Petition to Show Right to Intervene. — So where a petition of intervention does not state facts entitling the intervener to intervention, the petition must be treated the same as a complaint which fails to state facts sufficient to constitute a cause of action, and therefore an objection to its sufficiency can be taken at any time, even in the Supreme Court. *Harlan v. Eureka Min. Co.*, 10 Nev. 92.

5. Waiver of Right. — The right to intervene may be waived.¹

IV. TIME FOR INTERVENTION — *Under Statutes.* — A person may become a party by intervention in an action or controversy between others only during the pendency of the action.² He may intervene after issue has been joined, provided in doing so he does not retard the principal suit.³ His application must, however, be denied if made after the trial has commenced,⁴ after final judgment has been rendered,⁵ or after the case has been duly dismissed⁶ or settled.⁷ If the original plaintiff was not

1. In *Meissner v. Meissner*, 68 Wis. 336, it was held that a failure by a creditor to intervene with other creditors, induced by a condition or promise by the creditor against whom he fails to intervene, waives the right to intervene.

2. *Edwards v. Cosgro*, 71 Iowa 296.

3. *Brooks v. Hager*, 5 Cal. 281; *Coburn v. Smart*, 53 Cal. 742; *Boyd v. Heine*, 41 La. Ann. 393; *Baker v. Texarkana Nat. Bank*, 74 Fed. Rep. 598.

A petition to intervene may be filed either before or after issue joined. *Fischer v. Hanna*, 8 Colo. App. 471.

4. *Lincoln v. Ball*, 6 La. 685; *Ah Goon v. Superior Ct.*, 61 Cal. 555; *Fischer v. Hanna*, 8 Colo. App. 471; *Rockwell v. Coffey*, 20 Colo. 397; *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722; *Carswell v. Neville*, 12 How. Pr. (N. Y. Supreme Ct.) 445; *Van Bibber v. Geer*, 12 Tex. 15; *Wright v. Neathery*, 14 Tex. 211.

In *Coburn v. Smart*, 53 Cal. 742, it is held that the right to intervene may be exercised at any time before the trial of the action has commenced, if the complaint in intervention tender only such an issue as is already joined by the answer of the defendant on file.

Petition Filed the Day Before Trial. — In *Van Bibber v. Geer*, 12 Tex. 15, it was held that when a petition was not filed until the day before the trial, nor brought to the notice of the court until the case was called for trial, and this neglect was not accounted for, the court was not bound to receive it. See also *Smith v. Strickland*, 19 La. Ann. 118; *Smith v. Gale*, 144 U. S. 509.

5. *Hicklin v. Nebraska City Nat. Bank*, 8 Neb. 467; *Owens v. Colgan*, 97 Cal. 454; *Langenour v. Shanklin*, 57 Cal. 70; *Meadows v. Goff*, 90 Ky. 540; *Henry v. Cass County Mill, etc., Co.*, 42 Iowa 33; *Leon First Nat. Bank v. Gill*, 50 Iowa 425.

After Final Decree. — In *Fischer v. Hanna*, 8 Colo. App. 471, it was held that intervention cannot be allowed several months after a final decree has been entered.

After Final Order. — In *California* it has been held that if an action be tried by a District Court without a jury, and counsel for the plaintiff be instructed by the court to draw a judgment in his favor, but, before the judgment was finally passed, a stranger claiming to have succeeded to the title of the defendant moves for a stay of proceedings and to be allowed to intervene, and the motion is allowed, the Supreme Court will not by mandamus compel the District Court to set aside the order and enter a final judgment in the case. *People v. Sexton*, 37 Cal. 532.

After Interlocutory Judgment. — The objection that an intervention cannot be permitted after final judgment does not apply in the case of an interlocutory judgment, and intervention may be made by a party interested after entry of such judgment. *Clarke v. Baird*, 98 Cal. 642.

Coincident with Judgment. — In *Hocker v. Kelley*, 14 Cal. 164, it was held that where the suit had been pending for some time, an application made just as the plaintiff was taking judgment was properly refused.

After Appeal. — In *Cowan v. Lowry*, 7 Lea (Tenn.) 620, it was held that after appeal from a justice to the Circuit Court, a petition of intervention in the Circuit Court was properly refused.

6. *Harris v. Cronk*, 17 Neb. 475; *Lambie v. Wibert*, (Tex. Civ. App. 1895) 31 S. W. Rep. 225. See also *Fayerweather v. Monson*, 61 Conn. 431.

7. If an agreement is made between the parties to an action by which the controversy is settled, third parties cannot intervene. The court cannot, by allowing the intervention at that time, transform proceedings by intervention

barred by the statute of limitations a third party may intervene after the expiration of the statutory limit.¹

In Equity.—A petition to intervene in an equitable proceeding comes too late after the case has been appealed.² It has been held that where such persons as stockholders and the like, who are not satisfied with the action had in their behalf by those entrusted with their interests, wish to intervene in a suit to protect their own interests, they must act with due diligence, and an application to intervene made when the whole case is about to be closed by the court may properly be refused by reason of the delay.³

V. LEAVE TO INTERVENE—1. Necessity for.—A party desiring to intervene should first obtain leave from the court to file his petition.⁴ The mere filing of a petition for leave to intervene in a suit in equity, in the absence of an order granting such petition, does not make the petitioner a party to the suit.⁵ The original parties are entitled to be heard on the question of his admission,

into original proceedings. If the proposed interveners have rights which require protection, they should commence an original action in the ordinary way for that purpose. *Henry v. Cass County Mill, etc., Co.*, 42 Iowa 33. See also *Palmer v. Albee*, 50 Iowa 429.

1. *Foote v. O'Rourke*, 59 Tex. 216, holding that a suit brought on a promissory note before the limitation was complete will inure to the benefit of an intervener interested in the recovery who intervened in the action after the expiration of the four years from the time when the statute began to run.

2. **After Appeal.**—When the people are not a party to the record, and the case has been appealed, the attorney-general will not be allowed to intervene in the Supreme Court. Such intervention should begin in the court having original jurisdiction. *Blatchford v. Newberry*, 100 Ill. 484, holding that in a cause brought before the Appellate Court, none save such as are parties to the record in the Appellate Court have a right to be heard. If there are interests such as would make it proper for other parties to intervene in the cause, such intervention must begin in the court of original jurisdiction, and cannot be allowed in the Appellate Court.

3. *Central Trust Co. v. Texas, etc., R. Co.*, 24 Fed. Rep. 153. See also *Hawes v. Oakland*, 104 U. S. 450.

4. *Stone v. Ingham Circuit Judge*, 105 Mich. 234; *Dietrich v. Steam Dredge, etc.*, 14 Mont. 261; *Bradley v. Trous-*

dale, 15 La. Ann. 206; *Fowler v. Lewis*, 36 W. Va. 112.

Failure to Obtain Leave.—In *Bradley v. Trousdale*, 15 La. Ann. 206, it was held that a judgment cannot be rendered on a petition of intervention which has been filed without leave of the court and has not been served or put at issue.

In *Dietrich v. Steam Dredge, etc.*, 14 Mont. 261, it was held that one interested in a matter in controversy does not become an intervener by the filing without leave of court of a demurrer to the complaint.

Presumption of Leave.—In *Grove v. Foutch*, 6 Colo. App. 357, the court said: "Jurisdiction does not, in such cases, depend upon the record of the permission. The permission is presumed where nothing to the contrary appears and the court has assumed jurisdiction. This would certainly be the case when it occurred without objection and no exception was taken."

Error in Refusing—How Cured.—Error in striking out the complaint of intervention is cured by allowing the person filing such complaint to defend in the name of his predecessor in interest. *Muller v. Carey*, 58 Cal. 538.

5. *Doyle's Petition*, 14 R. I. 55.

Order that Cause Shall Stand Over.—When a person applies to be made a party to a suit in equity and an order is made that the cause stand over, with liberty to the complainant to amend his bill by adding proper parties if he should be so advised, such order does

and he should follow up his petition by procuring an order of notice to them, and setting it down for hearing.¹ Although there are numerous cases in which persons have been treated as parties to a suit after having filed a petition of intervention, yet in all such cases they have acted or been recognized as parties in the subsequent proceedings.² The court should grant leave to a party desiring to intervene, unless it is evident that there is no legal foundation for the request.³

2. Appeal from Order Refusing Leave. — It was formerly held in some jurisdictions that no appeal would lie from an order denying leave to intervene, on the ground that such order was not a final judgment.⁴ A different rule, however, seems to have been established by later decisions, according to which one whose petition for leave to intervene is denied may have an immediate right of appeal.⁵

VI. OBJECTIONS TO INTERVENTION — 1. When to Be Taken. — The objection that certain parties cannot intervene must be made in the court below, and cannot be raised for the first time on appeal.⁶

not make the applicant a party to the bill, nor create a *lis pendens* as to him prior to his being made a party. *Bigelow v. Stringfellow*, 25 Fla. 366.

1. *Doyle's Petition*, 14 R. I. 55.

2. *Ex p. Cutting*, 94 U. S. 20; *Myers v. Fenn*, 5 Wall. (U. S.) 205; *Ogilvie v. Knox Ins. Co.*, 2 Black (U. S.) 539; *Washington, etc., R. Co. v. Bradley*, 7 Wall. (U. S.) 575; *Harrison v. Nixon*, 9 Pet. (U. S.) 491; *Bronson v. La Crosse, etc., R. Co.*, 2 Wall. (U. S.) 304; *Umbarger v. Watts*, 25 Gratt. (Va.) 167.

Waiver. — Although leave to intervene in a suit in equity should properly be granted by an order, yet the want of an order where it has not been objected to, and the proceeding has gone on to its conclusion, will not be ground for reversal. *Myers & Fenn*, 5 Wall. (U. S.) 205.

3. *Citizens' Sav. Bank v. Ingham* Circuit Judge, 98 Mich. 173. See also *Oatman v. Epps*, 15 Oregon 437.

Form of Order. — In *Ex p. Jordan*, 94 U. S. 248, an order granting leave to intervene is set out.

Allowance by Ex Parte Order. — In *Spanagel v. Reay*, 47 Cal. 608, it is held that an *ex parte* order may be made allowing a petition in intervention to be filed.

Allowance by Order Nunc Pro Tunc. — Though an intervener ought first to obtain permission to file his petition, yet the court may, by order *nunc pro tunc*, authorize and validate the intervention and filing of such petition, though filed

without permission. *Stone v. Ingham* Circuit Judge, 105 Mich. 234, holding that an order refusing to strike out a petition of intervention filed without permission and an order overruling a demurrer to such petition are together equivalent to a *nunc pro tunc* order granting permission to intervene.

4. *Wenborn v. Boston*, 23 Cal. 321.

5. *State v. Parish* Judge, 27 La. Ann. 184; *Stich v. Dickinson*, 38 Cal. 608.

Mandamus Not Proper. — In *People v. Sexton*, 37 Cal. 532, it is held that a motion for leave to file an intervention presents a judicial question which will not be reviewed by the appellate court on petition for a writ of mandamus.

6. *McKenty v. Gladwin*, 10 Cal. 227; *Smith v. Penny*, 44 Cal. 161; *Donner v. Palmer*, 51 Cal. 629. See article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 157.

In *Herman v. Pfister*, 2 La. 456, it was held that if a petition in intervention be answered on the merits, and the cause be tried in relation to them, the right of the party to intervene cannot be questioned on appeal.

Intervention in Equity. — An objection to a petition to intervene in an equitable proceeding should be made by the parties in the court below. *French v. Gapen*, 105 U. S. 525. See also *Myers v. Fenn*, 5 Wall. (U. S.) 205.

After Answer and Submission on Merits. — In *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, it was held that an objection that the court erred in allowing certain persons to intervene on

2. Waiver of Right to Object. — By failure to object at the proper time the right of objection will be held to have been waived.¹

VII. PETITION — **1. In General.** — Intervention is either by petition or complaint.²

2. Essential Averments — **Generally.** — Such petition or complaint must show affirmatively by averment that the rights of the applicant are involved in the cause which is being litigated, and that he is entitled to the relief which he asks.³

In Equity. — A petition to intervene in a suit in equity should show the nature of the original suit,⁴ and should pray for the relief desired.⁵ It is immaterial that the petition is styled a petition in the nature of a cross-bill, unless it sets up facts not

imperfect petitions should have been raised before or at the time of the answer, and comes too late after answer and submission on the merits.

1. *McKenty v. Gladwin*, 10 Cal. 227; *Smith v. Penny*, 44 Cal. 161; *Donner v. Palmer*, 51 Cal. 629; *People v. Reis*, 76 Cal. 269; *Sanxey v. Iowa City Glass Co.*, 63 Iowa 707; *Holland v. Commercial Bank*, 22 Neb. 585.

2. *Rosenbaum v. Adams*, 61 Iowa 382; *Dullard v. Phelan*, 83 Iowa 471; *People v. Talmage*, 6 Cal. 256; *Ward v. Healy*, 114 Cal. 191; *Grove v. Foutch*, 6 Colo. App. 357; *Shepard v. Murray County*, 33 Minn. 519; *Clapp v. Phelps*, 19 La. Ann. 461.

Separate Petitions in Distinct Cases. — A party cannot by one petition intervene in several distinct and unconsolidated actions. *Rosenbaum v. Adams*, 61 Iowa 382.

Petition Filed in Name of Agent. — A principal cannot intervene in an action under a petition filed by his agent in his own name. *Rosenbaum v. Adams*, 61 Iowa 382.

3. *Smith v. Allen*, 28 Tex. 497; *People v. Talmage*, 6 Cal. 256; *Ward v. Healy*, 114 Cal. 191; *Shepard v. Murray County*, 33 Minn. 519; *Clapp v. Phelps*, 19 La. Ann. 461, the case last cited holding that an intervener must set out his demand as clearly and as explicitly as a plaintiff.

Where an intervener claims to be an innocent purchaser without notice, his pleading will be insufficient unless it contains proper averments to that effect. *Coffey v. Greenfield*, 62 Cal. 602.

Effect of Failure to Aver Such Facts. — Where the petition for intervention states no fact entitling the intervener to become a party to the suit, the failure of the court to rule upon such petition, although erroneous, will not justify the

reversal of the judgment. *Wellborn v. Eskey*, 25 Neb. 195.

Verification of Petition. — *Smith v. Allen*, 28 Tex. 501, where the court said: "No authority has been cited that a petition to intervene must be verified by affidavit. It is believed that the practice has been to intervene upon leave of the court, and that affidavits have not been required as a condition upon which the leave to intervene is granted."

4. *Ransom v. Winn*, 18 How. (U. S.) 295.

5. *French v. Gapen*, 105 U. S. 519. In this case the petition is set out in full.

"While a petition of intervention need not be as formal as a bill or complaint, and should, perhaps, be distinguished for brevity, it yet should exhibit all the material facts which are relied upon for the specific relief invoked, embodying, either by recital or by reference, so much of the record in the original suit in which the petition is filed as is essential to show a right to the particular relief demanded by the petition." *Empire Distilling Co. v. McNulta*, 77 Fed. Rep. 703.

Must Present a Case of Substantial Equity. — In *Davis v. Sullivan*, 33 N. J. Eq. 569, it was held that a party who, having acquired an interest during the pendency of the suit, applies under the Chancery Act to be made a party in order to move to open the decree must present, in his petition, a case of substantial equity. See also *Guest v. Hewitt*, 27 N. J. Eq. 479, holding that a party coming into a case by petition, by force of section 41 of the Chancery Act, providing that "such person shall be bound by all orders and proceedings in the cause against the party whose interest he has acquired," is no further

alleged in the original bill, which, though they relate to the subject matter of the original bill, are made the basis for affirmative relief.¹

3. Amendment. — It is within the discretion of the court to allow an intervenor to amend his complaint or petition at the trial to conform to the proofs, and it is no error to allow such amendment.²

Proceeding Subsequent to Filing of Petition. — Where, subsequently to the filing of the petition of intervention, proceedings have been had under the original bill which would fortify the right of the intervening petitioner, either to the particular relief demanded or to some other relief, the matter should be incorporated into the petition of intervention by amendment.³

VIII. SERVICE OF PETITION — In General. — The petition in intervention should be served on the party against whom it is directed, in order that he may be able to answer to the same.⁴ Parties properly before the court are, however, required to take notice of a petition of intervention filed by leave of the court.⁵ Although in many cases persons have been allowed to intervene in equitable proceedings without any special notice of the application,⁶ yet the better practice would seem to be to require notice.⁷

bound by the previous orders and proceedings in the cause than the party whose interest he has acquired would have been bound.

Questions Not Founded on Matter in Petition. — In *Clyde v. Richmond, etc.*, R. Co., 55 Fed. Rep. 445, it was held that questions which may be argued will not be considered unless the matters to which they apply are set forth in the petition.

1. *Fidelity Trust, etc., Co. v. Mobile St. R. Co.*, 53 Fed. Rep. 850.

2. *Ward v. Waterman*, 85 Cal. 488.

Supplemental Petition. — In *Joliet Iron, etc., Co. v. Chicago, etc., R. Co.*, 51 Iowa 300, it was held that where the court had jurisdiction of the subject-matter and the parties it might render judgment in favor of an intervenor on an amended petition, setting up an award had upon an agreement of arbitration made subsequently to the filing of the original petition of intervention.

3. *Empire Distilling Co. v. McNulta*, 77 Fed. Rep. 702.

4. *Fischer v. Hanna*, 8 Colo. App. 471; *Bradley v. Trousdale*, 15 La. Ann. 206. See also *Chism v. Ong*, 33 La. Ann. 702.

In *Fowler v. Lewis*, 36 W. Va. 112, it was held that where a petition is filed by a stranger to a cause asking relief against a defendant in such cause on

new matter set out in the petition, process to answer such petition must be served on the defendant, unless waived by appearance or otherwise.

Trial Before Service of Petition. — When an intervention is allowed, a trial before service of the petition of intervention on the adverse party is premature, but an erroneous procedure in that respect does not affect the question of jurisdiction. *Ah Goon v. Superior Ct.*, 61 Cal. 555.

5. *Fleming v. Seeligson*, 57 Tex. 524.

6. *Lombard Invest. Co. v. Seaboard Mfg. Co.*, 74 Fed. Rep. 325; *McLeod v. New Albany*, 66 Fed. Rep. 378.

The parties to an original bill are bound to take notice of a petition in intervention filed in the suit. *McLeod v. New Albany*, 66 Fed. Rep. 378.

7. *Doyle's Petition*, 14 R. I. 55.

In *Lombard Invest. Co. v. Seaboard Mfg. Co.*, 74 Fed. Rep. 325, it was held that it is not necessary, though it is the better practice, to give notice to the parties to the cause of a petition for leave to intervene in a suit for the foreclosure of a mortgage. The court said: "The practice has been to allow parties to intervene without any special notice of the application therefor, other parties to the cause having always the right to object to the intervention and to move the court to vacate the order allowing it."

Service by Substitution. — In the case of an intervention by beneficiaries of a trust in a suit in equity affecting the trust property, it was held that by leave of court service may be had by substitution upon the complainant's attorney, when the complainant is beyond the jurisdiction of the court.¹

IX. DEMURRER TO PETITION. — If the petition is defective it may be demurred to like an original complaint.²

X. DISMISSAL OF PETITION — By Intervener. — If no issue is raised as against the intervener he may dismiss his petition.³ And he will not be estopped by the judgment rendered in the case from subsequently insisting upon the matters contained in his petition of intervention.⁴

On Motion. — If the petition fails to show a right to intervene the remedy is by a motion to dismiss.⁵

Dismissal Without Prejudice. — A decree dismissing an intervention "without prejudice" means simply that the intervener may institute another suit to enforce his alleged rights, and may, at best, perhaps, intervene again on the same cause of action in the same cause.⁶

XI. ANSWER TO PETITION. — After the petition or complaint has been filed by leave of the court and served upon the parties to the action, such parties may answer or demur as if it were an original complaint or petition.⁷ Where the allegations of the complaint are not denied by the answer, the facts which it alleges are held to be admitted, and a finding thereon is unnecessary.⁸

1. Fidelity Trust, etc., Co. v. Mobile St. R. Co., 53 Fed. Rep. 850.

2. Fischer v. Hanna, 8 Colo. App. 471; Ragland v. Wisrock, 61 Tex. 391.

A petition to intervene may be demurred to for failure to state a cause of action or ground of intervention, as the case may be. Shepard v. Murray County, 33 Minn. 519, decided under the provisions of the Gen. Stat. Minn. (1894), § 5273, that an "intervention shall be by complaint, * * * and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings."

3. An intervener against whom no relief is prayed can dismiss his complaint in intervention, and this right is not affected by the fact that one of the plaintiffs is dead and his successors in interest have not been brought in as parties. Sheldon v. Gunn, 56 Cal. 582.

4. Dalhoff v. Coffman, 37 Iowa 283. See also Woodward v. Jackson, 85 Iowa 432.

In Washburn v. Frank, 31 La. Ann. 427, it was held that an intervention which has neither been answered nor proved must be dismissed.

5. Ragland v. Wisrock, 61 Tex. 391. **Petitioner Without Interest.** — The petition will be dismissed on motion if it fails to show an interest in the subject of litigation. Noyes v. Brown, 75 Tex. 458.

6. Easton v. Houston, etc., R. Co., 44 Fed. Rep. 9.

7. Chase v. Evoy, 58 Cal. 348.

In Kentucky the practice under the statute does not require any answer to the claimant's petition; it is to be regarded as traversed by all parties. The issue raised is a separate and distinct issue, to be tried by different proceedings in a different manner. There is to be no summons, and the claimant is not a party to the original litigation. Taylor v. Taylor, 3 Bush (Ky.) 118.

Time to Answer. — As has been before stated, pleadings in intervention are governed by the same rules as obtain in other pleadings, but if such petition or complaint is filed during the term, the court shall direct the time in which answer thereto shall be filed. Consol. Stat. Neb. (1893), § 4586; Minn. Stat. (1894), § 573.

8. Pomeroy v. Gregory, 66 Cal. 572.

All of the averments of an answer to a complaint of intervention must be considered as denied by the intervener.¹

XII. RIGHTS, DUTIES, AND LIABILITIES OF INTERVENER — 1.

Right to Prosecute Original Suit. — An intervener has the right to claim the benefit of the original suit and to prosecute it to judgment. Such right cannot be defeated by the dismissal of the suit by the plaintiffs after the filing of the petition and notice thereof to such plaintiffs.²

2. Right to Plead Inconsistent Pleas. — In accordance with the rule that a defendant may plead as many inconsistent pleas as he may choose, provided they are pertinent and in due order of pleading, an intervener who is occupying an attitude of defendant is entitled to the same latitude in his pleadings.³

3. Right to Demur. — An intervener has the right to interpose a general demurrer or exceptions going to the merits of the action.⁴

4. Right to Jury Trial. — An intervener has the same right to a jury trial as the original parties, although such trial has not been demanded by either of them.⁵

5. Intervener Must Take Suit as He Finds It. — An intervener in a suit between other parties must accept such suit as he finds it,⁶ and is bound by the record of the case at the time of his intervention.⁷ He cannot raise an issue as to whether the proceedings

1. *Pearson v. Creed*, 78 Cal. 144.

2. *Field v. Gantier*, 8 Tex. 74. See also *Elliott v. Ivers*, 6 Nev. 287.

Effect of Nonsuit. — If there is an intervener who claims an interest in the matter in dispute adverse to both plaintiff and defendant, and they answer the intervention, raising material issues, and, on motion of the defendant, the court nonsuits the plaintiff, the action is still pending as to the issues raised on the intervention, and the court should proceed and try them. The intervention should not be dismissed on the ground that there is no action pending. *Pochlmann v. Kennedy*, 48 Cal. 201.

Judgment by Default for Intervener. — Where the allegations in the pleading of the intervener in an action traverse the complaint, such allegations have the same effect as denials in an answer and require affirmative proof by the plaintiff of his cause of action. In default of such proof judgment will be rendered in favor of the intervener. *Speyer v. Ihmels*, 21 Cal. 281.

3. *Smith v. Sublett*, 28 Tex. 163.

4. *Hanchett v. Gray*, 7 Tex. 552.

5. *La Croix v. Menard*, 3 Martin N. S. (La.) 339, where the court said: "It is true the statute, in prescribing the mode in which parties to a cause may

have their case submitted to a jury, speaks only of the plaintiff and defendant; and an intervening party, technically speaking, is neither one nor the other. But it is not less true that he either opposes the pretensions of one or both of the parties litigating, and that, considered in this light, he stands in the situation of plaintiff; or at least he is an actor in the cause. But by whatever appellation he be designated, it appears to us a necessary consequence of admitting him as a party that he should have the same right in proving his case, in trying it, and in enforcing his judgment, as those who were originally plaintiffs and defendants. Were we doubtful on this point, the regard which we entertain for the trial by jury, and the high opinion we hold of its value in ascertaining facts, would induce us to support the citizen who claims its aid and the investigation of his rights."

6. *Cahn v. Ford*, 42 La. Ann. 965; *Lacroix v. Menard*, 3 Martin N. S. (La.) 339.

7. *Hudson v. Morriss*, 55 Tex. 595; *Late v. Armorer*, 14 La. Ann. 838.

While the statements of fact in the record are not binding on the intervener, yet where he adopts the allegations of the plaintiff and prays for the

are regular,¹ nor can he plead exceptions having for their object the dismissal of the action.² He cannot raise new issues in the suit,³ nor insist upon a change in the form of the proceedings.⁴ An intervener cannot exercise any rights which are limited to the parties to the action.⁵

6. Must Not Retard Suit. — Intervention will not be permitted where it would retard the principal suit so as to work an injustice to the parties.⁶ An intervener cannot insist upon delay in the trial of the action, and it is error to allow an intervention which

same relief, the judgment affects alike both plaintiff and intervener. *Hudson v. Morriss*, 55 Tex. 595.

A party to the record may admit any adverse allegation and thus dispense with proof of it, though if the admission be not of a conceded fact, any other party other than the one originally making the allegation may make proof in opposition. *Dorn v. O'Neale*, 6 Nev. 155.

Evidence Prior to Intervention. — An intervener cannot object to the admissibility of evidence regularly taken prior to his being made a party to the suit. *Late v. Armorer*, 14 La. Ann. 838.

1. *Fleming v. Shields*, 21 La. Ann. 118; *Gasquet v. Johnson*, 1 La. 425; *Lee v. Bradlee*, 8 Martin (La.) 55; *Emerson v. Fox*, 3 La. 178; *Blair v. Puryear*, 87 N. Car. 101; *Bateman v. Ramsey*, 74 Tex. 589; *Nenney v. Schluter*, 62 Tex. 327.

Defective Oath or Bond in Attachment. — An intervening party has no right to take advantage of the insufficiency of the oath or bond on which process of attachment issues. *Valsain v. Cloutier*, 3 La. 170. See also *Emerson v. Fox*, 3 La. 178.

2. *West v. His Creditors*, 8 Rob. (La.) 123. See also *Lee v. Bradlee*, 8 Martin (La.) 55; *Yeatman v. Estill*, 3 La. Ann. 222; *Clamageran v. Bucks*, 4 Martin N. S. (La.) 487.

May Not Plead Peremptory Exceptions. — In *Clamageran v. Bucks*, 4 Martin N. S. (La.) 487, the court said: "We are also of opinion that an intervening creditor cannot plead peremptory exceptions, the only object of which is to have the cause dismissed for irregularities in the proceedings. These were matters for the consideration of the defendants or those who represented them, and if they thought fit to waive a defense which should not be used in a just action, no other party can. It is

exercising rights which do not belong to him and which no law that we are acquainted with confers."

3. *Mayer v. Stahr*, 35 La. Ann. 57; *Van Gorden v. Ormsby*, 55 Iowa 657; *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722; *Carraby v. Morgan*, 5 Martin N. S. (La.) 499.

When a case has been submitted to the court upon an agreed statement of facts, it is no error to deny a third party the privilege of intervening, when such intervention would raise new issues and would require a continuance of the main cause for the purpose of hearing the testimony. *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722.

4. *Van Gorden v. Ormsby*, 55 Iowa 657; *Kassing v. Walter*, (Iowa 1896) 65 N. W. Rep. 832; *Carraby v. Morgan*, 5 Martin N. S. (La.) 499.

Litigation of Greater Interest than Set Up by Original Parties. — Whether an intervener can litigate any greater interest than that set up by the original parties was mooted but not decided in *Fleming v. Seeligson*, 57 Tex. 524.

5. *Clapp v. Phelps*, 19 La. Ann. 461; *Cahn v. Ford*, 42 La. Ann. 965; *Phillips v. Both*, 58 Iowa 499.

Objection to Amount of Judgment. — In *Phillips v. Both*, 58 Iowa 499, it was held that an objection to the amount of the judgment in the main action, by the intervener, will not be considered on appeal if not made in the court below, and that it is doubtful whether an intervener is entitled to make such objection.

6. *Eccles v. Hill*, 13 Tex. 65; *Smalley v. Taylor*, 33 Tex. 668.

An intervention which in its consequences, if the intervener should prove successful, would result in postponing the determination of the cause as between the original parties will not be allowed. *Ragland v. Wisrock*, 61 Tex. 391.

produces this result, against the objection of the parties.¹ But although an intervener will not be allowed to retard the trial of a cause, yet he is entitled to the time necessary to have his intervention served and put at issue, before the cause can be tried.²

7. Liability for Costs. — If the intervener fails on the trial a judgment for costs is rendered against him.³

XIII. TIME FOR DETERMINATION OF INTERVENTION. — The court should determine upon the intervention at the same time when the action is decided.⁴

XIV. EFFECT OF JUDGMENT IN SUIT. — A judgment in an action where a third party has intervened as defendant is conclusive both upon the original defendant and the intervener.⁵ But where a party has announced his intention to intervene, but afterwards withdraws, having filed no petition for intervention, he does not become a party to the suit, and a judgment therein will not affect the rights of the intervener.⁶

XV. APPEAL. — If the intervener is dissatisfied with the final judgment in the action, he cannot avail himself of the appellate proceedings of the other parties to the action, but must prosecute a separate appeal, giving a notice and undertaking on his own

1. *Van Gorden v. Ormsby*, 55 Iowa 657; *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722; *Perkins v. Perkins*, 20 La. Ann. 257; *Walker v. Dunbar*, 6 Martin N. S. (La.) 627; *Gaines v. Page*, 15 La. Ann. 108; *Taylor v. Boedicker*, 22 La. Ann. 79; *Lacroix v. Menard*, 3 Martin N. S. (La.) 339.

"If the person intervening has rights which require protection, and which cannot be determined by intervention in the main action without delaying the trial, he ought not to intervene, but should commence an original action, and, if need be, and a proper case therefor can be made, protect his interests by injunction." *Van Gorden v. Ormsby*, 55 Iowa 657.

Must Be at All Times Ready to Exhibit Evidence. — An intervener must be at all times ready to exhibit his evidence and to proceed with the trial of the issue which he has brought into the action. *Walker v. Dunbar*, 6 Martin N. S. (La.) 627; *Gaines v. Page*, 15 La. Ann. 108; *Taylor v. Boedicker*, 22 La. Ann. 79.

Where an Intervention Has Not Been Brought to an Issue with the original parties, it is no error for the court to refuse to admit evidence offered by the intervener. *Baker v. Texarkana Nat. Bank*, 74 Fed. Rep. 598.

2. *Silbernagel v. Silbernagel*, 32 La.

Ann. 765. See also *Perkins v. Perkins*, 20 La. Ann. 257, holding that if one intervenes after issue joined, time must be allowed him to issue the proper citations and for the entry of the answers required by the code.

3. *Sheldon v. Gunn*, 56 Cal. 582.

Where an Intervener Makes a Joint Defense, he thereby renders himself liable for costs jointly with defendants. *Spruill v. Arrington*, 109 N. Car. 192; *Davis v. Sharron*, 15 B. Mon. (Ky.) 64; *Kinnear v. Flanders*, 17 Colo. 11.

Not Liable for Prior Costs. — An intervener is not liable, however, for costs which have accrued before he came into the suit. *Railsback v. Patton*, 34 Neb. 490.

4. *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722; *Fischer v. Hanna*, 8 Colo. App. 471.

Effect of Failure So to Determine. — In *Aleix v. Derbigny*, 22 La. Ann. 385, it was held that the intervention fails whenever the judgment does not pass thereon at the same time as on the main question.

5. *Witter v. Fisher*, 27 Iowa 9.

6. *Wilson v. Trowbridge*, 71 Iowa 345.

In *Gradwohl v. Harris*, 29 Cal. 150, it was held that an assignor retaining an interest may intervene in an action by an assignee, but if he does not intervene he is bound by the judgment.

behalf.¹ Where intervener and defendant take separate appeals from the judgment in favor of the plaintiff, the appellate court may affirm the judgment on the defendant's appeal, and reverse it and grant a new trial on the appeal of the intervener.²

In Equity. — An intervener has the right to appeal from the final decree of the court.³

1. *State v. New Orleans*, 27 La. Ann. 469; *Beckwith v. Peirce*, 22 La. Ann. 67.

2. *Donner v. Palmer*, 45 Cal. 180.

3. *Ex p. Jordan*, 94 U. S. 248.

In *Williams v. Morgan*, 111 U. S. 684, it was held that a holder of railroad

bonds secured by a mortgage under foreclosure has an interest in the amount of the trustee's compensation which entitles him to intervene, and to contest it, and to appeal from an adverse decision.

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CROSS-REFERENCES.

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I. INDICTMENTS, COMPLAINTS, AND INFORMATIONS. (See generally article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.)—1. **Unlawful Sales, Barter, and Gifts, in General**—*a. CERTAINTY OF ALLEGATION*—As a General Requisite.—The same degree of certainty is not required in indictments for misdemeanors as in indictments for graver offenses,¹ and certainty to a common intent is sufficient in charging violations of liquor laws.²

1. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 475, note.

2. *State v. Wishorn*, 15 Mo. 504; *State v. Odam*, 2 Lea (Tenn.) 220; *Bilbor v. State*, 7 Humph. (Tenn.) 534; *Martin v. State*, 6 Humph. (Tenn.) 204; *McCool v. State*, 23 Ind. 127.

An Inferential Averment of the facts is not sufficient. The facts constituting the offense should be alleged positively. *State v. Higgins*, 53 Vt. 191.

Omission of Word.—Where the word "to" was omitted before the word "keep" in an indictment for maintaining a building in which to keep intoxicating liquors for sale, it was held not to vitiate the indictment under section 4305 of the *Iowa Code*, which provides that indictments shall be sufficient if

they are in ordinary and concise language, and intelligible to a person of common understanding, and such as to enable the court to pronounce judgment according to law. *State v. Caffrey*, 94 Iowa 65. See *State v. Lane*, 33 Me. 536.

Sufficient Averment of Sale.—Where the indictment charged that the defendant acted as agent in effecting the alleged sale, it was held to be a sufficient averment that the sale was made. *State v. Caldwell*, (Miss. 1895) 17 So. Rep. 372.

Description of Complainant.—Where a complaint described the complainant as "special constable appointed to make complaints for violation of the liquor laws under chapter 508 of Public Laws of Rhode Island," it was held that the

The indictment should describe the offense in such plain and intelligible language that the accused may have notice of the precise offense with which he is charged,¹ and that the court may know that the accused is being tried upon the identical charge passed upon by the grand jury,² and with sufficient certainty that the accused may be able to plead his acquittal or conviction in bar of a second indictment for the same offense.³

The Indictment Should State the Particular Facts constituting the alleged violation of law,⁴ but to avoid prolixity the law allows general

description was sufficient, although lacking in accuracy. *State v. Carver*, 12 R. I. 285.

1. *Cannady v. People*, 17 Ill. 158; *Mapes v. People*, 69 Ill. 523; *State v. Moran*, 40 Me. 129; *Com. v. Certain Intoxicating Liquors*, 138 Mass. 506; *People v. Olmsted*, 74 Hun (N. Y.) 323; *State v. Burchard*, 4 S. Dak. 548; *State v. Boughner*, 5 S. Dak. 461; *Alexander v. State*, 29 Tex. 495.

2. *State v. Burchard*, 4 S. Dak. 548.

Trivial Objections. — "When the charge against a party is stated so plainly that he may know how to make his defense, and the jury may readily understand the nature of the accusation, the trial ought to be conducted solely with a view to determine whether the accused is guilty or innocent. We are not inclined to regard with favor mere trivial objections interposed for no other purpose than to obstruct the administration of the law." *Mapes v. People*, 69 Ill. 523.

3. *State v. Moran*, 40 Me. 129; *People v. Olmsted*, 74 Hun (N. Y.) 323; *State v. Burchard*, 4 S. Dak. 548; *Alexander v. State*, 29 Tex. 495.

Offense Which Can be Committed Only in Certain Municipal Division. — "Where the offense is statutory, and can be committed only in a certain municipal division, which is less than the county within the jurisdiction of the court, the name or description of such division, and the fact that the offense was committed therein, must be set forth in the indictment." *Seifried v. Com.*, 101 Pa. St. 200.

4. *State v. Cox*, 29 Mo. 475; *People v. Olmsted*, 74 Hun (N. Y.) 323; *State v. Butcher*, 1 S. Dak. 401.

"A crime is made up of acts and intent, and they must be set forth in the indictment with reasonable particularity of time, place, and circumstances; and the accused has the right to have the charge against him thus stated, in order that he may decide

whether he should present his defense by motion to quash, demurrer, or plea, and that the court may determine whether the facts will sustain the indictment. The want of a direct allegation of anything material in the description of the substance, nature, or manner of the crime cannot be supplied by any intendment or implication whatsoever." *State v. Benjamin*, 49 Vt. 101.

Mere Belief of Complainant. — A complaint which does not set forth the facts and circumstances of which the offense consists, but merely states the complainant's belief that defendant sold intoxicating liquor in violation of a certain act of the legislature, between certain specified days, is insufficient to confer jurisdiction upon the justice before whom it is made to compel the attendance of witnesses to testify concerning supposed violations of law. *Matter of Morton*, 10 Mich. 208. See also *Mowery v. Camden*, 49 N. J. L. 106; *Com. v. Phillips*, 16 Pick. (Mass.) 211.

Verification of Complaint. — If the offense is charged in positive language, the addition of the words, "and this deponent says he verily believes" the defendant to be guilty of the facts charged, will not vitiate the complaint as not being sworn to positively. *Brown v. State*, 16 Neb. 658. See also *People v. Schottery*, 66 Mich. 708.

In *New Jersey* and *Wisconsin* a different rule seems to prevail. In *Roberson v. Lambertville*, 38 N. J. L. 69, the court said: "It would have been sufficient to state that the prosecutor had just cause to suspect, and did suspect, the party charged, provided the complaint, in all other respects, conformed to the requirements of the common law." In *State v. Tall*, 56 Wis. 577, the complaint for unlawfully selling without license stated the facts upon the complainant's information and belief, and it was held sufficient, as being

pleading where the subject comprehends a multiplicity of matter.¹

The Certainty Required in a Complaint for Violation of a Municipal Ordinance is the same as that required in indictments for similar offenses against the statute.²

Statutory Form. — The indictment or complaint in the form prescribed by statute is sufficient, unless the statute violates constitutional guaranties.³

in stronger language than the statute required, the words of the statute being "had good reason to believe."

Conclusions of Law. — A complaint charging that defendant sold intoxicating liquors "unlawfully" or "contrary to law," without stating in what manner he violated the law, is insufficient. The facts constituting the violation should be set forth. *Cortland v. Howard*, 1 N. Y. App. Div. 131. See also *Com. v. White*, 18 B. Mon. (Ky.) 492.

Manner of Sale. — An information charging that the defendant, in violation of the prohibition law, sold intoxicating liquors, but failing to state that the defendant had no license to sell, or that, having a license, he sold in a manner prohibited by law, is insufficient when properly attacked by motion to quash. *State v. Burkett*, 51 Kan. 175.

Charge Not Necessarily Inconsistent with Innocence. — If, admitting the truth of the facts alleged in the indictment, still the defendant may not be guilty of the offense defined in the statute, the indictment is fatally defective. *Com. v. Young*, 15 Gratt. (Va.) 664.

The Rule Qualified. — "It is only where the act charged is not in itself unlawful, but becomes so by other facts connected with it, that the facts in which the illegality consists must be set out." Where the giving away of intoxicating liquor on election day is declared by the statute to be an offense, the act, being unlawful within itself, is sufficiently charged in the language of the statute without setting forth the particular facts and circumstances. *Cearfoss v. State*, 42 Md. 403.

1. Keeping Disorderly Tippling House. — "It is said that the indictment is defective because it does not set forth the particular acts which composed the disorderly manner in which the tippling house was kept. As a general rule the essential facts which constitute the offense should be specifically

and certainly stated in the indictment; but there is a class of cases to which that rule does not apply. Whenever the charge consists of a series of acts they need not be specially described, because they are not the offense itself, but merely go to make up the evidence of the offense." *Shilling v. State*, 5 Ind. 443; *State v. Stinson*, 17 Me. 154; *Com. v. Pray*, 13 Pick. (Mass.) 359. See also *Rex v. Higginson*, 2 Burr. 1232. And see article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 474.

2. Cunningham v. Berry, 17 Oregon 622.

Where a warrant required the defendants to appear before the city court, "to answer to the city of Lexington why they should not be fined for presuming to sell by retail, without a proper and legal license so to do, any quantity of wine, brandy, whiskey," etc., it was held too indefinite to support a judgment by the city court under the city ordinance, which made it an offense to sell by retail less than a quart. *Bridgeford v. Lexington*, 7 B. Mon. (Ky.) 47.

3. State v. Comstock, 27 Vt. 553; *State v. Hodgson*, 66 Vt. 134. See *State v. Spaulding*, 61 Vt. 505.

Averments in excess of the prescribed form may be rejected as surplusage. *State v. Woodward*, 25 Vt. 616.

In Rhode Island. — Pub. L. 1886, c. 596, § 15, provides that the form of complaint prescribed therein, if substantially followed in prosecutions under section 9, shall be sufficient. A complaint for unlawfully keeping intoxicating liquors for sale, drawn in the statutory form, is sufficient, although the words "and delivery" after the words "for the purposes of sale," are omitted. "Keeping for sale" must be construed as meaning the same as "keeping for sale and delivery" *State v. Murphy*, 15 R. I. 543; *State v. Kane*, 15 R. I. 395.

b. DISJUNCTIVE OR CONJUNCTIVE ALLEGATIONS — Disjunctive Allegations. — The use of the disjunctive "or" will be fatal to the indictment if it renders the statement of the offense uncertain,¹ but it may be used in negative averments to exclude statutory exceptions.²

Charging Offenses in the Alternative. — A complaint which charges the commission of two or more offenses in the alternative is insufficient.³

Alternative Averment as to Kind of Liquor. — It is generally sufficient, in charging unlawful sales, barter, and gifts, and other dispositions of liquors, to charge the kind of liquor in the alternative.⁴

In *Indiana* the 18th section of the Act of February 27, 1873, provided that "in all prosecutions under this act, by indictment or otherwise, it shall not be necessary to state the kind of liquor sold, or to describe the place where sold, and it shall not be necessary to state the name of the person to whom sold." It was held that in so far as the section dispensed with the statement of the name of the person to whom the liquor was sold, it was invalid. *McLaughlin v. State*, 45 Ind. 338. But it was held not necessary to state the price for which the liquor was sold, nor to negative license authorizing the sale. *O'Connor v. State*, 45 Ind. 347.

Insufficient Statutory Form. — The statutory form will be insufficient if it does not describe any offense punishable under the statute to which it applies. *State v. Learned*, 47 Me. 426.

1. *State v. Carver*, 12 R. I. 285; *Com. v. Grey*, 2 Gray (Mass.) 501.

As to Authority to Sell. — An indictment charged the sale of liquor to be drunk on the defendant's premises, "without having obtained a license therefor as a tavern keeper, or without being in any way authorized to sell the same as aforesaid." It was held that the disjunctive "or" did not vitiate the indictment, for the reason that there was no way in which one could legally sell intoxicating liquor to be drunk on his premises except by a license as a tavern keeper, and the addition of the words "or without being in any way authorized," etc., might be rejected as surplusage. *People v. Gilkinson*, 4 Park. Cr. Rep. (Dutchess Oyer & T. Ct.) 26.

2. **As to Negative Averments.** — It is proper to use the disjunctive "or" in connecting "negative averments introduced to exclude the defendant from the classes of persons authorized to

sell intoxicating liquors." *State v. Carver*, 12 R. I. 285.

3. **Charging More than One Offense.** — Where the indictment charged that the defendant "did sell or give away," or "sold, bartered, exchanged, or otherwise disposed of, or permitted to be taken," or "sold, gave away, or otherwise disposed of," it was held insufficient, as charging in the disjunctive the commission of two or more offenses. *Thompson v. State*, 37 Ark. 408; *Raisler v. State*, 55 Ala. 64; *State v. Fairgrieve*, 29 Mo. App. 641; *State v. Froehlich*, (N. J. 1887) 6 Cent. Rep. 537.

Charging Acts Not Unlawful. — An indictment charged that the defendant "sold, bartered, exchanged, or otherwise disposed of, or permitted to be taken, spirituous, vinous, or malt liquors," etc. The court said: "Several of these disjunctive averments charge no offense known to the law. The indictment thus charges that the defendant did one of several acts, many of which are not indictable under the statute. A disjunctive averment in pleading, to be sufficient, must, in each of its alternative phases, charge an indictable offense." *Raisler v. State*, 55 Ala. 64. *Citing Andrews v. McCoy*, 8 Ala. 929; *Lucas v. Oliver*, 34 Ala. 626; *David v. Shepard*, 40 Ala. 587.

4. *Cost v. State*, 96 Ala. 60; *Boon v. State*, 69 Ala. 226; *Powell v. State*, 69 Ala. 10; *Cunningham v. State*, 5 W. Va. 508; *Thomas v. Com.*, 90 Va. 92; *Morgan v. Com.*, 7 Gratt. (Va.) 592.

The *Alabama* Code of 1887, § 4385, provides that "when offenses are of the same character, and subject to the same punishment, the defendant may be charged with the commission of either in the same count in the alternative."

"Or" in the Sense of "To Wit." — The disjunctive "or" is permissible when

Disjunctive as to Place.—As a general rule place should not be laid in the disjunctive.¹

Conjunctive Allegations.—If the statute makes it an offense to do any one of several things mentioned disjunctively, the same punishment being prescribed for each, the whole may be charged conjunctively as a single offense.²

used in the sense of "to wit" in explanation of what precedes it and signifies the same thing, as a charge that the defendant did "deal or traffic in," etc., or that the defendant sold "intoxicating or malt liquor." *Clifford v. State*, 29 Wis. 327; *State v. Boncher*, 59 Wis. 477. In the latter case it was held that "the word 'or' is manifestly there used to explain the kind of intoxicating liquors sold, to wit, malt as distinguished from ardent or spirituous liquors," and that "it would have been error to allow testimony of a sale of any other than malt liquors."

"All spirituous liquor is intoxicating; yet all intoxicating liquor is not spirituous. * * * A complaint or indictment on the statute should charge the defendant either with selling spirituous liquor, or with selling intoxicating liquor, or with selling spirituous liquor and intoxicating liquor." *Com. v. Grey*, 2 Gray (Mass.) 501. See also *Clifford v. State*, 29 Wis. 327. *Thompson v. State*, 37 Ark. 408.

Alternative Averments Held Insufficient.—In *Smith v. State*, 19 Conn. 493, the information alleged that the defendant sold "wines, spirituous liquor, or other intoxicating beverage," and the court held that the information was insufficient because of the alternative charge as to the kind of liquor sold.

In *Grantham v. State*, 89 Ga. 121, the indictment charged that the accused sold a quantity of "spirituous, malt, or intoxicating liquor," and the court held that the indictment was bad on special demurrer, because of the alternative charge; and it was further held that *Johnson v. State*, 8 Ga. 453, and *Hinton v. State*, 68 Ga. 322, are no authority on this point, the precise question not having been made or determined in those cases.

In *Com. v. Grey*, 2 Gray (Mass.) 501, the complaint charged the defendant with selling "spirituous or intoxicating liquor," and the court said: "If spirituous liquor and intoxicating liquor were the same, and the word

'intoxicating' had been used in Stat. 1852, c. 322, as a mere explanation of the word 'spirituous,' the complaint in the present case would have been rightly drawn. But the two words are not synonymous."

1. Place Where Liquors Were to Be Drunk.—An indictment charged that the defendant, at a certain time and place, did sell intoxicating liquors to a certain person, "to be drunk in, upon, or about the building or premises where sold," and the court held that the indictment was fatally defective in charging in the disjunctive the place where the liquors were to be drunk. *State v. Charlton*, 11 W. Va. 332.

Keeping Place for Sale of Liquor.—An indictment charged that the defendant, etc., "did keep a certain store or shop, etc., for the purpose of selling wine or spirituous liquors to be drank thereat," and the court said: "Considering the mode of using the words 'store' and 'shop' in this country, and the meaning usually attached to them, especially when they are applied to a place where goods are bought and sold, in which sense they are obviously used in the act on which this information is founded, we think that they are to be considered in that statute, and also in this information, which is in the very words of it, as synonymous terms; and that therefore, although the words are connected by the disjunctive particle, and the allegation as to the place kept is in an alternative form, it is not in substance and sense an allegation that the accused kept one or other of two different places, but that he kept one place, called by the name of a store or shop." *Barth v. State*, 18 Conn. 439.

2. *State v. Finan*, 10 Iowa 19; *State v. Schweiter*, 27 Kan. 499; *State v. McGinnis*, 30 Minn. 52; *Lea v. State*, 64 Miss. 201; *State v. Pittman*, 76 Mo. 56; *State v. Fairgrieve*, 29 Mo. App. 641; *State v. Nations*, 75 Mo. 53; *State v. Kerr*, 3 N. Dak. 523; *State v. Colwell*, 3 R. I. 284; *State v. Nolan*, 15 R. I. 529; *Boldt v. State*, 72 Wis. 7.

c. FOLLOWING LANGUAGE OF STATUTE. — It is generally sufficient to charge a purely statutory offense in the language of the statute,¹ or in other words of similar or equivalent

Where the statute is in the disjunctive form it is generally sufficient to charge the offense in the conjunctive, unless the acts so charged are repugnant; and to "sell and give away," or "sell, give away, or otherwise dispose of," are not repugnant acts and they may be well charged in the conjunctive form. *State v. Fairgrieve*, 29 Mo. App. 641; *State v. Pittman*, 76 Mo. 56. See also *State v. Fitzsimmons*, 30 Mo. 236.

Conviction or Acquittal on Disjunctive Charge or Conjunctive Charge. — "If separately so charged, at the choice of the prosecution, the statute under consideration creates several distinct offenses, as the vending, dealing in, or giving away with unlawful intent, of any spirituous or ardent liquors or drinks, or the vending, dealing in, or giving away with like intent of any intoxicating liquors or drinks; and should the defendant in a case like the present be subsequently complained against for the commission of any one of these six several offenses, stated by itself, or of all of them, each being separately stated in different counts or complaints, or the whole alleged conjunctively, and any one or all of them should be the identical offense or offenses of which he was formerly convicted, it would, nevertheless, be impossible for him to protect himself by pleading and producing the first record. It is not so, however, where the several acts specified in the statute are charged conjunctively, or the word 'and' instead of 'or' is used; for in that case all are regarded as constituting but one offense, and the conviction or acquittal is a complete bar to any subsequent prosecution for all or either, whether separately or otherwise pleaded and alleged." *Clifford v. State*, 29 Wis. 330.

1. *Arkansas*. — *State v. Witt*, 39 Ark. 216.

Georgia. — *Sharp v. State*, 17 Ga. 290.

Illinois. — *McCutcheon v. People*, 69 Ill. 601.

Indiana. — *Wood v. State*, 9 Ind. App. 42; *Payne v. State*, 74 Ind. 203.

Iowa. — *State v. Devine*, 4 Iowa 443.

Kansas. — *State v. Tanner*, 50 Kan. 365.

Louisiana. — *State v. Porte*, 9 La. Ann. 105.

Maryland. — *Cearfoss v. State*, 42 Md. 403; *Parkinson v. State*, 14 Md. 184.

Michigan. — *People v. Paquin*, 74 Mich. 34.

Missouri. — *State v. Roehm*, 61 Mo. 82; *State v. Kock*, 61 Mo. 117; *State v. Meagher*, 49 Mo. App. 571; *State v. Atkins*, 40 Mo. App. 344; *State v. Houts*, 36 Mo. App. 265.

New Hampshire. — *State v. Rust*, 35 N. H. 438.

Tennessee. — *State v. Odam*, 2 Lea (Tenn.) 220.

West Virginia. — *State v. Boggess*, 36 W. Va. 713.

Statutory Ingredients. — It is a well-settled principle that in an indictment for a statutory offense the statute must be strictly pursued. The indictment should state all of the facts that constitute the definition of the offense, and it is desirable in every case "to attend with the greatest nicety to the words contained in the act, for no others can be so proper to describe the crime;" and if the definition and description contained in the statute be departed from in any material respect, and "any ingredient in the definition of the offense be omitted, the indictment will be bad." *Bush v. Republic*, 1 Tex. 455. See also *Com. v. Young*, 15 Gratt. (Va.) 664. See *Whiting v. State*, 14 Conn. 487.

Exception to Rule. — To the general rule that it is sufficient to charge the offense in the language of the statute, there are exceptions in which greater particularity is required by known principles of law, or from the obvious intention of the legislature, and in such case it is for the defendant to show that he comes within the exception. *Whiting v. State*, 14 Conn. 487; *State v. Abbott*, 31 N. H. 434.

Selling "as a Beverage." — Under a statute providing that any person "who shall within this state sell, etc., any of such intoxicating liquors as a beverage, shall, for the first offense, be deemed guilty of a misdemeanor," an information charging that defendant did "sell intoxicating liquors maliciously and wilfully, and contrary to the

import.¹ But where the statute does not create an offense, nor describe any, the purpose being to substitute a new form of indictment for selling contrary to law, it is not sufficient to follow the language of the statute.²

statutes," etc., is insufficient. The offense does not consist in selling the liquors "maliciously and wilfully," but in selling them "as a beverage." *State v. Hafsoos*, 1 S. Dak. 382.

Surplusage in Conclusion.—Where an indictment contains sufficient in other respects, mere surplusage matter in the conclusion of the indictment will not vitiate it. *State v. Hall*, 26 W. Va. 236.

1. *Bryan v. State*, 45 Ala. 86; *Harris v. State*, 50 Ala. 127; *Rawson v. State*, 19 Conn. 292; *Roberts v. State*, 26 Fla. 360; *Howell v. State*, 4 Ind. App. 148; *Zumhoff v. State*, 4 Greene (Iowa) 526; *State v. Looker*, 54 Kan. 227; *Mankato v. Arnold*, 36 Minn. 62; *State v. Baskett*, 52 Mo. App. 389; *Com. v. Sellers*, 130 Pa. St. 32.

Failure to Employ the Statutory Terms.—Where the indictment charging an offense does not employ all the statutory terms, but only a portion of them, yet sets forth the offense so plainly that its nature may be easily understood by the jury, it is sufficiently technical and correct under the law. *Loeb v. State*, 75 Ga. 258, citing section 4628 of the code.

Sale to Habitual Drunkard.—The use of the phrase "in the habit of becoming intoxicated" instead of "in the habit of being intoxicated," the terms of Rev. Stat. *Indiana* 1881, § 2093, will not vitiate an indictment for selling intoxicating liquor to an habitual drunkard. *Dolan v. State*, 122 Ind. 141. See also *Connell v. State*, 46 Ind. 446.

Sufficiency of General Description.—"It is well settled that the indictment must, by express words, bring the offense within the substantial description made in the statute; and those circumstances mentioned in the statute to make up the offense shall not be supplied by the general conclusion *contra formam statuti*. * * * But where the offense is prohibited in general terms in one section [or clause] of the statute, and a penalty prescribed, and in another section [or clause] entirely distinct there is a particular description of the elements which shall constitute the offense, we perceive no reason, upon principle or authority, why the indictment should contain

anything more than the general description." *State v. Casey*, 45 Me. 435; *State v. Collins*, 48 Me. 217.

Not Aided by the Videlicet.—Where the statutory offense consists in the selling of intoxicating liquors of any kind in any quantity less than four gallons, etc., the charge of selling intoxicating liquors in less quantity than one gallon is insufficient, and such allegation is not aided by a statement under the *videlicet* that the quantity sold was one pint. *State v. Baskett*, 52 Mo. App. 389. See also *State v. Greenhagen*, 36 Mo. App. 24; *State v. Fanning*, 38 Mo. 409.

"Whiskey" Instead of "Distilled Liquor."—If the indictment uses the word "whiskey" instead of the statutory term "distilled liquor," it will be sufficient. *State v. Dengolensky*, 82 Mo. 44, *adhering to State v. Williamson*, 21 Mo. 496, and *disregarding State v. Lisle*, 58 Mo. 359, because the question here raised was not considered in that case.

Words Necessarily Importing Guilt.—"It is sufficient to use in the indictment such terms of description as that, if true, the accused must of necessity be guilty of the offense described in the statute." *Com. v. Young*, 15 Gratt. (Va.) 664.

2. **In New Jersey.**—Pub. L. 1893, p. 193, "does not * * * create an offense, nor does it purport to describe any. The expressed intention of the enactment was to substitute a form of indictment for selling contrary to law for the more sweeping charge of keeping a disorderly house in all cases where the elements of unlawfulness were confined to the sale of intoxicating liquors. In effect it simply prohibits the use of the indictment for keeping a disorderly house in those cases in which that offense consists wholly in the unlawful sale of intoxicants. * * * The act under consideration does not attempt to prescribe the language in which the pleader shall aver the facts that constitute the offense, which, consequently, is left to the established canons of criminal pleading." *State v. Schmid*, 57 N. J. L. 625.

*d. DUPLICITY*¹ — (1) *Joint and Several Sales.* — An indictment may properly charge a joint sale as having been made to several persons, known or unknown,² or distinct unlawful sales to different persons.³

Several Sales at Same Time. — An indictment charging several sales at the same time charges but one offense,⁴ and an indictment charging a number of sales of intoxicating liquors to divers persons at divers times charges but one offense where it is of a continuous character.⁵

(2) *Dual Character of Purchaser.* — The fact that the indictment describes the purchaser in the dual character of being an intoxicated person and one who is in the habit of getting intoxicated will not render the indictment double.⁶

(3) *As to Time.* — If the indictment charges the offense to have been committed on a day named "and on divers other days and times," it will not be insufficient on objection for duplicity,⁷ but the indictment will be double if it charges unlaw-

1. As to what constitutes duplicity generally, see article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 532 *et seq.*

2. *People v. Schmidt*, 19 N. Y. Misc. Rep. (Oneida County Ct.) 458. See also *Peer's Case*, 5 Gratt. (Va.) 674.

3. *Com. v. Broker*, 151 Mass. 355.

Two Distinct Sales. — Where a complaint in a municipal court alleging unlawful sales of liquor on a named day to a certain person proceeded as follows: "And said F. * * * on oath complains that said " defendant on the same day unlawfully sold such liquors to other persons named, it was held that the complaint set out two distinct sales, and that the motion to quash was rightly overruled. *Com. v. Broker*, 151 Mass. 355.

Physician Unlawfully Prescribing. — A charge against a physician for unlawfully prescribing liquor is not rendered double because the person to whom the prescription was given is charged differently in different counts. *State v. Atkinson*, 33 S. Car. 100.

4. *Storrs v. State*, 3 Mo. 9; *State v. Atkins*, 40 Mo. App. 344.

5. Where an indictment charged the retailing of twenty glasses or drams of intoxicating liquor to divers persons at divers times, the court said: "The offense charged is of a continuous character, carried on from day to day, and although the unlawful traffic is alleged to have been continued for several days or weeks prior to the commencement of the prosecution, it must

still be regarded as but the one offense, made the more enormous by its long continuance, and requiring the more exemplary punishment." *Zumhoff v. State*, 4 Greene (Iowa) 526. See also *People v. Adams*, 17 Wend. (N. Y.) 475.

6. "It appears to have been claimed in the court below that selling liquor to a person intoxicated was one offense, and that the same sale to that person, he being a person in the habit of getting intoxicated, was another, and that by joining the two in a single count two separate and distinct crimes were charged. We cannot so regard it. The offense is but a single one. There is but one sale of liquor, and but one person to whom it is sold. The fact that such person represents two characters under the statute does not make the offense double." *State v. Conner*, 30 Ohio St. 405.

7. **Continuando** — *Surplusage.* — Where the indictment charges the defendant with unlawfully selling on a day certain "and on divers other days and times," etc., the *continuando* may be rejected as surplusage, and the indictment cannot be objected to as being duplicitous. *People v. Adams*, 17 Wend. (N. Y.) 475; *Osgood v. People*, 39 N. Y. 449; *State v. Kobe*, 26 Minn. 148.

But where an information charged that "on the first day of March, 1893, and on divers days and times between that day and the seventh day of May, 1893, respondent did sell and furnish," the court said: "The objection that

ful sales to have been made at different times to different persons.¹

(4) *As to Place*.—An indictment is not bad for duplicity in describing a place by the conjunctive use of several synonymous terms,² nor where the only effect of conjunctive descriptions is that more is charged than is necessary to constitute the offense.³

(5) *As to Liquors Sold*.—If the statute, in defining the offense, mentions several kinds of liquor, the sale of either of which will constitute the offense, the indictment may allege a sale of them conjunctively, and will not be bad for duplicity.⁴

the information is bad for duplicity is well taken. Each sale to a person in the habit of becoming intoxicated is, under our statute, a separate offense, and as the offense is not of a continuing character, we do not think that the continuando can be rejected as surplusage." *People v. Hamilton*, 101 Mich. 87. See also *State v. Temple*, 38 Vt. 37; *State v. Pischel*, 16 Neb. 490, 608.

1. An indictment charged that on March 1, 1885, at a named place, the defendant sold, to several persons named, intoxicating liquors; also that at the same place, on the 26th of August, 1885, he sold liquor to other persons named; also that on the 12th day of September and the 28th of July, at the same place, he sold liquor to still other persons named. It was held that the indictment charged more than one offense and on demurrer was insufficient for duplicity. *People v. O'Donnell*, 46 Hun (N. Y.) 358.

2. *House, Store, and Shop*.—Thus an indictment was held not to be double where it alleged that the defendant kept a certain house, store, and shop for the purpose of selling wines, etc., to be drunk thereat. *Rawson v. State*, 19 Conn. 292, where the court said: "The objection supposes the defendant to be charged with keeping a house, and also a store, and also a shop, as three distinct and separate places, for the purpose of selling wine and spirituous liquors, the keeping of each of which constitutes a distinct offense. We do not think that the language of the complaint, understood in its ordinary import, warrants this inference. The grand juror evidently used the words 'house,' 'store,' and 'shop' as synonymous, and as defining

but one place. 'A certain house, store, and shop,' [is] equivalent to saying 'one certain house, etc., to be drunk thereat,' viz., at that certain place. This language is in the singular throughout, with no allusion to more buildings than one. And he was well warranted in so understanding and using these words, which, in common parlance, and especially in reference to their being houses used for buying and selling, are generally understood to mean the same thing." See also *Barth v. State*, 18 Conn. 432.

3. Where the indictment alleged that the liquor was sold to be drunk in the defendant's "house, out-house, yard, garden, and the appurtenances thereto belonging," it was not bad as being duplicitous. *Stout v. State*, 93 Ind. 150. And in an almost identical case the court said: "Being thus conjunctively connected, the only effect was that more was charged in the indictment than was necessary to make out the offense under the statute. * * * If these phrases and words had been disjunctively connected a different question would have been presented." *Stockwell v. State*, 85 Ind. 522.

4. *Charging Sales of Various Kinds of Liquor*.—Where the indictment alleges that the defendant sold "intoxicating, spirituous, vinous, and malt liquors," or "vinous and spirituous liquors," or "wine, brandy, rum, and other strong liquors," or "beer, a fermented or malt liquor," and but one penalty is prescribed, the indictment charges but one offense and is not open to objection for duplicity. *Kreamer v. State*, 106 Ind. 192; *State v. Cottle*, 15 Me. 473; *State v. Nerbovig*, 33 Minn. 480; *Murphy v. State*, 28 Miss. 637; *Lea v. State*, 64 Miss. 201.

(6) *Acts Constituting Distinct Offenses.* — Acts Constituting Different Stages of the Same Offense, although each act when taken alone will constitute an offense, may be joined in one count.¹

1. Keeping, Exposing, Offering, and Selling. — An indictment charging that the defendant "did * * * sell and exchange, and offer and expose for sale and exchange, and did own and keep, with intent to sell and exchange, spirituous and intoxicating liquors," etc., or that the defendant "did sell and did offer to sell," is not bad for duplicity. *State v. Burns*, 44 Conn. 149; *Barnes v. State*, 20 Conn. 232.

Exposing and Keeping for Sale constitute but one offense, and an indictment so charging will be supported by proof of either. *Com. v. Dolan*, 121 Mass. 374. See *Com. v. Byrnes*, 126 Mass. 248; *Com. v. Curran*, 119 Mass. 206.

Sold and Suffered to be Sold. — If the indictment charges that the defendant sold and suffered to be sold, or "did offer to sell, sell, and suffer to be sold," certain intoxicating liquors, such allegation will not render the indictment bad for duplicity. *State v. Nolan*, 15 R. I. 529; *State v. Colwell*, 3 R. I. 284.

"Did Sell and Was Unlawfully Interested in the Sale," is not a charge which makes an indictment bad for duplicity. *Davis v. State*, 50 Ark. 17.

Unlawfully Sold and Caused to be Sold. — An allegation that the defendant sold and caused to be sold certain liquors does not render the indictment double. *State v. Cottle*, 15 Me. 473; *State v. Stinson*, 17 Me. 154; *State v. Fant*, 2 La. Ann. 837.

In *Com. v. Schoenhutt*, 3 Phila. (Pa.) 20, the indictment charged that the defendant "did sell and cause to be sold," and the court said: "This form of expression has always been held as charging the same offense. It is the common form of words used in such indictments in Pennsylvania from the early period, and no objection on the ground of duplicity has ever been sustained." See also *Com. v. Baird*, 4 S. & R. (Pa.) 141; *Whart. Prec.* 475; 6 Pa. L. J. 283; *Com. v. Eaton*, 15 Pick. (Mass.) 273.

Selling on Sunday at Retail or Without License. — An affidavit charged that the defendant, at a certain time and place, and to a named person, sold "a less quantity than a quart of intoxicating liquor, to wit, four gills of beer, for the

sum of ten cents, to be drunk as a beverage, said 10th day of July, 1887, being the first day of the week, and commonly called Sunday." It was held that the affidavit contained more words than were necessary to charge the offense of selling on Sunday, but that they constituted only one charge, that of selling intoxicating liquor on Sunday. *Henry v. State*, 113 Ind. 304.

Where the indictment charged a sale on Sunday, to wit "one gill of intoxicating liquor * * * to be drank on the premises where sold," the averment that the defendant did not have a license authorizing him so to sell will not render the indictment double, and such averment may be rejected as surplusage. *State v. Hutzell*, 53 Ind. 160.

Selling at Retail to Be Drunk on Premises. — "In an indictment against a person for selling a less quantity than a quart, the charge of the offense is complete when the sale is charged; and whether it was sold to be drank on the premises, or otherwise, * * * is immaterial, and if stated in the indictment is mere surplusage and may be disregarded." *State v. Wickey*, 54 Ind. 438; *State v. Wickey*, 57 Ind. 596.

Contra. — Under a section of a *Mississippi* statute declaring that "it shall not be lawful for any person to sell or retail any vinous or spirituous liquors in less quantities than one gallon, nor suffer the same or any part thereof to be drank or used in or about his or her house," a count in an indictment charging that the defendant sold in less quantity than one gallon, and suffered the same to be drank in his house, was held duplicitous on the ground that it was impossible for the defendant to determine with what offense he was charged, whether with selling less than a gallon, or allowing liquor to be drunk or used in or about his house. *Miller v. State*, 5 How. (Miss.) 250.

Presuming to Be a Common Seller and Causing to Be Sold. — An indictment charging that the defendant did "presume to be a common seller * * * and did * * * cause to be sold," etc., is not duplicitous. *State v. Stinson*, 17 Me. 154.

Presuming to be Retailer and Selling. — An indictment charging that the de-

Cognate Acts. — Where the statute, in defining the offense, mentions several acts disjunctively, the doing of either of which will constitute an offense, the indictment may charge all of such acts without being bad for duplicity.¹

defendant "did presume to be a retailer * * * and did * * * sell," etc., is not bad for duplicity. *Com. v. Wilcox*, 1 Cush. (Mass.) 503; *State v. Churchill*, 25 Me. 306.

A Charge of Selling Without Filing Bond, Paying Tax, or Posting Receipt will not render the indictment double. *People v. Wade*, 101 Mich. 89.

Where an information charged the defendant with having sold intoxicating liquors in less quantities than a quart, "said occupation being taxable by law, without first obtaining a license therefor, and the taxes then and there due by him to the said state upon said occupation amounted to three hundred dollars, and the taxes then and there due by him to said county amounted to one hundred and fifty dollars," the taxes having been duly levied, it was held sufficient, and charged but one offense. *Allen v. State*, (Tex. App. 1890) 13 S. W. Rep. 998.

Druggist Selling at Retail as a Beverage Without Payment of Tax. — An information, after charging that the defendant was engaged in the business of a druggist, at a certain time and place, alleged that he did at said time and place sell and furnish, etc., spirituous and intoxicating liquors, to wit, whiskey, to named persons, at a named place, and that said liquor was not sold and furnished, to said named persons for medical, chemical, scientific, mechanical, or sacramental purposes, but was sold and delivered to said named parties, as aforesaid, as a beverage, without license, etc., and without paying any tax for selling and keeping for sale at retail, it was held that the information was not bad for duplicity, and that it charged only one offense, to wit, the sale by a druggist who had not paid a special retail tax of whiskey to be used as a beverage, and not for any of the purposes permitted to druggists. *Luton v. Newaygo Circuit Judge*, 69 Mich. 610.

That Defendant Sold Liquor Without Paying the Tax, and Engaged in the Business without having the receipt and notice posted up, is not such an allegation as will render the charge double. *People v. Aldrich*, 104 Mich. 455. To

the same point see *People v. Paquin*, 74 Mich. 34.

Keeping Place and Selling. — An information charged that the defendant, in a certain described local option precinct, "did then and there unlawfully and wilfully keep and run, and was then and there interested in keeping and running, a 'blind tiger,' for the purpose of selling intoxicating liquors; that he did then and there sell to" a named person "intoxicating liquors." It was held that the allegation that the defendant kept a "blind tiger" was sufficient without further description, and the allegation that he sold intoxicating liquors to a named person did not make the information duplicitous. *Segars v. State*, 35 Tex. Crim. Rep. 45.

Contra — Specific Sales and Keeping Saloon. — Where the information in one count charged the defendant with specific sales of liquor to a named person, and also with keeping a saloon where intoxicating liquors are sold as a beverage, the court held that the count was bad for duplicity. *People v. Keefer*, 97 Mich. 15.

Keeping Open on Sunday and Selling is a charge of but one offense, and it will be sufficient to prove either of such acts. *Morganstern v. Com.*, (Va. 1896) 26 S. E. Rep. 402.

1. Selling and Giving Away. — If the statute mentions several things disjunctively as constituting an offense, all of which are punishable alike, the whole may be charged conjunctively in the same count as constituting but one offense. *Thompson v. State*, 37 Ark. 408; *State v. Finan*, 10 Iowa 19; *State v. Kerr*, 3 N. Dak. 523. *Contra*, *State v. Pischel*, 16 Neb. 490; *Smith v. State*, 32 Neb. 105.

Under the *New York Code Crim. Pro.*, "the indictment must charge but one crime, and in one form," but "the crime may be charged in separate counts to have been committed in a different manner or by different means, and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts." Where the defendant was charged in one count with selling intoxicating liquor on Sunday the 26th of February,

c. CHARGING OFFENSE DIFFERENTLY IN DIFFERENT COUNTS.

—The same offense may be described differently in different counts of the same indictment, and, in the absence of statutory requirements, it is not necessary to allege that the counts are different descriptions of the same offense, nor that the offenses described in the several counts are distinct offenses.¹

1888, to a named person, and in a second count with the giving away on Sunday the 18th of March, 1888, intoxicating liquor to a named person, the indictment was held bad for duplicity. *People v. Harmon*, 49 Hun (N. Y.) 558.

Sell, Barter, and Give Away — Surplusage. — An indictment charged that the defendant "did then and there unlawfully sell, barter, and give away to one Richard Fisher, at and for the price of ten cents, certain intoxicating liquors," etc. The court said: "A sale, a barter, and a gift cannot all be included in one act. There is a radical difference between a sale and a barter, and between a sale and a gift, and between a barter and a gift. * * * We have the distinct charge that the appellant did 'sell * * * one pint of beer.' This makes a good charge of a sale. There is no sufficient charge of a barter, for it is not alleged that any property was exchanged for the beer. * * * The giving away is coupled with 'at and for the price of ten cents.' This expression destroys the idea of a gift, for there can be no gift upon a consideration. * * * All that part of the indictment which relates to bartering and giving away may be treated as surplusage." *Hatfield v. State*, 9 Ind. App. 296.

An affidavit and information charged that the defendant, at a named time and place, did "sell, barter, and give away intoxicating liquor to," etc., and it was held that "it does not charge a selling, because it does not allege what, if anything, was paid for the liquor; nor a bartering, because it does not allege what, if anything, was exchanged for it. These words may be held as surplusage, and still leave the charge of giving well alleged. The affidavit is good." *Eagan v. State*, 53 Ind. 162. See also *Divine v. State*, 4 Ind. 240; *Shafer v. State*, 26 Ind. 191.

Sell, Give, Vend, and Retail. — "In misdemeanors, when two offenses of the same character are created by the same statute, and are punishable in the same manner, they may be joined in

the same count of an indictment or presentment." *State v. Irvine*, 3 Heisk. (Tenn.) 155, holding that a charge that the defendant did "sell, give, vend, and retail," etc., was not double.

Sale and Exchange. — The first count of an information alleged that the defendant did unlawfully "sell and exchange, and offer and expose for sale and exchange, to, etc., certain intoxicating liquors, without a license therefor," etc. The court said: "The intention of the pleader is * * * plain — to charge one transaction, and one only. There is but one time and one place, and we think it was intended to charge but one act; but whether that act was a sale for cash or a sale in a broader sense by way of exchange, the pleader, not knowing, alleged that it was both, so that proof of either would sustain the charge." *State v. Teahan*, 50 Conn. 92.

Sell and Traffic in. — A complaint charged that the defendant did at a named time "unlawfully sell, deal and traffic in, and, for the purpose of evading the law, did give away certain spirituous, malt, and intoxicating liquors," etc., and it was held that the indictment being in the language of the statute, and conjunctive, alleged but one offense. *Boldt v. State*, 72 Wis. 7.

1. *State v. Rust*, 35 N. H. 438, where the court said: "Although indictments for misdemeanors may contain several offenses, provided the judgment on each will be the same, * * * yet when only a single offense is described in different counts, it is manifestly unnecessary and improper to allege and charge the offense described in each count as distinct and different from that described in all the others."

"In this commonwealth several different substantive offenses may be included in different counts of the same indictment, when they are of the same general nature, and when the mode of trial and the nature of the punishment are the same. * * * It is equally well settled that the same offense may

f. **SURPLUSAGE.** (See, generally, article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 530.)—**In General,** surplusage matter will not vitiate an indictment if, after striking out such matter, enough remains to constitute a good charge of the offense,¹ and a defect in the manner of stating surplus matter is immaterial.²

As to Sales, Barters, and Gifts.—Where a sale is well charged, surplusage matter as to barter or gift will not render the indictment invalid.³

As to Place Where Liquor Was to Be Drunk.—Where a sale at retail is sufficiently charged, an addition that the liquor was sold to be drunk on the premises where sold,⁴ or was drunk⁵ or was suffered

be alleged in different counts of an indictment to have been committed in different modes, and by different means, so as to meet different possible phases of the evidence." *Com. v. Jacobs*, 152 Mass. 276. See *State v. Atkinson*, 33 S. Car. 100.

1. *State v. Nations*, 75 Mo. 53; *Feigel v. State*, 85 Ind. 580.

Useless and Insensible Words may be rejected as surplusage where enough still remains to charge an offense. *Com. v. Penniman*, 8 Met. (Mass.) 519.

Second Glass.—An indictment charging an unlawful sale added "and being a second glass of intoxicating liquor" sold by the defendant to, etc. The allegation as to the second glass was regarded as surplusage and not deemed descriptive. *State v. Staples*, 45 Me. 320.

As to Time.—Where an indictment alleged a retailing of liquor at a named time, and that the defendant "on divers other days and times [between certain named days] did presume to be and was a retailer and seller," etc., the words quoted were rejected as surplusage. *Com. v. Bryden*, 9 Met. (Mass.) 137. See also *Com. v. Pray*, 13 Pick. (Mass.) 359; *People v. Adams*, 17 Wend. (N. Y.) 475.

2. **Misrecital of Statute.**—"It is not every misrecital that is fatal. The mistake must be in something material to the plaintiff's case. In *Shaftsbury v. Digby*, 2 Mod. 99, it was said: 'If a party undertakes to recite a statute, and mistakes in a material point, it is incurable; but if he recites so much as will serve to maintain his own action truly, and mistakes the rest, this will not vitiate the declaration.' It is sufficient if enough be stated to bring the case within the statute, or to charge the defendant." *Rawlings v. State*, 2 Md. 201.

Reference to Statute.—"It is not nec-

essary that an indictment for violating the provisions of a local prohibitory act should refer to the statute, as that is a matter of law, not of fact. * * * For the same reason, if the indictment should refer to the wrong act it is immaterial, and mere surplusage, when the act charged is in fact a violation of any statute." *State v. Snow*, 117 N. Car. 778.

3. **Unlawful Sales.**—Where it is alleged that the liquor was sold, bartered, and given away at and for a certain price, the transaction is a sale, as the mentioning of the price destroys the idea of a barter or gift, and the allegations as to barter and gift may be rejected as surplusage. *Hatfield v. State*, 9 Ind. App. 296; *Steel v. State*, 26 Ind. 92; *Leary v. State*, 39 Ind. 360; *Massey v. State*, 74 Ind. 368.

Sale and Gift.—Under a statute enacting that "all persons who shall sell or give away, upon any pretext," etc., an indictment charging that the defendant did "unlawfully sell and give away to," etc., is not bad for duplicity; a giving away on pretext not being charged, the allegation as to gift may be treated as surplusage. *State v. Ball*, 27 Neb. 601.

4. An indictment, after charging an unlawful sale in less quantity than a quart at a time, proceeded to allege that the sale was made "to be then and there drank and suffered to be drank in the house, out-house, garden, and yard," etc. It was held that the sale of less than one quart of whiskey, without a license, is a complete offense within itself without an allegation as to the place where it was drunk, and that the allegation as to the place where it was to be drunk is mere surplusage. *State v. Wickey*, 54 Ind. 438.

5. *Com. v. Luddy*, 143 Mass. 563; *Com. v. Coe*, 9 Leigh (Va.) 620.

to be drunk at the place of sale, may be rejected as surplusage.¹

As to License. — The negation as to license in a case where no license could have been granted authorizing the sale may be treated as surplusage.²

As to Purchaser. — Words describing the race or nationality of the purchaser may be rejected as surplusage where a description of the purchaser is immaterial.³

As to Knowledge. — An allegation as to knowledge, where knowledge is not an ingredient of the offense, is surplusage.⁴

g. NEGATIVE AVERMENTS — (1) *Of License or Authority to Sell* — (a) **When Necessary.** — Where the act complained of is one which may be authorized, and is unlawful unless authorized by the constituted authorities, the indictment for such offense should negative the existence of license or authority to do such act.⁵

(b) **When Not Necessary** — **In General.** — But where the act is made unlawful without regard to whether the person committing it had

1. *State v. Hornbeak*, 15 Mo. 478, in which case an indictment charged that the defendant did "unlawfully sell one half pint of brandy, of the value of ten cents, to," etc., "and suffered the same to be drunk at the place of sale, without then and there having a grocery license, dram-shop keeper's license, an innkeeper's license, or any legal authority," etc., and it was held that the indictment was sufficient for selling liquor without license, and that the part which averred that the liquor was suffered to be drunk at the place of sale might be rejected as surplusage.

2. An indictment charged a sale of liquor on Sunday to a named person, to be drunk on the premises where sold, and alleged further that the defendant did not have a license or permit authorizing such sale, and the court held that the indictment charged a sale on Sunday, a sale which a license will not protect, and that the allegations as to a license were surplusage. *State v. Hutzell*, 53 Ind. 160.

Licensed as an Innholder. — Where a complaint alleged that the defendant, "not being then and there first duly licensed, according to law, as an innholder or common victualler, and without any authority or license therefor duly had and obtained, according to law, to sell intoxicating liquor," sold intoxicating liquor to, etc., and it appeared in evidence that the defendant was duly licensed as a common innholder, but had no authority to sell intoxicating liquor, it was held that the allegation that the defendant was not

licensed as a common innholder should be rejected as surplusage, and that he was rightly convicted on the other allegations in the complaint. *Com. v. Baker*, 10 Cush. (Mass.) 405.

3. Under the laws regulating the sale of intoxicating liquor in the district of Alaska, where the vendee is a white man or Indian, or belongs to some other nationality, the statement in an indictment that the purchasers named were Indian women was regarded as descriptive, or, if not, then surplusage. *U. S. v. Warwick*, 51 Fed. Rep. 280.

4. **Sale to Minor.** — Where a statute makes it an offense to sell intoxicating liquor to a minor, without regard to whether the vendor had knowledge of the minority of the purchaser, allegation as to knowledge should be treated as surplusage. *State v. Cain*, 9 W. Va. 559.

5. *Koopman v. State*, 61 Ala. 70; *Howe v. State*, 10 Ind. 423; *State v. Carpenter*, 20 Ind. 219; *Stevenson v. State*, 65 Ind. 409; *Com. v. Tuttle*, 12 Cush. (Mass.) 502; *Com. v. Thurlow*, 24 Pick. (Mass.) 374; *State v. McBride*, 64 Mo. 364; *State v. Savage*, 48 N. H. 484; *Cunningham v. Berry*, 17 Oregon 622; *State v. Horan*, 25 Tex. Supp. 271.

That the Liquor Was Not Defendant's Own Manufacture. — An indictment based upon *North Carolina Act 1888*, c. 175, § 34, subd. 2 and 3, should allege that the liquor was not of defendant's own manufacture and sold at the place of manufacture, and was not the product of his farm. *State v. Hazell*, 100 N. Car. 471.

or had not a license, and none could be granted authorizing such act, the indictment need not negative license.¹

An Allegation that the Owner Had No License is not necessary, as the seller will be presumed to be the owner if nothing to the contrary appears.²

(c) **Form of Averment — In General.** — The negation of license must be broad enough to cover all the sources from which license might have been obtained.³

1. Sale on Sunday. — Where a permit could not have authorized defendant to make a sale of intoxicating liquor on Sunday, it was held not necessary that the indictment for that offense should allege that defendant had no permit. *Lehritter v. State*, 42 Ind. 383; *Hulsman v. State*, 42 Ind. 500; *Stein v. State*, 50 Ind. 21; *Lambert v. State*, 8 Mo. 492.

In a prosecution under *Maryland* Code, art. 27, § 248, prohibiting the selling of intoxicating liquor on Sunday, the indictment need not allege that the defendant was a licensed trader. *State v. Edlavitch*, 77 Md. 144, *distinguishing Bode v. State*, 7 Gill (Md.) 326, where it was held that the act then in force only intended to embrace licensed tavern-keepers and licensed retailers of liquors and cordials therein designated, while in the case in hand the prohibition extends to all persons, licensed or unlicensed.

A Sale to a Minor being one which a license would not authorize, license need not be negated in an indictment for such offense. *Meyer v. State*, 50 Ind. 18; *Johnson v. State*, 74 Ind. 197; *State v. Hamilton*, 75 Ind. 238.

Local Option Law. — Where, by the terms of a local option law, no license can be granted in the local option district, an indictment for a violation of such law need not negative license. *South v. Com.*, 79 Ky. 493; *State v. Hanley*, 25 Minn. 429; *Hargrave v. Com.*, (Va. 1895) 22 S. E. Rep. 314.

Keeping Tippling House. — If the indictment is for keeping a tippling house, it is sufficient to aver that the defendant kept a tippling house, without alleging that he had no license to retail spirituous liquors. *Com. v. Harvey*, 16 B. Mon. (Ky.) 1, where the court said: "If, however, he was guilty of keeping a tippling house, as charged in the presentment, the necessary conclusion is that he had no license which authorized him to sell spirituous liquors to be drunk in his house, for it

is the act of selling and allowing it to be drunk in his house without a license therefor that constitutes him the keeper of a tippling house. If he have a license to do it he cannot be guilty, under the statute, of keeping a tippling house, and therefore the averment that he kept a tippling house negatives the idea that he had a license, and no additional averment is necessary." See also *Com. v. Allen*, 15 B. Mon. (Ky.) 1.

In *Webster v. Com.*, 7 Dana (Ky.) 215, decided in 1838, the indictment charged that the defendant kept a tippling house "not under pretense of keeping a tavern," and it was held good after verdict, though the court said that the phrase "without having obtained license to keep a tavern" would have been more appropriate.

Sale by Druggist. — In *Michigan* an information charging an unlawful sale of liquor by a druggist, as a beverage which was drunk on the premises, need not allege that the defendant was not licensed to keep a saloon. *People v. Curtis*, 95 Mich. 212.

In *Missouri* an indictment under the drug-shop law need not negative defenses which might exist under an indictment framed under another law. *State v. Gibson*, 61 Mo. App. 368.

Negating Importation. — Under the *New Hampshire* statute of 1849 it was not necessary to allege that the liquors sold were not imported from a foreign country, and sold in the original package. *State v. Fuller*, 33 N. H. 259; *State v. Blaisdell*, 33 N. H. 388.

2. State v. Devers, 38 Ark. 517, holding that an indictment alleging that the defendant sold intoxicating liquors without having a license to sell the same sufficiently negatives authority to sell, and that if the sale has been made by the defendant as agent or servant of the owner, who had a license, it is matter of defense. See also *State v. Keith*, 37 Ark. 96; *Johnson v. State*, 37 Ark. 98.

3. Hardison v. State, 95 Ga. 338;

Following Language of Statute.—In negating license it is not necessary to use the exact words of the statute, but it is sufficient to use other words conveying the same meaning.¹

Meier v. State, 57 Ind. 386; *O'Brien v. State*, 63 Ind. 242; *Henderson v. State*, 60 Ind. 296; *State v. Pitzer*, 23 Kan. 250; *Trost v. State*, 64 Miss. 188; *State v. Souvniere*, 3 Vt. 156; *State v. Munger*, 15 Vt. 290.

Time of Holding License.—Where the words of negation were "not having a license to sell said liquors as aforesaid," etc., it was held that the negation had reference to the time of the sale, and not to the time of finding the bill. *State v. Munger*, 15 Vt. 290.

As to Quantity of Liquor.—The negation of license was "not having a license to sell rum, brandy, or gin by the half-gill, gill, or half-pint," and it was held that the words of negation relative to the quantity of liquor alleged to have been sold without license were co-extensive with the quantity which the defendant was charged to have sold, viz., "by the gill, half-gill, and half-pint." *State v. Munger*, 15 Vt. 290. See *State v. Ashcraft*, 11 Ind. App. 406.

Averment Too Narrow.—In *State v. Sommers*, 3 Vt. 156, license was negated by an averment of "not having a license from the County Court within and for said county of Caledonia, nor from any judge of the same, nor from the civil authority and selectmen of said Barnet, to keep an inn or house of public entertainment in said Barnet." The court said: "It is evident that the negation in this case is too narrow to cover the eighth section in the first act, when restricted or limited by the words 'to keep an inn or house of public entertainment.' Had those words been omitted in the indictment, the sale of the spirituous liquors complained of would have been without license from any legitimate source; but taken as a part of the negation, it follows that the defendant might have had a license and lawful authority to sell spirits at the time and place he did, but not to keep an inn or house of public entertainment. For these reasons the judgment must be arrested."

Negating Various Forms of License.—If a pleader attempts to negative the various forms of license by name, he should include all the forms and sources

of license by which authority to sell the liquor may have been granted. *State v. Pitzer*, 23 Kan. 250 [*explaining State v. Pittman*, 10 Kan. 593]; *Trost v. State*, 64 Miss. 188.

As to Druggists.—Where a complaint charges an unlawful sale of intoxicating liquors by one who was not "then and there a druggist, and said liquor not being then and there sold for chemical, scientific, mechanical, medicinal, or sacramental purposes," and "not being proprietary patent medicines," it is sufficiently broad to show that the accused was not selling lawfully as a druggist. *People v. Aldrich*, 104 Mich. 455.

1. *State v. Buckner*, 52 Ind. 278; *Burke v. State*, 52 Ind. 522.

It is sufficient in negating license to follow substantially the language of the statute where the statute defines the offense which it creates. *Howell v. State*, 4 Ind. App. 148.

The averment, "without having a license therefor according to law," is not equivalent to the averment, "without paying such tax and obtaining such certificate as is prescribed by the fourteenth section," which were the words of the statute, and an indictment was held defective for that reason. *Com. v. Young*, 15 Gratt. (Va.) 664.

Unnecessary Averments.—If one is charged with being a common seller of intoxicating liquors, it is not necessary to set forth the manner in which he was not appointed the agent of the town or city. "An averment that he was not 'duly' or was not 'legally' appointed, or that he 'was not appointed' such agent, or 'was not such agent' at the time of the sales complained of, is fully sufficient." *State v. Barker*, 3 R. I. 280.

And where the sale is alleged to have been made in a certain town or city it need not negative the fact that the defendant was agent for any other city or town than that in which the sale is alleged to have been made. *State v. Shaw*, 35 N. H. 217, where the court said: "The offense created by the act is the selling in a city or town without being agent for the city or town where the sale is made. Having this local character, in order to describe the

Negative Pregnant. — Where there are two or more authorities from which a license may in certain contingencies be obtained, the averment should be broad enough to negative the existence of a license from either authority. Alleging specifically the want of a license from one, only of such authorities makes the averment a negative pregnant.¹

offense the indictment must set out truly the city or town in which the sale was made, and negative the agency for that place. And the proof must sustain the allegation as to the place of the sale. Whether or not the respondent was agent for any other town is immaterial, and consequently unnecessary to be negated.

Neither is it necessary, in an indictment for being a common seller of intoxicating liquors without license, to allege that the defendant was not appointed as the "agent of any city or town to sell liquors for medicinal and mechanical purposes." *State v. Keen*, 34 Me. 500, where the indictment charged that the defendant, "without any lawful authority, license, or permission, did presume to be and was a common seller of spirituous and intoxicating liquors," but did not contain the words "without being duly appointed." The court held that the negation of license or authority as found in the indictment sufficiently negated the fact that the defendant was duly appointed agent to sell liquors in the town or city where the sale was alleged to have been made.

If the complaint negatives "license," it need not also negative a "permit." *Neuman v. State*, 76 Wis. 112.

1. From Board of Commissioners. — Where an indictment alleged an unlawful sale at retail, "not having then and there procured a license therefor from the board of commissioners" of the county wherein the sale was made, it was held that the averment was too narrow, as the defendant might have procured a license, on appeal, from the Circuit Court. *Meier v. State*, 57 Ind. 386; *Henderson v. State*, 60 Ind. 296; *O'Brien v. State*, 63 Ind. 242. See also *State v. Pittman*, 10 Kan. 593; *State v. Pitzer*, 23 Kan. 250.

Where a complaint charged an unlawful sale "without having first obtained a license therefor from the county commissioners," the court held that it sufficiently negated license

from the board of county commissioners and was broad enough. *State v. Nerbovig*, 33 Minn. 480.

Exception as to Town Agent. — Where the enacting clause of a statute contains an exception as to town agents who are licensed to sell under the statute, the indictment must allege that the defendant is not such an agent or it will be insufficient. *State v. Savage*, 48 N. H. 484.

City License. — A complaint for the violation of a municipal ordinance by unlawfully selling liquor without a license from the municipal authorities is not defective for omitting to aver that the defendant had or had not been licensed under the laws of the state. *Frankfort v. Aughe*, 114 Ind. 77.

As to Kind of Liquor. — If the statute specifies the kind of liquor for which a license may be granted, the averment negating license will be sufficient if it embraces only such liquors. *State v. Blaisdell*, 33 N. H. 388.

Unnecessary Allegation. — In *Georgia* where an indictment for an unlawful sale charges that it was made without a license from the ordinary it is sufficient, without alleging that the defendant had no license from an incorporated town or city authorized by law to grant the same. *Johnson v. State*, 60 Ga. 634.

Sale at Retail — Quantity. — Where the indictment charges a sale at retail it should negative the fact that the defendant had a license to retail in a less quantity than a quart at a time, and not that he had no license to sell liquor to be drunk on the premises where sold. *Burke v. State*, 52 Ind. 522.

Variance. — One licensed as a taverner to sell fermented liquor only, cannot be convicted of selling spirituous liquor "without being duly licensed as an innholder." The court held that the indictment should have alleged that the defendant, being an innholder with authority to sell fermented liquor only, sold spirituous liquor. *Com. v. Thayer*, 5 Met. (Mass.) 246.

Approved Forms of Averment. — The

General Averment. — Many authorities hold that an averment negating a license in general terms is sufficient, without specifying any particular kind of license.¹

References from One Count to Another. — Where there are several counts in a complaint, each count should contain an averment negating license, and a negation as to license following the last count, and intended to apply to that and the preceding count, will not be sufficient as to either count.²

Sale by Two or More Jointly. — In an indictment charging a sale by two or more jointly, the negative averment as to license must apply to them severally as well as jointly.³

averments in the following cases were sustained:

An allegation, in a prosecution for unlawfully retailing, that the defendant, "not then and there having a license to sell intoxicating liquors in a less quantity than a quart at a time," etc. *Josephdaffer v. State*, 32 Ind. 402.

"Not being then and there licensed to sell distilled spirituous liquors, as is required by the statute laws of this state." *State v. Clark*, 23 Vt. 293.

"Not having then and there any license, authority, or appointment according to law to make such sale of said intoxicating liquors, sold as aforesaid, to be drunk on the said premises as aforesaid." *Com. v. Luddy*, 143 Mass. 563.

"Without being duly appointed, by the town council of Coventry, an agent of said town of Coventry for the sale of ale, wine, rum, and other strong and malt liquors, to be used for medicinal and mechanical purposes only." *State v. Johnson*, 3 R. I. 94.

1. *Indiana*. — *Howell v. State*, 4 Ind. App. 483; *State v. Buckner*, 52 Ind. 278; *State v. Wickey*, 57 Ind. 596; *State v. Ashcraft*, 11 Ind. App. 406; *State v. Watson*, 5 Blackf. (Ind.) 155.

Massachusetts. — *Com. v. Wilson*, 11 Cush. (Mass.) 412; *Com. v. Murphy*, 2 Gray (Mass.) 510; *Com. v. Lafontaine*, 3 Gray (Mass.) 479; *Com. v. Clapp*, 5 Gray (Mass.) 97; *Com. v. Conant*, 6 Gray (Mass.) 482; *Com. v. Keefe*, 7 Gray (Mass.) 333; *Com. v. Roland*, 12 Gray (Mass.) 132; *Com. v. Boyle*, 14 Gray (Mass.) 3; *Com. v. Kingman*, 14 Gray (Mass.) 85; *Com. v. Chisholm*, 103 Mass. 213.

Mississippi. — *West v. State*, 70 Miss. 598; *Norton v. State*, 65 Miss. 297.

Missouri. — *Neales v. State*, 10 Mo. 498; *State v. Wishon*, 15 Mo. 504; *State v. Williamson*, 19 Mo. 384.

New York. — *Jefferson v. People*, 101 N. Y. 19.

Rhode Island. — *State v. Hines*, 13 R. I. 10.

Wisconsin. — *Allen v. State*, 5 Wis. 329; *State v. Tall*, 56 Wis. 577.

2. A complaint was in three counts, and the second and third charged unlawful sales, but did not contain an averment negating license, but the words following the third count were: "And the complainant further says that all of said sales were made by said Crossley without any lawful right or authority." The court said: "The words that follow the third count are manifestly intended to apply to all the counts, and not to the third count alone, and cannot fairly be considered to be a part of that count unless they can be considered to be a part of the other counts. This method of pleading is slovenly, and is not to be encouraged. There is no precedent for it, so far as we are aware, in any adjudicated case or in any approved book of forms, and it violates the rule that each count must be complete in itself. The motion to quash the second and third counts should, therefore, have been granted." *Com. v. Crossley*, 162 Mass. 515.

3. **Forms of Averment.** — The following negative forms have been held sufficient:

An indictment charging the defendants with presuming to be common sellers of intoxicating liquors "without being first duly licensed therefor according to law." See also *State v. Gregory*, 27 Mo. 231; *Com. v. Tower*, 8 Met. (Mass.) 527.

An indictment against two persons for presuming to be common retailers of intoxicating liquors "without being first licensed as a retailer of wine and spirits, according to law." *Com. v. Sloan*, 4 Cush. (Mass.) 52.

(d) **Presumption of License.** — If a complaint does not allege that the defendant was not licensed to make the sale complained of, it will be presumed that he had a license to sell generally.¹

(2) **Exceptions and Defenses — Necessity of Negative Averment.** — An exception contained in the enacting clause of the statute,² or made a part thereof by reference,³ should be negated in the indictment; otherwise, however, where the exception is not a part of the enacting clause by incorporation or reference,⁴ but is

An indictment alleging the defendants to be copartners in business, "not being then and there a licensed taverner or retailer." *State v. Burns*, 20 N. H. 550.

An indictment charging A and B generally with selling one quart of brandy, "not being agents for the town" to sell spirituous liquors. *State v. Wadsworth*, 30 Conn. 55, where it was held that the negation as to authority to sell as agent of the town applied to each of the defendants.

1. *Com. v. Lattinville*, 120 Mass. 385.

2. *Alabama*. — *Davis v. State*, 39 Ala. 521.

Arkansas. — *State v. Scarlett*, 38 Ark. 563; *Thompson v. State*, 37 Ark. 408.

Florida. — *Baumel v. State*, 26 Fla. 71.

Georgia. — *Elkins v. State*, 13 Ga. 435.

Indiana. — *Kinser v. State*, 9 Ind. 543; *Lemon v. State*, 4 Ind. 603; *Bruton v. State*, 4 Ind. 601.

Kentucky. — *Throckmorton v. Com.*, (Ky. 1896) 35 S. W. Rep. 635.

Maine. — *State v. Gurney*, 37 Me. 149; *State v. Keen*, 34 Me. 500.

Maryland. — *Rawlings v. State*, 2 Md. 201.

Michigan. — *People v. Wheeler*, 96 Mich. 1; *People v. Haas*, 79 Mich. 449; *People v. Decarie*, 80 Mich. 578.

Missouri. — *State v. Flam*, 21 Mo. App. 290.

New Hampshire. — *State v. McGlynn*, 34 N. H. 422; *State v. Abbott*, 31 N. H. 434.

New Jersey. — *Roberson v. Lambert*, ville, 38 N. J. L. 69.

New York. — *Jefferson v. People*, 101 N. Y. 19.

North Carolina. — *State v. Stamey*, 71 N. Car. 202.

Virginia. — *Com. v. Hill*, 5 Gratt. (Va.) 682.

United States. — *U. S. v. Nelson*, 29 Fed. Rep. 202.

Selling by Quart Without License. — Where the defendant was indicted for

a violation of that part of section 4565 of the *Georgia* Code prohibiting the selling of spirituous liquors by the quart without having a license and taking the oath described by the code, the court held that "it is only when the defendant is indicted for retailing spirituous liquors in quantities less than one quart that the indictment should contain the negative averment that it was not sold within the limits of any incorporated town or city authorized by law to grant licenses." *Johnson v. State*, 60 Ga. 636.

3. **Exception Incorporated by Reference.**

— One section of a statute prohibited the manufacture and sale of ale, wine, rum, and other strong and malt liquors and mixed liquors, etc., except for the purposes of exportation, "unless as is hereinafter provided." A subsequent section of the same chapter made it lawful for the town agents to sell the liquors enumerated in the first-mentioned section, and for any person to keep and sell imported liquors contained in original packages in which they were imported. It was held that the exceptions found in the subsequent section were by reference made a part of the enacting clause and of the description of the offense, and should be negated in the indictment based upon the first section. *State v. O'Donnell*, 10 R. I. 472. See also *State v. Rush*, 13 R. I. 198.

Contra. — Where a statute enacted that "any person other than such as are hereinafter excepted who shall, otherwise than is hereinafter expressly provided, sell by retail any of such liquors as aforesaid, not to be drank in or at the place where it shall be sold," etc., the court held that the exceptions referred to were not so incorporated into the enacting clause as to require them to be negated in the indictment based upon such section. *Com. v. Hill*, 5 Gratt. (Va.) 682.

4. **Matter of Defense.** — If the exception is not a part of the enacting clause

contained in a subsequent clause,¹ proviso,² section,³ or statute.⁴

Form of Negative Averment. — In negating statutory exceptions it is not necessary to use the exact words of the statute, but other words which set forth the exception with equal certainty may be used.⁵

it need not be negated in the indictment or complaint, but is matter of defense, and the accused must show that he comes within the exception. *State v. Bailey*, 43 Ark. 150; *Williams v. State*, 89 Ga. 483; *Metzker v. People*, 14 Ill. 101; *Com. v. Burding*, 12 Cush. (Mass.) 506; *Com. v. Gagne*, 153 Mass. 205; *State v. Taylor*, 73 Mo. 52; *State v. Buford*, 10 Mo. 703; *State v. Wade*, 34 N. H. 495. See also *Nelson v. U. S.*, 30 Fed. Rep. 112.

1. *Baume v. State*, 26 Fla. 71; *Elkins v. State*, 13 Ga. 435; *Metzker v. People*, 14 Ill. 101; *State v. Thompson*, 2 Kan. 427; *State v. Gurney*, 37 Me. 149; *State v. Adams*, 6 N. H. 532; *State v. Abbott*, 31 N. H. 434; *State v. McGlynn*, 34 N. H. 422; *Jefferson v. People*, 101 N. Y. 19; *Nelson v. U. S.*, 30 Fed. Rep. 112; *U. S. v. Nelson*, 29 Fed. Rep. 202.

Where a statute (How. Annot. Stat. *Michigan*, § 2283e) provided that "all saloons, restaurants, bars, in taverns or elsewhere, and all other places except drug stores where any of the liquors mentioned in this act are sold or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday," it was held that the words "except drug stores," were used to apply to "other places" immediately preceding, and that an information alleging that a saloon where liquors mentioned in the act were sold was kept open on Sunday was good. *People v. Taylor*, (Mich. 1896) 68 N. W. Rep. 303.

2. *Carson v. State*, 69 Ala. 236; *State v. Stapp*, 29 Iowa 551; *Rawlings v. State*, 2 Md. 201; *State v. Fuller*, 33 N. H. 259; *State v. Tamlar*, 19 Oregon 528; *Com. v. Hill*, 5 Gratt. (Va.) 682.

3. *Wilson v. State*, 35 Ark. 414; *Blackwell v. State*, 36 Ark. 178; *State v. Wadsworth*, 30 Conn. 55; *State v. Miller*, 24 Conn. 522; *Com. v. Tuttle*, 12 Cush. (Mass.) 502; *People v. Robbins*, 70 Mich. 130; *Surratt v. State*, 45 Miss. 601; *State v. Crowley*, 37 Mo. 369; *State v. Shaw*, 35 N. H. 217; *Jefferson v. People*, 101 N. Y. 19; *State v. Downs*, 116 N. Car. 1064; *Becker v. State*, 8 Ohio St. 392; *State v. Duggan*,

15 R. I. 403; *Williams v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 664.

Matter of Defense. — "As a rule, an exception in a statute by which certain particulars are withdrawn from or excepted out of the operation of the enacting clause thereof, defining a crime concerning a class or species, constitutes no part of the definition of such crime, whether placed close to or remote from such enacting clause. And whenever a person accused of the commission of such a crime claims to be within such exception, it is more logical and convenient that he should aver and prove the fact than that the prosecutor should anticipate such defense and deny it." *Nelson v. U. S.*, 30 Fed. Rep. 112.

4. *Bogan v. State*, 84 Ala. 449; *Baume v. State*, 26 Fla. 71; *Metzker v. People*, 14 Ill. 101; *State v. Beneke*, 9 Iowa 203; *Com. v. Shaw*, 5 Cush. (Mass.) 522; *State v. Moore*, 107 Mo. 78; *State v. Jaques*, 68 Mo. 260; *State v. Elam*, 21 Mo. App. 290; *Jefferson v. People*, 101 N. Y. 19; *State v. Freeman*, 27 Vt. 523.

Negating Treaties. — An indictment in a state court regards only the law of the state against which the offense was committed, and defenses arising from treaties with, or under the statutes of, another government need not be negated in the indictment. *State v. Gurney*, 37 Me. 149.

5. *State v. Keen*, 34 Me. 500.

General Allegation. — In *Missouri* it was held that the general allegation is sufficient, and that "the usual allegation in indictments for selling liquor without license is that defendant had not a dram-shop license, or any other authority to sell intoxicating liquors," etc." *State v. McBride*, 64 Mo. 367.

As to Druggists. — In *Michigan*, under Laws 1887, § 3, which provide that the penal provision of the code shall not apply "to druggists who sell liquors for chemical, scientific, medicinal, mechanical, or sacramental purposes only, and in strict compliance with law," an information alleging that the accused unlawfully sold liquor to a named person, "not being then and there a drug-

h. SCIENTER. — If the knowledge with which an act is done is made an element of the offense it must be alleged in the indictment, but if the statute creating the offense is silent as to knowledge it need not be alleged.¹ This general rule has been applied in prosecutions for selling to intoxicated persons,² and to minors.³

i. AVERMENTS AS TO DEFENDANT — (1) *Character or Occupation.* — Where the prohibition of the statute is directed against a

gist," does not sufficiently negative the exception. *People v. Haas*, 79 Mich. 449. See also *People v. Decarie*, 80 Mich. 578; *People v. Telford*, 56 Mich. 542; *Luton v. Newaygo Circuit Judge*, 69 Mich. 610.

Forms Approved. — The following negative averments have been held sufficient:

"Not having then and there any license, authority, or appointment according to law to make such sale." *Com. v. Davis*, 121 Mass. 352; *Com. v. Burke*, 121 Mass. 39.

"Said sale and delivery aforesaid not there and then being as provided in section sixty of chapter eighty-seven of the Public Statutes of said state, 'Of the suppression of intemperance,'" under a statute forbidding the sale of intoxicating liquors "except as provided in section 60 of said chapter 87." *State v. Walsh*, 14 R. I. 507.

"Not being wine sold for sacramental purposes," under a town charter making it unlawful to sell vinous, spirituous, or malt liquor except for sacramental purposes. *Stone v. State*, (Miss. 1890) 7 So. Rep. 500.

That the defendant sold one pint of whiskey, sufficiently negatives the exceptions of the statute allowing wine to be sold for sacramental purposes and intoxicating liquors to be sold by distilleries or their agents in quantities not less than five gallons, not to be drunk on the premises where sold, but does not negative the exception allowing a practising physician, as such, to prescribe intoxicating liquor to his patient. *Throckmorton v. Com.*, (Ky. 1896) 35 S. W. Rep. 635.

1. *McCutcheon v. People*, 69 Ill. 601.

2. **Selling to Intoxicated Person.** — In charging an unlawful sale of intoxicating liquor to an intoxicated person, it must be alleged that the defendant knew that the person to whom the sale was made was at the time intoxicated. *Com. v. Bell*, 14 Bush (Ky.) 433; *Miller*

v. State, 3 Ohio St. 477; *Parker v. State*, 4 Ohio St. 565; *Com. v. Liebtreu*, 1 Pearson (Pa.) 107. *Contra*, *Mapes v. People*, 69 Ill. 523; *Werneke v. State*, 50 Ind. 23; *Com. v. Sellers*, 130 Pa. St. 32.

Variance Between Affidavit and Information. — Where, in a prosecution on affidavit and information for selling liquor to a person in the habit of getting intoxicated, the information alleged the defendant's knowledge of the purchaser's habit of getting intoxicated, but the affidavit upon which the defendant was arrested did not allege that the defendant knew of such habit, the court held that the affidavit was sufficient for the purpose of arresting and recognizing the defendant to appear, and that the affidavit did not require the same strictness as an information or indictment, and was sufficient to support the information. *Parker v. State*, 4 Ohio St. 565.

3. **Selling to Minor.** — In a prosecution for selling intoxicating liquors to a minor, it is not necessary to allege that the defendant sold the liquor to the minor knowing him to be such. *McCutcheon v. People*, 69 Ill. 601; *Ward v. State*, 48 Ind. 289; *Miller v. State*, 3 Ohio St. 476; *Birney v. State*, 8 Ohio 237; *Com. v. Sellers*, 130 Pa. St. 32; *State v. Baer*, 37 W. Va. 1. *Contra* *Aultfather v. State*, 4 Ohio St. 467; *Com. v. Liebtreu*, 1 Pearson (Pa.) 107; *Woods v. State*, (Tex. Crim. App. 1893) 20 S. W. Rep. 915; *Williams v. State*, 23 Tex. App. 70.

Sufficient Averment of Knowledge. — An indictment alleging that the defendant "did unlawfully and knowingly sell and give, and cause to be sold and given, spirituous, vinous, and intoxicating liquors to, etc., a person under the age of twenty-one years," is sufficient as to its allegation that the defendant knew that the vendee was a minor. *Woods v. State*, (Tex. Crim. App. 1893) 20 S. W. Rep. 915.

certain class of persons, with a special penalty distinct from that attached to other offenders, the indictment should indicate on its face that the party charged is the one defined by the statute.¹

(2) *Residence*. — Where the residence of the accused is material, it must be properly alleged.²

j. ALLEGING SHAM GIFT. — Where a gift is not unlawful unless made under certain circumstances mentioned in the statute, the existence of these facts must be alleged or the indictment will charge no offense.³

1. *State v. Heitsch*, 29 Minn. 134; *State v. Ryan*, 30 Mo. App. 159; *State v. Runyan*, 26 Mo. 167; *State v. Andrews*, 26 Mo. 169; *Bode v. State*, 7 Gill (Md.) 326. See also *State v. Lises*, 58 Mo. 359, a case of selling on Sunday by a dramshop keeper; *State v. Heitsch*, 29 Minn. 134, where the defendant was charged with selling after notice forbidding him.

Judgment Declaring Future Incapacity of Defendant. — In *Brown v. State*, 2 Head (Tenn.) 180, it was held not necessary to allege in the indictment or presentment that the accused was a licensed grocery keeper before the court could pronounce judgment of incapacity to obtain a license in the future, as authorized by statute in such cases.

Different Penalties for Different Classes. — If the statute fixes a certain penalty, and adds an additional penalty where the defendant is a licensed vendor of spirits, the additional penalty cannot be inflicted if the indictment fails to show that the accused was a licensed vendor of spirits. *Baer v. Com.*, 10 Bush (Ky.) 8.

When Character or Occupation Need Not Be Alleged. — If a sale without a license is prohibited, no matter what the occupation of the seller may be, it is not necessary to describe his occupation. *State v. Butcher*, 40 Ark. 362. See also *Com. v. Luddy*, 143 Mass. 563; *State v. Farmer*, 104 N. Car. 887.

Allegation of Partnership, and Ownership and Control. — The defendants were jointly indicted for keeping open a barroom or saloon where intoxicating liquors were sold during an election day, and the indictment was objected to because it did not allege a partnership between the defendants, or that they or either of them owned or controlled the saloon. The court said: "It was not necessary that the indictment should allege a partnership be-

tween defendants, nor that they or either of them owned or controlled said saloon. In this offense parties may be joint principal and joint offenders without being partners, and parties may violate the statute by opening and keeping open a saloon without being the owners of the same." *Janks v. State*, 29 Tex. App. 233.

2. An indictment charged that the defendant, "of Somersworth, in the county of Strafford, * * * without a license from the selectmen of the town of Somersworth aforesaid, the same being the town where the said "defendant resided, etc. The defendant lived with his family in Berwick, Maine, but kept a store in Somersworth, and did business there in business hours. The court held that the defendant was properly described as of Somersworth, and further said: "The domicile, inhabitancy, or residence of the respondent may be in Berwick for the purposes of taxation, liability to military duty, and election to office, or for any purpose whatever; and yet it does not follow that his residence may not properly be described as being in Somersworth, in this case." *State v. Moore*, 14 N. H. 451.

3. *Stallworth v. State*, 16 Tex. App. 345, holding that an indictment charging the defendant with a gift of liquor must allege that it was "with the purpose of evading the law," to meet the language of the statute.

Gift for a Consideration. — In *State v. Finan*, 10 Iowa 19, the court said: "It is not an offense under the statute to give to any other persons intoxicating liquors, unless, as expressed in section 6, Acts of 1854-55, c. 45, p. 58, 'they be given in consideration of the purchase of any other property.' In which case, upon an averment that the liquors were given to a person, the fact that they were given in consideration of the purchase of other property should be

k. **USE TO BE MADE OF THE ARTICLE SOLD.** — Where the statute merely forbids a sale for a particular use or purpose, the use to be made of the article must be alleged, or no violation of the statute is shown.¹

l. **AVERMENTS AS TO TIME** — (1) *In General.* See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 511.

(2) *Sale on Sunday.* — If an unlawful sale is charged to have been made on Sunday, and the day of the month is also alleged, the allegation is sufficient,² and the prosecution will be sustained by proof of a sale on any Sunday within the period of limitations;³ and if the day of the month stated falls on some day of the week other than Sunday, it will nevertheless be sufficient, the allegation as to the day of the month being mere surplusage.⁴

averred in order to constitute the offense."

1. Sold as a Beverage. — Where the statute makes it an offense to sell unadulterated cider, when sold "to be used as a beverage or for tippling purposes," the indictment will be insufficient if it does not charge such use. *State v. Dunlap*, 81 Me. 389.

In charging an unlawful sale of intoxicating liquor by a druggist, the indictment will be insufficient unless it charges that the accused sold liquor as a beverage, where he might have sold the same for other purposes. *State v. Buckner*, 20 Mo. App. 420.

But in a prosecution against a druggist for unlawfully selling liquor to a person in the habit of getting intoxicated, it need not be alleged that it was sold as a beverage. *People v. Hamilton*, 101 Mich. 87.

Sufficiency of Averment. — The allegation that the liquor was sold "as a beverage" is equivalent to alleging that it was sold "to be used as a beverage." *People v. Hinchman*, 75 Mich. 587. See, further, as to the sufficiency of allegations, *State v. Shackle*, 29 Kan. 341.

2. Roy v. State, 91 Ind. 417.

Particular Sunday Not Material. — The offense should be charged to have been committed on some Sunday prior to the finding of the indictment, but the particular Sunday is not material. *Robinson v. State*, 38 Ark. 548.

Judicial Notice. — And if the offense be charged to have been committed on a day of the month, the court will take judicial notice of the day of the week on which the day of the month falls. *Robinson v. State*, 38 Ark. 548.

Failure to State Day of Month. — Where the indictment charged that the

liquor was sold "on the ——— day of June, A. D. 1886, that day being then and there the first day of the week, commonly called Sunday," the fact that no day of the month on which the offense was committed was alleged did not vitiate the indictment. *State v. Effinger*, 44 Mo. App. 81.

3. Roy v. State, 91 Ind. 417; *Frasier v. State*, 5 Mo. 536. See *Robinson v. State*, 38 Ark. 548.

Proof and Variance. — Where the proof was that the offense was committed on the 4th day of May, and on Sunday, but failed to disclose the year, it was held insufficient to authorize a conviction, although the 4th day of May, 1873, the year charged in the indictment, was on Sunday. *Lehrtritter v. State*, 42 Ind. 383.

The defendant was indicted for selling spirituous liquor on Sunday, May 18, 1884, and was convicted of selling the same on Sunday, April 20, 1884. The court held that time was a material ingredient of the offense, that the variance between the indictment and the proof was fatal, and that the offense was not charged with sufficient certainty as to time so that defendant might be able to prepare his defense against the offense of April 20. *People v. Lavin*, 4 N. Y. Crim. Rep. (N. Y. Supreme Ct.) 547.

4. Marquardt v. State, 52 Ark. 269; *Megowan v. Com.*, 2 Metc. (Ky.) 3; *Hoover v. State*, 56 Md. 584; *State v. Eskridge*, 1 Swan (Tenn.) 413; *People v. Ball*, 42 Barb. (N. Y.) 324, where the court said: "It was not an essential element in the offense charged that it should have been committed on the 13th day of the month mentioned, or on any other day of that month. The time was not material, provided the

On or About. — An allegation that the offense was committed on or about a certain day commonly called Sunday is not sufficient.¹

(3) *Continuando.* — Where the offense charged is a continuous prohibited traffic carried on from day to day, it may be laid with a *continuando*.² This form of averment is not proper, however,

day when the sale was made, which was the subject of the complaint, was Sunday. The statement of the day of the month, in an indictment for committing an offense on Sunday, though the doing of the act on that day is the gist of the offense, is not more material than in other cases."

Word Sunday as Surplusage. — A complaint charged that the offense was committed on "Sunday, the third day of July," and it was held that the word "Sunday" was surplusage, and at most limited the evidence to that day, and did not vitiate the charge. *State v. Fletcher*, 13 R. I. 522.

Contra. — An indictment charged that the defendant kept a tippling house open on the 4th day of April, 1873, "being the Sabbath day," when in fact the 4th day of April, 1873, fell on Friday. The court held the indictment insufficient, and said further: "An indictment cannot be sustained which, charging an act to have been done on Friday, thereby showing it an innocent act, seeks to convert it into a criminal one by calling Friday the Sabbath day." *Werner v. State*, 51 Ga. 426.

1, *Effinger v. State*, 47 Ind. 235.

An indictment alleged that the defendant committed the offense "on or about the ——— day of July, 1869, which was the first day of the week, commonly called Sunday," and it was held that the indictment was insufficient, on motion to quash, for failure sufficiently to designate the time of the offense. *Clark v. State*, 34 Ind. 436.

In Nebraska a contrary rule appears. A complaint charged an unlawful sale "on or about the 17th day of February, 1884, * * * that being the first day of the week, commonly called Sunday," and the court held the charge sufficient as to time, and said that the day of the transaction was not a material ingredient of the offense, under section 14 of the liquor law of that state. *Brown v. State*, 16 Neb. 658.

2, *Our House No. 2 v. State*, 4 Greene (Iowa) 172; *Com. v. Hersey*, (Mass. 1887) 9 N. E. Rep. 837; *State v. Cofren*, 48 Me. 364. See also the article

INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 517.

Being a Common Seller of intoxicating liquors may be charged with a *continuando*. *Com. v. Tower*, 8 Met. (Mass.) 527; *Com. v. Wood*, 4 Gray (Mass.) 11; *Com. v. Snow*, 14 Gray (Mass.) 20; *State v. Cottle*, 15 Me. 473.

Keeping for Sale may be charged with a *continuando*. *Com. v. Chisholm*, 103 Mass. 213; *Com. v. Hersey*, (Mass. 1887) 9 N. E. Rep. 837.

Averment of Guilt Prior to First Date Stated. — An indictment charged the defendant with being a common retailer of intoxicating liquors from the first day of November, 1835, until the finding of the indictment. The court held that the period was sufficiently fixed and definite to support a conviction, and that the averment of such period was not impaired by the averment that the defendant had also been guilty before the first period. *State v. Cottle*, 15 Me. 473, where the court said that the latter averment "might have the effect to protect the defendant from any other prosecution for a similar offense at any time prior to the indictment. The averment that the defendant did presume to be a common retailer is expressive of the fact that such was his habit. This, coupled with the averment that he did sell to divers persons within the period stated, is a sufficient description of the offense. * * * It is one of that class of offenses which, to avoid unnecessary prolixity, may be described in general terms."

Sufficiency of Averment. — Where a complaint charged the defendant with being a common seller of intoxicating liquor on a named day "and from that day to the day of the date of receiving this complaint," or "to the day of exhibiting this complaint," the last-named date being certified by the magistrate at the foot of the complaint, the time of the commission of the offense was alleged with sufficient certainty. *Com. v. Kingman*, 14 Gray (Mass.) 85. See also *Com. v. Hagarman*, 10 Allen (Mass.) 401.

in offenses which are not of a continuous nature, but if so charged the continuando may be rejected as surplusage, and the indictment will be good where the time is otherwise sufficiently alleged.¹

If an indictment charges the defendant with being a common seller of intoxicating liquor from a day named to "the day of the finding, presentment, and filing of this indictment," it is insufficient in its averment of time. *Com. v. Adams*, 4 Gray (Mass.) 27, where the court said: "It fixes no time by which the proof of the offense can be limited with precision. The day of the finding and presentment is not necessarily, nor by any reasonable intentment, identical with the day of the filing of the indictment. They are separate and distinct acts, performed by two distinct and separate agencies. The former is the act of the grand jury; the latter is the duty of the clerk. They cannot be simultaneous, nor is it necessary that the one should take place within any fixed or certain time after the other. Indeed, in ordinary practice, they often occur on different days."

An indictment charged the defendant with selling "wine, beer, ale, cider, brandy, and rum, and other strong liquors," by retail, at a named time and on divers days and times until the finding of the indictment, and the defendant was found guilty of the whole charge. It was held that he was rightly convicted, although the sale of beer, ale, and cider by retail, during a portion of the time alleged, was not unlawful. *Butman's Case*, 8 Me. 113.

An indictment in a prosecution against a person who had a license to sell intoxicating liquors charged that "on the 1st day of June, A. D. 1875," and thereafter, until the finding of the indictment, the defendant kept a place where he sold intoxicating liquor in a disorderly manner. The court held that under the proviso of the *Indiana* Act of March 17, 1875, § 17, regulating the sale of intoxicating liquor, the offense charged was not punishable until after the close of the regular sessions of the Board of Commissioners next after the taking effect of such act, and that the offense charged could not have been committed on June 1, 1875; and, as no other time was sufficiently laid in the indictment, it was insufficient on motion to quash. *Collins v. State*, 58 Ind. 5.

Proof — *Common Seller of Intoxicating Liquor*. — Time is material in the offense of being a common seller of intoxicating liquor, and the evidence must be confined to the time alleged in the indictment. *State v. Small*, 80 Me. 452.

An indictment charging the accused with being a common seller of intoxicating liquor during a named period will be supported by proof of the commission of the offense during any part of such period. *Com. v. Wood*, 4 Gray (Mass.) 11. That the allegation need not be proved as laid, see *Com. v. Maloney*, 16 Gray (Mass.) 20.

Where the offense is charged to have been committed on a named day and on divers other days and times between such days and the finding of the indictment, the defendant cannot be convicted of a substantial offense committed prior to the time alleged. *Dansey v. State*, 23 Fla. 316.

A complaint charged that the defendant was a common seller of intoxicating liquors "on the third day of April in the year of our Lord eighteen hundred and sixty-five * * * within six months last past," and it was held that the complaint could only be supported by proof that the defendant was a common seller on the third day of April. *Com. v. Traverse*, 11 Allen (Mass.) 260.

1. *Dansey v. State*, 23 Fla. 316; *Com. v. Campbell*, 5 Bush (Ky.) 311; *South v. Com.*, 79 Ky. 493; *People v. Adams*, 17 Wend. (N. Y.) 475; *Com. v. Bryden*, 9 Met. (Mass.) 137; *Com. v. Walton*, 11 Allen (Mass.) 238; *Com. v. Kendall*, 12 Cush. (Mass.) 414; *Com. v. Rhodes*, 148 Mass. 123; *People v. Gilkinson*, 4 Park Cr. Rep. (Dutchess Oyer & T. Ct.) 26; *State v. Boughner*, 5 S. Dak. 461; *State v. Munger*, 15 Vt. 290.

Time Laid Partly Under One Statute and Partly Under Another. — An indictment charged that the defendant was a common seller of intoxicating liquors on the 1st day of July, 1858, and on divers days and times between that day and the day of finding the indictment, in the following October; and the court held the indictment sufficient in its averment of time, although offenses alleged to have been committed during a portion of such time

m. LAYING VENUE.—In an indictment for an unlawful sale of intoxicating liquor, the venue should be laid in the county where the sale was made.¹

n. AVERMENTS AS TO PLACE—(1) *When Need Not Be Made.*—Where place is not of the essence of the offense, and does not affect the degree of punishment or the disposition of the fine, it need not be particularly alleged in the indictment.²

(2) *When Must Be Made.*—But where the place is of the essence of the offense, or affects the degree of punishment or the disposition of the fine, it must be alleged with particularity.³

were punishable under an Act of 1856, and the remaining portion under an Act of 1858. *State v. Pillsbury*, 47 Me. 449.

1. *State v. Hughes*, 22 W. Va. 743.

Crime Committed on Ohio River.—If the crime of unlawfully selling intoxicating liquor is committed on the Ohio river between the states of Indiana and Kentucky, south of low-water mark, on the Indiana side, the venue may be laid in a county in Indiana opposite the place where the offense was committed. *Welsh v. State*, 126 Ind. 71.

Proof.—The venue should be proved as laid, and it should not be left to inference that the sale took place within the county and magisterial district laid in the venue. *Savage v. Com.*, 84 Va. 619, where the only evidence touching the place was that the offense was committed at the defendant's hotel, and this was held insufficient.

Illegal Transportation.—An indictment charged an illegal transportation of liquors from a place in Waldo county to Clinton and Waterville in Kennebec county, and it was held, there being no other averment of venue in the indictment, that it did not charge a commission of one part of the offense within Kennebec county, for the latter places are towns in Kennebec county, on the line between the two counties. *State v. Bushey*, 84 Me. 459.

2. *Dansey v. State*, 23 Fla. 316; *Megowan v. Com.*, 2 Metc. (Ky.) 3; *People v. Aldrich*, 104 Mich. 455; *People v. Ringsted*, 90 Mich. 371; *State v. Kurtz*, 64 Mo. App. 123; *State v. Jaques*, 68 Mo. 260; *State v. Cottrill*, 31 W. Va. 162; *State v. Bogges*, 36 W. Va. 713.

In the County.—A complaint for selling intoxicating liquors without a license is sufficient in its averment as to place where it charges that the sale

has been made in a certain county, without a more particular allegation as to place. *State v. Hickok*, 90 Wis. 161.

Public Place.—Where the words "public place" in a statute have reference only to giving away, and not to selling, it is not necessary, in charging the offense of unlawfully selling under such statute, to allege that it was committed in a public place. *King v. State*, 66 Miss. 502.

Keeping with Intent to Sell.—The offense of keeping liquors with intent to sell the same unlawfully involves no fixed or certain place as a part of its identity. They may be kept on the person or in a movable vehicle, the allegation as to place not being material, and it will be sufficient to show that the illegal keeping was within the county. *Com. v. Kern*, 147 Mass. 595.

It is sufficient to charge that the liquors were kept "with intent unlawfully to sell the same in this commonwealth." *Com. v. Gillon*, 148 Mass. 15.

But in *Maine* the court held that the complaint or judgment should show that the liquor was intended for sale in the city, town, or place where the liquors were kept or deposited. *Barnett v. State*, 36 Me. 198.

In Dwelling House.—Where the complaint averred that the liquors were kept and deposited by A. "in a certain dwelling house building [describing the situation] occupied by the said A. as a dwelling," it sufficiently averred that the liquors were kept by A. in his dwelling house. *Com. v. Certain Intoxicating Liquors*, 116 Mass. 27.

3. *Legori v. State*, 8 Smed. & M. (Miss.) 697; *State v. O'Keefe*, 41 Vt. 691; *Arrington v. Com.*, 87 Va. 96.

An indictment against a licensed retailer for violating certain provisions touching the conduct of his business on

Presumption After Verdict.—Where nothing to the contrary appears, it will be presumed, after verdict, that the liquor was

the licensed premises was held fatally defective for omitting to allege that the unlawful act was committed at the place where the liquors were to be sold under his license. *State v. Church*, 4 W. Va. 745.

Violation of Three-mile Law.—Under an act making it a crime to sell intoxicating liquors "at or within three miles of Providence College," in the county of Lee, it was held not sufficient simply to allege in the indictment that the sale was "at Nettleton," in violation of said act, and the defect was not cured by proof that Nettleton was within three miles of the college. *Ragan v. State*, 67 Miss. 332.

Local Option Law.—In a prosecution for violation of the local option law, the indictment must show that the offense was committed within the local option district. *Young v. Com.*, 14 Bush (Ky.) 161; *Savage v. Com.*, 84 Va. 619.

Sale Without License.—An indictment for selling intoxicating liquor without license must distinctly state the place where the liquor was sold in a named town. *Arrington v. Com.*, 87 Va. 96.

So, under a statute providing that where a nuisance consists wholly of unlawful sales of intoxicating liquor the offense shall be punished as for unlawful selling, and not for a nuisance, the indictment must show with particularity the place where the sales were made, so that at common law the seller would be deemed a keeper of a disorderly house. *Rogers v. State*, 58 N. J. L. 220.

Selling at Retail.—If a statute fixes the amount to be paid for a license for retailing and varies the price according to the place where the business is to be carried on, place is a material ingredient of the offense, and must be alleged, for the offense consists in selling at a place without having a license to sell there. *Harris v. State*, 50 Ala. 129; *Com. v. Head*, 11 Gratt. (Va.) 819.

And if the penalty varies with reference to the place where the offense is committed, the place must be particularly stated. *Grimme v. Com.*, 5 B. Mon. (Ky.) 263.

Contra.—In *Iowa* it was held that in a prosecution for unlawfully retailing place need not be stated with more particularity than that the offense was committed in the county where the in-

dictment was found. *Zumhoff v. State*, 4 Greene (Iowa) 526. And in *Texas* it was also held not necessary to describe the house where the liquor was sold. *State v. Heldt*, 41 Tex. 220.

Unlawfully Selling to Be Drunk on Premises Where Sold.—In a prosecution for unlawfully selling liquors to be drunk on the premises where sold, it is sufficient to follow the language of the statute in charging the place. *Woode v. State*, 9 Ind. App. 42. And it should be alleged that the place where the liquors were sold was owned by the defendant at the time, and was in his possession, or under his control. *State v. Woolsey*, 92 Ind. 131; *Blough v. State*, 121 Ind. 355. And an allegation that the accused "did then and there sell to one C. one half gill of spirituous liquor, to be used in and about his dwelling house," was construed to mean the dwelling house of the accused. *Com. v. Stowell*, 9 Met. (Mass.) 569; *Com. v. Moulton*, 10 Cush. (Mass.) 404.

Selling on Election Day.—An indictment for unlawfully selling intoxicating liquor on election day should allege the township in which the liquor was sold and in which the election was held, notwithstanding the time laid in the indictment is that on which the law requires a general election to be held. *State v. Weaver*, 83 Ind. 542, where the court said: "If we should place in equal rank the presumption of innocence and the presumption that the public officers did their duty and held an election on the day fixed by law, then the scale would be equally balanced, and of course no offense would be made out. It is for the state to destroy this equilibrium, and allege all facts essential to the existence of the offense sought to be charged." See also *Smith v. State*, 18 Tex. App. 454.

And where a statute makes it an offense to keep open a liquor shop, or to keep an open bar, within a certain distance of an election district or election grounds, the indictment must charge that the shop or bar was kept open within such distance, or it will be insufficient. *State v. Powell*, 3 Lea (Tenn.) 164; *Patton v. State*, 31 Tex. Crim. Rep. 20. See *Janks v. State*, 29 Tex. App. 233.

Keeping Open on Election Day.—Where

in the commonwealth at the time of the sale.¹

(3) *Form of Averment.* — If place is an essential element of the offense, it must be charged with such certainty as to enable an officer executing process to identify it.²

o. AVERMENT AS TO MODE OF SALE OR GIFT. — Where the mode of sale or gift is made an element of the offense by statute, it must be so charged in the indictment.³ Where the statute

the law makes it an offense to keep open on election day a place where on other days intoxicating liquors are habitually sold and drunk, it is not sufficient to describe the place as one "where intoxicating liquors were on other days habitually sold and drunk." *Weisbrodt v. State*, 50 Ohio St. 192.

1. *Com. v. Jones*, 7 Gray (Mass.) 415, where the charge was that the defendant was a common seller of intoxicating liquors at a named town in the commonwealth of Massachusetts.

2. *Hagen v. State*, 4 Kan. 90.

Sufficient Allegations of Place. — Place was held to be sufficiently alleged where the indictment charged that the liquor was sold in a certain one-story building within the limits of a named city, known as Worcester's Drug Store, West v. Columbus, 20 Kan. 633; and where the sale was charged to have been made at a certain place without designating the part of the lot on which the sale was made, *Hintermeister v. State*, 1 Iowa 101; and where the place described was "in the south portion of a certain connected row of frame buildings fronting east on Spruce street, between North Second street and North Third street, in the city of Abilene," where objection was made to the information only by objecting to the introduction of evidence, and the court limited the evidence to the extreme south building of the connected row mentioned, *State v. Rohrer*, 34 Kan. 427; and that the offense was committed "at Ogden, in the county of Riley, * * * in a certain stone building then and there used and occupied by the said A B as a grocery and dwelling house." *State v. Muntz*, 3 Kan. 384.

House, Store, and Shop. — Where a complaint charged that the defendant kept a certain house, store, and shop for the purpose of, etc., it was held that such allegation was used to designate but one place, and was sufficient. *Conley v. State*, 5 W. Va. 522; *Rawson v. State*, 19 Conn. 292.

In a Certain State, County, and Town. —

In some jurisdictions it is held a sufficient description of the place of sale to name the state, county, and town in which the sale is alleged to have been made. *People v. Polhamus*, 8 N. Y. App. Div. 133.

Judicial Notice. — An indictment charged that "John Cottle of Windsor, in the county of Kennebec," etc., and it was held that by the word "Windsor" must be understood the town of Windsor, and that the court would take judicial notice that there is such a town in the county of Kennebec. *State v. Cottle*, 15 Me. 473.

Selling to Be Drunk on Premises Where Sold. — The place or places alleged in the indictment should be those mentioned in the statute, as "house, out-house, yard, garden," etc., and where the statute mentions several places it will be sufficient to charge them conjunctively, *Burke v. State*, 52 Ind. 461; *State v. Freeman*, 6 Blackf. (Ind.) 248; *Stockwell v. State*, 85 Ind. 522; *Stout v. State*, 93 Ind. 150; *Stout v. State*, 96 Ind. 407; and it is not necessary to state the name of the street or the number of the house, *Schwab v. People*, 4 Hun (N. Y.) 520; neither is it necessary that the place should be a public resort. *Picket v. State*, 22 Ohio St. 405.

3. In *People v. Norton*, 76 Hun (N. Y.) 7, the defendant was charged before a justice of the peace with violating the excise laws of the state of New York "by selling or giving away intoxicating liquors without having a license therefor," and the court held that the complaint charged no offense, because it did not state that the act was committed in the manner described by the statute, and specified no mode of sale or gift within the prohibition of the statute, it not being an offense to sell or give away strong or spirituous liquors unless it be done in the manner prohibited by the statute.

In *State v. Devine*, 4 Iowa 443, in passing upon the question of the necessity of alleging the method of sale, the

makes it an offense to give away liquor only when given upon pretext, to avoid the law, such pretext must be alleged and proved.¹

p. AVERMENT OF QUANTITY OF LIQUOR SOLD — (1) *Necessity of Averment.* — If the statute makes it an offense to sell, give away, or otherwise dispose of intoxicating liquors under certain conditions, without reference to the quantity of liquor thus sold, given away, or disposed of, the indictment need not allege the quantity of liquor.² But where the quantity sold is an element of the offense, the quantity must be particularly alleged in the indictment.³

(2) *Form of Averment.* — If the sale of a specific quantity is averred, it should be further alleged that the quantity sold was less than the minimum fixed by the statute.⁴ It will be sufficient,

court said, in substance, that the information charging an unlawful sale of intoxicating liquors need not state in what manner the sale was made. Where the law speaks of selling "directly or indirectly, or on any pretense, or by any device," it is only meant to describe different methods of committing the same offense, and the particular method of making the sale need not be specified.

1. In *Wendt v. State*, 32 Neb. 182, an indictment charged the defendant with unlawfully giving away intoxicating liquor without being licensed as a retailer or having a permit as a druggist, but failed to allege that the gift was a pretext to avoid the law, a gift not being otherwise unlawful under the statutory provisions, and the court held that no offense was charged.

2. *Alabama.* — *Ulmer v. State*, 61 Ala. 208; *Block v. State*, 66 Ala. 493.

Arkansas. — *McCuen v. State*, 19 Ark. 636.

Connecticut. — *Whiting v. State*, 14 Conn. 487.

Georgia. — *Williams v. State*, 89 Ga. 483.

Indiana. — *Morris v. State*, 47 Ind. 503; *Manville v. State*, 58 Ind. 63; *State v. Corll*, 73 Ind. 535; *Brow v. State*, 103 Ind. 133.

Kentucky. — *Megowan v. Com.*, 2 Metc. (Ky.) 3.

Massachusetts. — *Com. v. Brown*, 12 Met. (Mass.) 522; *Com. v. Clark*, 14 Gray (Mass.) 367; *Com. v. Eaton*, 9 Pick. (Mass.) 165; *Com. v. Churchill*, 2 Met. (Mass.) 118.

Michigan. — *Luton v. Newaygo Circuit Judge*, 69 Mich. 610.

Missouri. — *State v. Hays*, 38 Mo. 367.

New Hampshire. — *State v. Rust*, 35 N. H. 438.

Tennessee. — *State v. Eskridge*, 1 Swan (Tenn.) 413.

Wisconsin. — *Allen v. State*, 5 Wis. 329; *Sires v. State*, 73 Wis. 251.

Selling to be Drunk on Premises Where Sold. — "In a case * * * for selling liquor without a license, to be drank or suffered to be drank on the premises, * * * it is not necessary to state the quantity sold. The selling of intoxicating liquor without a license, to be drank or suffered to be drank on the premises, constitutes an indictable offense, without reference to the quantity which may be sold at any one time." *Plunkett v. State*, 69 Ind. 68.

Pursuing Business of Retailing. — "It is the pursuing of the particular kind of business without a license that is made an offense, and not the selling of a particular quantity of spirituous liquors on a particular day to a particular person. The accused is notified of the charge that on a certain day he did retail spirituous liquors without first procuring the license required by law." *State v. Kuhn*, 24 La. Ann. 474.

3. *State v. Chambless*, 45 Ark. 349; *State v. Clayton*, 32 Ark. 185; *Grupe v. State*, 67 Ind. 327; *Arbintrode v. State*, 67 Ind. 267; *State v. Mondy*, 24 Ind. 268; *Manville v. State*, 58 Ind. 63; *State v. Corll*, 73 Ind. 535; *Blakely v. State*, 57 Miss. 680; *State v. Wilkson*, 36 Mo. App. 373; *Neales v. State*, 10 Mo. 498; *Blasdel v. Hewitt*, 3 Cai. (N. Y.) 137. See also *Com. v. Conant*, 6 Gray (Mass.) 482.

4. *Willard v. State*, 4 Ind. 407; *Struckman v. State*, 21 Ind. 160; *Smith v. State*, 23 Ind. 132; *Grupe v. State*,

however, to allege that the quantity sold was less than the minimum fixed by the statute, without alleging any specific quantity.¹ But "one drink,"² "two glasses,"³ or "by the small measure"⁴ are insufficient averments of the quantity sold.

67 Ind. 327; *Arbintrode v. State*, 67 Ind. 267; *Walter v. State*, 105 Ind. 589; *Quinn v. State*, 123 Ind. 59 [*contra*, *Wood v. State*, 21 Ind. 276; *Reams v. State*, 23 Ind. 111; *McCool v. State*, 23 Ind. 127]; *Com. v. Odlin*, 23 Pick. (Mass.) 275. *distinguished* in *Goodhue v. Com.*, 5 Met. (Mass.) 553, where the averment was that the defendant sold and retailed two quarts of spirituous liquor, and the court held it to be an averment that the defendant sold liquor in a less quantity than twenty gallons, whereas in the earlier Massachusetts case the averment was simply that the defendant sold "one pint of spirituous liquors" without using the word "retail," or any other word indicating that it was one pint only, or that it was not a part of a larger quantity.

In Missouri the courts seem to follow the rule as above stated. *State v. Fanning*, 38 Mo. 409. However, in *State v. Arbogast*, 24 Mo. 363, the allegation was that the defendant sold "intoxicating liquors in a quantity than one quart, to wit, one-half pint of whisky," etc., and the court held that the word "less" having been omitted from the averment as to quantity, the averment under the *videlicet* became material and must be proved as laid.

In Illinois, where the indictment charged a sale of "one gill of spirituous liquor, the same being a less quantity than one quart," it was held that the allegation as to quantity was sufficiently certain under the laws of that state. *Zarresseller v. People*, 17 Ill. 101.

In Minnesota, where the indictment charged a sale of "one pint" of intoxicating liquor, it was held that a quantity less than five gallons was sufficiently charged, and that such allegation meant a sale in that quantity, and no more. *State v. Lavake*, 26 Minn. 526; *State v. Bach*, 36 Minn. 234; *State v. Wyman*, 42 Minn. 182.

1. *State v. Jacks*, 54 Ind. 412; *State v. Mondy*, 24 Ind. 268; *Brutton v. State*, 4 Ind. 601; *Com. v. Roberts*, 1 Cush. (Mass.) 505; *State v. Baldwin*, 56 Mo. App. 423.

Materiality of Specific Averment.—In *Klein v. State*, 76 Ind. 333, it was held that in a prosecution for retailing

intoxicating liquors without a license therefor the gist of the offense is the sale of liquor in a less quantity than a quart at a time, and an allegation that the quantity sold was "one gill and no more" is immaterial, and does not limit proof to one gill.

2. *Cool v. State*, 16 Ind. 355, holding that in a prosecution for unlawful selling at retail the indictment should charge a sale of a given quantity, according to established measures, as a pint, half-pint, or gill; *Hubbard v. State*, 11 Ind. 554.

3. An indictment charged that the defendant "did unlawfully sell intoxicating liquors, * * * to wit, two glasses." The court said: "The addition of the words 'to wit, two glasses' does not make the quantity sold any more certain. Two glasses are not necessarily less than a quart. Indeed, a glass of liquor is no definite quantity, any more, as is remarked by counsel for the appellant, than a tub, or a pail, or a kettle full. A glass is no definite quantity known to the law, nor, as far as we are aware, to the commercial or drinking world." *Haver v. State*, 17 Ind. 455.

Contra.—In *State v. Reed*, 35 Me. 489, it was held that the allegation of "one glass" of spirituous liquor was a sufficient designation of the quantity sold.

Where the allegation was that the defendant "did purchase as a beverage one bottle of port wine, * * * and did then and there drink the same, and paid therefor," etc., without averring that the quantity sold was less than five gallons, the court held that the averment as to quantity was insufficient in a prosecution for violation of the law prohibiting a sale of liquor in a quantity less than five gallons without a license therefor. *People v. Bradt*, 46 Hun (N. Y.) 445.

4. Where the averment was that the defendant retailed intoxicating liquor "by the small measure," the court held it insufficient, and said that it should have been averred in addition that the quantity was "less than a quart." *State v. Shaw*, 2 Dev. L. (N. Car.) 198.

q. AVERMENT OF KIND OF LIQUOR SOLD.—As a general rule it is not necessary to state the particular kind of liquor alleged to have been sold, but it will be sufficient to charge that the liquor sold was "intoxicating" or "spirituous" liquor.¹

r. AVERMENT THAT LIQUOR SOLD WAS INTOXICATING.—If the indictment is specific to the degree of mentioning therein the particular kind of liquor, wine, or beer sold, the intoxicating quality thereof should be alleged unless it is one of whose intoxicating character the courts take judicial notice.² Where, how-

1. *Alabama*.—*Ulmer v. State*, 61 Ala. 208.

Arkansas.—*State v. Witt*, 39 Ark. 216.

Connecticut.—*State v. Teahan*, 50 Conn. 92; *Whiting v. State*, 14 Conn. 487.

Georgia.—*Williams v. State*, 89 Ga. 483.

Illinois.—*Cannady v. People*, 17 Ill. 158.

Indiana.—*Callahan v. State*, 2 Ind. App. 417; *Buell v. State*, 72 Ind. 523; *Wills v. State*, 69 Ind. 286; *Hooper v. State*, 56 Ind. 153; *Connell v. State*, 46 Ind. 446; *Josephdaffer v. State*, 32 Ind. 402; *Downey v. State*, 20 Ind. 37; *Simpson v. State*, 17 Ind. 444; *Leary v. State*, 39 Ind. 360; *State v. Mullinix*, 6 Blackf. (Ind.) 554; *State v. Graeter*, 6 Blackf. (Ind.) 105.

Iowa.—*State v. Whalen*, 54 Iowa 753; *Foreman v. Hunter*, 59 Iowa 550.

Kansas.—*State v. Brooks*, 33 Kan. 708.

Maine.—*State v. Dorr*, 82 Me. 341.

Massachusetts.—*Com. v. Odlin*, 23 Pick. (Mass.) 275; *Com. v. Wilcox*, 1 Cush. (Mass.) 503; *Com. v. Grady*, 108 Mass. 412; *Com. v. Morgan*, 149 Mass. 314; *Com. v. Timothy*, 8 Gray (Mass.) 480; *Com. v. Conant*, 6 Gray (Mass.) 483; *Com. v. Henderson*, 140 Mass. 303.

Minnesota.—*State v. McGinnis*, 30 Minn. 52.

Missouri.—*State v. Kurtz*, 64 Mo. App. 123; *State v. Houts*, 36 Mo. App. 265; *State v. Rogers*, 39 Mo. 432. But see *Neales v. State*, 10 Mo. 498.

New Jersey.—*State v. American Forcite Powder Mfg. Co.*, 50 N. J. L. 75. Compare *State v. Fox*, 16 N. J. L. 152.

North Carolina.—*State v. Downs*, 116 N. Car. 1064; *State v. Packer*, 80 N. Car. 439.

United States.—*U. S. v. Gordon*, 1 Cranch (C. C.) 58.

It will be sufficient if the indictment,

in charging the kind of liquor sold, follows the language of the statute. *State v. Blaisdell*, 33 N. H. 388. And where the statute makes it an offense to retail ardent spirits without license, the indictment will be sufficient if it alleges a sale of whiskey, brandy, and other liquors, to the grand jurors unknown. *Tefft v. Com.*, 8 Leigh (Va.) 721. So where the liquor mentioned in the statute was "fermented or distilled liquor," an indictment based on such statute may properly charge that the liquor sold was an "intoxicating liquor, to wit, one quart of whiskey." *State v. Williamson*, 21 Mo. 496.

Retailing Without License.—In a prosecution for retailing without license it is sufficient to charge that the defendant sold "intoxicating liquor," without specifying the particular kind of liquor. *Downey v. State*, 20 Ind. 82; *State v. Carpenter*, 20 Ind. 219; *State v. Mondy*, 24 Ind. 268; *Callahan v. State*, 2 Ind. App. 417.

In Local Option District.—In a prosecution for selling in a local option district, it is not necessary to allege that the liquor was such as was the subject of license before local option was adopted. *Savage v. Com.*, 84 Va. 619.

In Vermont.—In a prosecution for owning, keeping, and exposing intoxicating liquor for sale unlawfully, the particular kinds of liquor should be alleged in the complaint. *State v. Reynolds*, 47 Vt. 297.

2. *Butler v. State*, 25 Fla. 347; *State v. Munger*, 15 Vt. 290. See also *State v. Houts*, 36 Mo. App. 265; *State v. Brown*, 51 Conn. 1. In the case last cited the complaint alleged that the defendant did sell "spirituous liquor, to wit, one half gallon of beer," etc. By statute beer manufactured from hops and malt or barley was included within the term "spirituous and intoxicating liquors." The court held that the beer mentioned in the *videlicet* was to be taken to mean

ever, the statute expressly prohibits the sale, etc., of a particular kind of liquor, naming it, a description in the language of the statute is sufficient.¹ And if the statute declares that a liquor which is not in fact intoxicating shall be considered intoxicating within the meaning of the act, the indictment may describe it as intoxicating.²

beer of the kind described in the statute, and that the complaint was therefore sufficient. The court said: "If, as the defendant virtually claimed in the course of his argument, the *videlicet* is so restrictive in its operation as to make the complaint charge the sale of a liquor not intoxicating, it is repugnant to the allegations that precede it, and if so, instead of having the effect to nullify the previous words of description, as claimed, it would itself be rejected as surplusage, leaving the general description in full force. The doctrine that the *videlicet* must be wholly rejected as surplusage, if what comes under it is contrary or repugnant to the preceding matter, is supported by a great number of authorities. * * * But in the case at bar there is no repugnancy, because that which is particularized belongs to the class indicated by the general description, and giving to the *videlicet* its true office, as before explained, the complaint may be construed as charging a sale, contrary to the statute, of that kind of beer which comes within the description of intoxicating liquor."

Whiskey is judicially known to be intoxicating. *Carmon v. State*, 18 Ind. 450; *State v. Jones*, 3 Ind. App. 121; *Schlicht v. State*, 56 Ind. 173; *State v. Jones*, 3 Ind. App. 121.

Beer or Malt Liquor. — Under a statute enacting that the words "intoxicating liquor" shall be applied to all "spirituous, vinous, or malt liquor," an affidavit which charges an unlawful sale of "beer" sufficiently charges a sale of malt or intoxicating liquor. *Welsh v. State*, 126 Ind. 71. And if the indictment charges an unlawful sale of malt liquor, intoxicating liquor is sufficiently charged, as the courts will take judicial notice that malt liquor is intoxicating. *Shaw v. State*, 56 Ind. 188. And under a similar statute in *Massachusetts*, beer may be described as intoxicating liquor, and evidence will not be admitted to prove it not to be intoxicating. *Com. v. Anthes*, 12 Gray (Mass.) 29.

Sufficient Allegation that the Liquor

Was Intoxicating. — Where an indictment charged a sale without license of "intoxicating liquor, * * * to wit, one pint of ale," *Garst v. State*, 68 Ind. 101; or of "intoxicating liquors to be drunk," etc., *Higgins v. People*, 69 Ill. 11; it was held a sufficient averment that the liquor sold was intoxicating. See also *Simpson v. State*, 17 Ind. 444; *Downey v. State*, 20 Ind. 37.

Gen. Laws New Hampshire 1878, c. 109, §§ 13, 15, prohibit the sale and keeping for sale of malt liquors, but the prohibition in section 13 is against such as are intoxicating; and an indictment under section 15 must not allege that the liquor is intoxicating, but this must be alleged in an indictment under section 13. *State v. Jenkins*, 64 N. H. 375.

Insufficient Averments. — It was held in *State v. Witt*, 39 Ark. 216, that the court did not judicially know that alcohol is an intoxicating beverage, and that "a bare charge of selling alcohol discloses no criminal offense."

Where a statute enacted that it should be unlawful for any one to sell intoxicating liquor, and the title of the act was "an act to prohibit the sale of spirituous liquors," an indictment which charged in general terms a sale of intoxicating liquor, without alleging that they were spirituous liquors, was held not to charge an offense with the requisite certainty. *McDuffie v. State*, 87 Ga. 687.

Where the allegation was "one pint of liquor," with no further description of the kind of liquor or its qualities, the indictment did not sufficiently charge a sale of intoxicating liquor, *Ward v. State*, 48 Ind. 293.

1. *State v. Jenkins*, 64 N. H. 375; *State v. Thornton*, 63 N. H. 114, upon the principle that "it is sufficient in an indictment to follow the language of the statute when the words of the statute are descriptive of the offense."

2. *Com. v. Timothy*, 8 Gray (Mass.) 480, where the court said: "If the liquor sold was not in fact intoxicating, still if it was within the liquors enumerated in the first section of the statute

s. AVERMENT AS TO PRICE.—It may be laid down as an almost universal rule, that price need not be stated in an indictment for an unlawful sale of intoxicating liquors.¹

t. ALLEGING NAME OF PURCHASER—(1) *Necessity of Alleging*.—The authorities are nearly equally divided on the question whether the name of the purchaser need be alleged. In many jurisdictions it is held that it is necessary to allege the name of

ute, the keeping of it with intent to sell was, by the terms of the statute, to be punished in the same manner as if it was intoxicating. And such an enactment is within the discretion of the legislature to pass."

1. *Williams v. State*, 89 Ga. 483; *State v. Clare*, 5 Iowa 509; *State v. King*, 37 Iowa 462; *State v. Muntz*, 3 Kan. 384; *State v. Ladd*, 15 Mo. 430; *State v. Fanning*, 38 Mo. 359; *State v. Rogers*, 39 Mo. 432; *State v. Pischel*, 16 Neb. 608; *State v. Hines*, 13 R. I. 10; *State v. Downer*, 21 Wis. 277.

In *Indiana* the rule that the price must be stated prevailed until lately. See *Divine v. State*, 4 Ind. 240; *State v. Lockstand*, 4 Ind. 572; *State v. Miles*, 4 Ind. 577; *Brutton v. State*, 4 Ind. 601; *Miles v. State*, 5 Ind. 215, 239; *Snyder v. State*, 5 Ind. 194; *Segur v. State*, 6 Ind. 451; *State v. Downs*, 7 Ind. 237; *Hubbard v. State*, 11 Ind. 554; *Cool v. State*, 16 Ind. 355; *State v. Jacks*, 54 Ind. 412; *Schlicht v. State*, 56 Ind. 173. In view of Rev. Stat. 1894, § 1825, which provides that an indictment or information shall not be deemed invalid or be quashed for failing to state the value or price of any matter or thing in any case where the value or price is not of the essence of the offense, the appellate court, in passing on the question in *State v. Allen*, 12 Ind. App. 528, said: "A sale implies the transfer of the title and possession of property for a money consideration, although time may be given for the payment. * * * Stating the price does not make the idea of a sale more complete and definite. When the defendant is charged with having made a sale, he is bound to know that the transaction was upon a money consideration and for a price. If it should appear on the trial that the transaction was a barter or gift, this would constitute a fatal variance. The time to determine the nature of the transaction is upon the evidence." And in view of the authorities above cited, and of the

statute enacted since those decisions were rendered, the court held that the indictment was sufficient on motion to quash for failure to allege the price.

Massachusetts.—In *Com. v. O'Leary*, 143 Mass. 95, the court said: "It never has been held here that the price at which the liquor was sold * * * must be alleged. There is clearly some limit to the necessity of allegations for the purpose of identifying the offense. It has been said that the offense ought to be so far identified that the defendant may know what charge he has to meet, and may be able afterwards to plead a former conviction or acquittal. * * * The act of the defendant is defined with sufficient certainty by charging him, at a time and place named, with selling, unlawfully, intoxicating liquor to one Jane O'Connell, who was then and there a minor."

Missouri.—In *State v. Ladd*, 15 Mo. 430, the court said: "The sale of intoxicating liquor, *ex vi termini*, includes a person to whom it was made, and a price, and I cannot see any reason or necessity for the pleader to insert either in the indictment;" *overruling* the dictum in *Neales v. State*, 10 Mo. 498.

Bartering Liquor.—Where an affidavit charged that the defendant unlawfully bartered liquor to a minor for a pool check, it was held on motion to quash that the affidavit was not defective for failure to aver the value of the pool check, or that it was an article of value. *Forkner v. State*, 95 Ind. 406.

Charging Sale, Barter, and Gift.—An affidavit and information charged that the defendant "did sell, barter, and give away intoxicating liquor," but failed to state what price, if anything, was paid for the liquor, and the court held, on motion to quash the affidavit, that the words charging the sale should be treated as surplusage, and that a gift was sufficiently charged. *Eagan v. State*, 53 Ind. 162.

the purchaser as matter of description of the offense,¹ or that the name of the purchaser is unknown.² In other jurisdictions, how-

1. *Alabama*. — *Dorman v. State*, 34 Ala. 216.

Delaware. — *State v. Walker*, 3 Harr. (Del.) 547.

Indiana. — *Herron v. State*, (Ind. App. 1897) 46 N. E. Rep. 540; *Ashley v. State*, 92 Ind. 559; *McLaughlin v. State*, 45 Ind. 338; *Wreidt v. State*, 48 Ind. 579; *State v. Jackson*, 4 Blackf. (Ind.) 49; *State v. Stucky*, 2 Blackf. (Ind.) 289.

Iowa. — *State v. Allen*, 32 Iowa 491.

Kentucky. — *Com. v. Cook*, 13 B. Mon. (Ky.) 149; *Wilson v. Com.*, 14 Bush (Ky.) 159.

Maine. — *State v. Stinson*, 17 Me. 154.

Maryland. — *State v. Nutwell*, 1 Gill (Md.) 54; *Capritz v. State*, 1 Md. 569.

Massachusetts. — *Com. v. Crossley*, 162 Mass. 515; *Com. v. Trainor*, 123 Mass. 414; *Com. v. Griffin*, 105 Mass. 175; *Com. v. Remby*, 2 Gray (Mass.) 508; *Com. v. Blood*, 4 Gray (Mass.) 31; *Com. v. Hitchings*, 5 Gray (Mass.) 482; *Com. v. Thurlow*, 24 Pick. (Mass.) 374; *Com. v. Crawford*, 9 Gray (Mass.) 129.

Michigan. — *People v. Heffron*, 53 Mich. 527; *People v. Minnock*, 52 Mich. 628.

Minnesota. — *State v. Schmail*, 25 Minn. 368.

Missouri. — *State v. Martin*, 108 Mo. 117; *State v. Martin*, 44 Mo. App. 45; *State v. Cox*, 29 Mo. 475; *State v. Harris*, 47 Mo. App. 558; *Neales v. State*, 10 Mo. 498.

Nebraska. — *Martin v. State*, 30 Neb. 421.

New Hampshire. — *State v. Wentworth*, 35 N. H. 442.

North Carolina. — *State v. Faucett*, 4 Dev. & B. L. (N. Car.) 107; *State v. Blythe*, 1 Dev. & B. L. (N. Car.) 199; *State v. Stamey*, 71 N. Car. 202.

Rhode Island. — *State v. Doyle*, 11 R. I. 574, *overruling* the practice heretofore employed of omitting the name of the purchaser.

South Carolina. — *State v. Steedman*, 8 Rich. L. (S. Car.) 312.

South Dakota. — *State v. Boughner*, 5 S. Dak. 461; *State v. Burchard*, 4 S. Dak. 548.

Tennessee. — *State v. Carter*, 7 Humph. (Tenn.) 158.

Texas. — *Drechsel v. State*, 35 Tex. Crim. Rep. 580; *Martin v. State*, 31

Tex. Crim. Rep. 27; *Dixon v. State*, 21 Tex. App. 517; *Alexander v. State*, 29 Tex. 495.

Virginia. — *Com. v. Smith*, 1 Gratt. (Va.) 552; *Hulstead v. Com.*, 5 Leigh (Va.) 724.

Washington. — *State v. Bodeckar*, 11 Wash. 417.

United States. — *Nelson v. U. S.*, 30 Fed. Rep. 113.

As a Means of Identification. — In *Nelson v. U. S.*, 30 Fed. Rep. 113, it was held, in a prosecution for unlawful sales of intoxicating liquors in the district of Alaska, that the name of the purchaser, if known, should be alleged as a means of identifying the transaction, but that an omission to do so was not cause for reversing the judgment.

In *Com. v. Lattinville*, 120 Mass. 385, it was held that the name of the purchaser should be alleged for the purpose of identifying the transaction, so that the defendant might know what charge he is to meet, and, if necessary, to enable him to plead a judgment therein, as former conviction or acquittal.

Exposing for Sale. — In a prosecution for unlawfully exposing liquors for sale, the complaint and warrant must allege the name of the person to whom the exposure was made, or if his name is unknown, must describe him. *State v. Schmail*, 25 Minn. 368.

In *Missouri* it was held that the name of the purchaser need not be alleged in a prosecution for failure to take oath and give bond before selling liquors. *State v. Rogers*, 39 Mo. 432.

Charging Differently in Different Counts. — Following the principle that the same offense or transaction may be charged differently in different counts of the same indictment, it is proper to charge the liquor to have been sold to different persons in different counts of the indictment. *State v. Walters*, 5 Iowa 507.

2. *Delaware*. — *State v. Walker*, 3 Harr. (Del.) 547.

Indiana. — *Ashley v. State*, 92 Ind. 559; *McLaughlin v. State*, 45 Ind. 338; *State v. Jackson*, 4 Blackf. (Ind.) 49; *State v. Stucky*, 2 Blackf. (Ind.) 289.

Iowa. — *State v. Allen*, 32 Iowa 491.

Maryland. — *Capritz v. State*, 1 Md. 569.

Massachusetts. — *Com. v. Crossley*,

ever, it is held that the name of the purchaser need not be alleged,¹

162 Mass. 515; Com. v. Griffin, 105 Mass. 175; Com. v. Hitchings, 5 Gray (Mass.) 482; Com. v. Thurlow, 24 Pick. (Mass.) 374.

North Carolina.—State v. Faucett, 4 Dev. & B. L. (N. Car.) 107; State v. Blythe, 1 Dev. & B. L. (N. Car.) 199.

South Dakota.—State v. Burchard, 4 S. Dak. 548; State v. Boughner, 5 S. Dak. 461.

Tennessee.—State v. Carter, 7 Humph. (Tenn.) 158.

Texas.—Martin v. State, 31 Tex. Crim. Rep. 27; Dixon v. State, 21 Tex. App. 517.

Washington.—State v. Bodeckar, 11 Wash. 417.

Sufficiency of Allegation.—Where the name of the purchaser is unknown and it is necessary that the indictment should so allege, it is not sufficient to allege that the liquor was sold "to each of various and divers persons." *Roberson v. Lambertville*, 38 N. J. L. 69.

An objection to a complaint because it charged a sale of intoxicating liquor "to ———" was held to be merely formal and not available after judgment. *Green v. Com.*, 111 Mass. 417; holding that the fact of selling implies that there was a purchaser, and the allegation is equivalent to one that the defendant did sell to a person whose name is unknown.

Where Name of Purchaser Could Have Been Ascertained.—If the name of the purchaser is unknown to the complainant it will be sufficient so to allege, although he might easily have ascertained the name. *Com. v. Sherman*, 13 Allen (Mass.) 248.

Name Actually Known—Objection Waived.—Where the name of the purchaser was known to the grand jury, but the indictment alleged his name to be unknown, and the case proceeded to trial without preliminary objection, the variance was regarded as of no importance. *People v. Bradley*, (Supreme Ct.) 11 N. Y. Supp. 594.

Complaint Based on Information from Others.—Where a complaint alleges that the liquor was sold "to a person whose name is to your complainant unknown," it is no defense that, at the time of making the complaint, the complainant's only knowledge of the offense was by information from others. *Com. v. Crawford*, 9 Gray (Mass.) 129.

1. *Alabama*.—*Dorman v. State*, 34 Ala. 216.

Arkansas.—State v. Bailey, 43 Ark. 150; McCuen v. State, 19 Ark. 630.

Florida.—Jordan v. State, 22 Fla. 528; Dansey v. State, 23 Fla. 316.

Georgia.—Williams v. State, 89 Ga. 483.

Illinois.—Myers v. People, 67 Ill. 503.

Kansas.—State v. Moseli, 49 Kan. 142; State v. Brooks, 33 Kan. 708; Junction City v. Webb, 44 Kan. 71; State v. Schweiter, 27 Kan. 499; Lincoln Centre v. Linker, 5 Kan. App. 242.

Louisiana.—State v. Kuhn, 24 La. Ann. 474; State v. Brown, 41 La. Ann. 771.

Mississippi.—Riley v. State, 43 Miss. 397; Lea v. State, 64 Miss. 201.

Missouri.—State v. Elam, 21 Mo. App. 290; State v. Fanning, 38 Mo. 359; State v. Ladd, 15 Mo. 430; State v. Jaques, 68 Mo. 260; State v. Gibson, 61 Mo. App. 368; State v. Ford, 47 Mo. App. 601 (*overruling* State v. Greenhagen, 36 Mo. App. 24); State v. Rogers, 39 Mo. 432.

Nebraska.—State v. Pischel, 16 Neb. 608.

New York.—Osgood v. People, 39 N. Y. 449; People v. Polhamus, 8 N. Y. App. Div. 133; People v. Adams, 17 Wend. (N. Y.) 475.

Pennsylvania.—Com. v. Liebtreu, 1 Pearson (Pa.) 107; Com. v. Schoenhut, 3 Phila. (Pa.) 20.

Tennessee.—State v. Hickerson, 3 Heisk. (Tenn.) 375.

Texas.—Cochran v. State, 26 Tex. 678; State v. Heldt, 41 Tex. 220.

Vermont.—State v. Munger, 15 Vt. 290.

Virginia.—Com. v. Dove, 2 Va. Cas. 26.

West Virginia.—State v. Ferrell, 30 W. Va. 683; State v. Chisnell, 36 W. Va. 659; State v. Pendergast, 20 W. Va. 672.

United States.—U. S. v. Gordon, 1 Cranch (C. C.) 58.

Alleging Sale to Divers Persons.—An indictment charged that the defendant, at a named time and place, "did sell to divers persons a large quantity of ardent spirits, to wit," without setting out the names of the persons to whom the liquors were sold, or that the persons were unknown to the grand jury,

nor that the name of the purchaser was unknown.¹

(2) *Sufficiency of Allegation.* — If the purchaser is known by two or more names he may be described by either or all of them,² and it is no objection to a complaint that the Christian name of the purchaser is represented by initials.³

(3) *Sale to Agent.* — If the sale be to an agent of an undisclosed principal, it may be alleged in the complaint as a sale to the agent⁴ or to the subsequently disclosed principal;⁵ but if the sale be made to an agent of a principal disclosed at the time of the sale, it must be alleged to have been made to the principal.⁶

u. REPUGNANCY. — Repugnancy between the counts of an indictment will vitiate it.⁷

and the court held the indictment sufficient. *State v. Parnell*, 16 Ark. 506.

Unnecessary Description — Proof. — While it is not necessary that the name of the purchaser should be alleged, yet if alleged it becomes a part of the description of the offense, and cannot be stricken out and proof made of a sale to another person. *Hudson v. State*, 73 Miss. 784.

Name of Person Receiving or Carrying Away. — Where a complaint charged the defendant with presuming to be a retailer, etc., and that he sold intoxicating liquor to a named person, it need not allege to whom the liquor was delivered or by whom it was carried away. *Com. v. Wilcox* 1 Cush. (Mass.) 503.

1. *Rice v. People*, 38 Ill. 435; *Cannady v. People*, 17 Ill. 158; *State v. Houts*, 36 Mo. App. 265; *State v. Spain*, 29 Mo. 415; *State v. Pischel*, 16 Neb. 608.

In *State v. Wingfield*, 115 Mo. 428, the court said: "There has been much confusion in the appellate courts of this state. But the law is now quite well settled that in an indictment for the unlawful sale of liquor it is sufficient to charge a sale, simply, without stating to whom sold, or that such person was to the grand jurors unknown."

To charge that the persons to whom the liquors were sold were "to the grand jury unknown," would add nothing to the definiteness of the charge, nor enable the defendant more readily to prepare his defense. *Com. v. Schoenhut*, 3 Phila. (Pa.) 20.

2. *Henry v. State*, 113 Ind. 305; *Slaughter v. State*, (Tex. Crim. App. 1893) 21 S. W. Rep. 247.

3. *State v. Cameron*, 86 Me. 196, where the indictment charged an un-

lawful sale by the defendant "to one S. A. Willets." The defendant demurred generally and assigned the ground that the indictment did not allege sufficiently the name of the person to whom the sale was made. The court said: "It does not appear, and cannot be assumed, that he has any other or any more of a name. Letters of the alphabet, consonants as well as vowels, may be names sufficient to distinguish different persons of the same surname."

Reference to Name by the Word "Said." — In a complaint wherein "Alice Langley, of New Bedford," charged the defendant with an unlawful sale of intoxicating liquors "to said Alice," the court held that the person to whom the sale was made was sufficiently alleged. *Com. v. Melling*, 14 Gray (Mass.) 388.

4. *Com. v. Very*, 12 Gray (Mass.) 124; *Com. v. Kimball*, 7 Met. (Mass.) 308; *State v. Wentworth*, 35 N. H. 442.

5. *Com. v. McGuire*, 11 Gray (Mass.) 460.

Sale to Either Agent or Principal. — Where it appeared that the liquor was sold to one who was acting as the agent of another, but whose agency was not disclosed, nor was the principal disclosed at the time of the sale, the court said: "We think the government may, in an indictment describing such sale, allege it in either form; as a sale to the agent, or to the afterwards disclosed principal." *Com. v. McGuire*, 11 Gray (Mass.) 460; and to the same effect see *State v. Wentworth*, 35 N. H. 442.

6. *Com. v. Remby*, 2 Gray (Mass.) 508.

7. Counts Based on Two Systems of Law. — An indictment contained three counts, the first two of which charged

v. VARIANCE — (1) *Proof of Different Offense, Generally.* — If the proof shows a different offense from that alleged in the indictment, the variance will be fatal.¹

(2) *As to Act of Selling.* — An allegation of a sale will not be supported by proof of a gift² or barter,³ but is sustained by proof of a sale on credit.⁴ A charge of selling without a license is not proved by showing a selling in violation of a license.⁵ Nor will a charge of selling at retail authorize a conviction for keeping a tippling house⁶ or for selling at wholesale in violation of a different statute.⁷

(3) *As to Kind of Liquor Sold.* — An allegation of a sale of intoxicating liquor will be sustained by proof of a sale of gin,⁸ whiskey,⁹ brandy,¹⁰ or of any other kind of intoxicating liquor;¹¹

a violation of a system of law which authorized a sale of intoxicating liquors if the proper license had been obtained therefor, but the third count charged the violation of a system of law which prohibited any sale of intoxicating liquors in a part of the territory covered by the allegations in the first two counts. It was held that as the two sets of counts were irreconcilably repugnant the indictment was insufficient, because it could not be known upon which system the state relied as being in force in the territory covered by the third count. *Butler v. State*, 25 Fla. 347.

1. *Miller v. Colorado Springs*, 3 Colo. App. 309.

Selling to Be Drunk on Premises, Proof of Sale on Sunday. — An allegation that the liquor was sold to be drunk on the premises where sold, without license therefor, is not supported by proof that the sale was on Sunday, to be drunk on the premises. *People v. Brown*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 666.

2. *Williams v. State*, 91 Ala. 14; *New Decatur v. Lande*, 93 Ala. 84; *Humpeler v. People*, 92 Ill. 400; *Birr v. People*, 113 Ill. 645; *Siegel v. People*, 106 Ill. 89 [*distinguished* in *People v. Neumann*, 85 Mich. 98]; *Wlecke v. People*, 14 Ill. App. 447; *Stevenson v. State*, 65 Ind. 409; *Kurz v. State*, 79 Ind. 488; *Harvey v. State*, 80 Ind. 142; *Dahmer v. State*, 56 Miss. 787.

3. *Massey v. State*, 74 Ind. 368.

4. *Stevenson v. State*, 65 Ind. 409.

5. *People v. Buffum*, 27 Hun (N. Y.) 216, holding that an allegation of an unlawful sale without license is not sustained by proof of selling to be drunk on the premises where sold, in violation of a dram-shop license.

In *State v. Quinn*, 25 Mo. App. 102, it was held that an indictment charging a sale without license is not supported by proof merely that such liquors were drunk on the premises at the defendant's invitation.

Where an indictment charges a person with selling spirituous liquor in less quantities than five gallons at a time without license, he cannot be convicted by proof showing a sale in violation of a storekeeper's license. *Huffstater v. People*, 5 Hun (N. Y.) 23.

Contra. — In *Alabama* it was held that on an indictment charging a sale without license, and contrary to law, the accused might be convicted of selling to a person of known intemperate habits, by virtue of a section of the code which provided that the accused might be called on to answer any violation of the law for unlawfully retailing, the indictment being in conformity with the provisions of that section. *Elam v. State*, 25 Ala. 53.

6. *Robinson v. Com.*, 6 Dana (Ky.) 287.

7. *McPherson v. State*, 54 Ala. 221.

8. *Com. v. Peckham*, 2 Gray (Mass.) 514, and without proof that gin is intoxicating.

9. *Com. v. Morgan*, 149 Mass. 314.

10. *Com. v. Odlin*, 23 Pick. (Mass.) 275.

11. *Com. v. Morgan*, 149 Mass. 314; *Com. v. Leonard*, 11 Gray (Mass.) 458.

Proof of Sale of Beer will support an indictment charging a sale of intoxicating liquor. *Pancake v. State*, 81 Ind. 93.

But in *Josephdaffer v. State*, 32 Ind. 402; *Weis v. State*, 33 Ind. 204, it was held that such proof will not be suffi-

and proof of a sale of mixed liquor, part of which is spirituous, will sustain a charge of selling spirituous liquor.¹ But an indictment charging an unlawful sale of a particular kind of intoxicating liquor cannot be supported by proof of a sale of a different kind.²

(4) *As to Quantity of Liquor Sold.* — In a prosecution for unlawfully selling intoxicating liquors without a license, the quantity of liquor sold need not be proved precisely as charged in the indictment.³

cient without proof that the beer was intoxicating.

Where the indictment charges a sale of "lager beer," and the proof is of a sale of "beer," it will be inferred that the liquor proven is of the quality which the statute declares to be intoxicating, and it will not be deemed a variance. *Dant v. State*, 106 Ind. 79. See also *State v. Heinze*, 45 Mo. App. 403.

Where an indictment charges the carrying on of a business of dealing in spirituous, vinous, and malt liquors without a license, evidence of a sale of beer will not be sufficient unless it is shown that the beer sold was malt beer. *Netso v. State*, 24 Fla. 363.

Medicated Bitters. — So if an indictment charges a sale of intoxicating liquors, it is supported by proof of the sale of medicated bitters capable of producing intoxication. *Prinzel v. State*, 35 Tex. Crim. Rep. 274.

1. *Com. v. White*, 10 Met. (Mass.) 14, where the liquor sold was brandy or gin mixed with sugar and water.

Common Cordial. — If an indictment charges a sale of spirituous liquor, it will be sustained by proof of a sale of common cordial. *State v. Bennet*, 3 Harr. (Del.) 565.

Intoxicating But Not Spirituous. — But an indictment charging a sale of "spirituous and intoxicating liquors" is not supported by proof of a sale of intoxicating liquors only which are not shown to be spirituous liquors. *Com. v. Livermore*, 4 Gray (Mass.) 18.

2. *State v. Hesner*, 55 Iowa 494, where a sale of whiskey was charged. See also *Lincoln Center v. Linker*, 5 Kan. App. 242; *State v. Brown*, 51 Conn. 1; *Com. v. Morgan*, 149 Mass. 314, where the court said: "It may be assumed that if the complaint had charged the defendant with selling intoxicating liquor, to wit, gin, it could not be supported by proof of a sale of whiskey, because the two are different

kinds of intoxicating liquor, and a specification intended to restrict the meaning of general words in the description of a criminal act cannot be rejected as surplusage." But compare *Bruguier v. U. S.*, 1 Dakota 5, holding that where an indictment charges a selling "of spirituous and intoxicating liquors, to wit, one pint of whiskey," the word "whiskey" not being used in the statute, proof of selling spirituous liquor will sustain the charge in the indictment; *Frisbie v. State*, 1 Oregon 248, where the court said: "We think the proof of any kind, and any quantity less than one quart, of spirituous liquors would have supported this indictment. * * * The allegation of the kind of liquor is placed under a *videlicet*. This would have excused the state from strict proof, unless such matter became essentially descriptive of the offense."

3. *Com. v. Dillane*, 11 Gray (Mass.) 67; *State v. Tisdale*, 54 Minn. 105; *State v. Cooper*, 16 Mo. 551; *Brock v. Com.*, 6 Leigh (Va.) 634.

Series of Sales to One for Others. — In a prosecution for retailing without a license the indictment charged that the defendant unlawfully sold "one gill and no more" of intoxicating liquor, etc., and that the liquor sold was a quantity less than a quart. The court held that the indictment was sustained by proof that the defendant sold the liquor mentioned to one person for several persons, who drank it in glasses holding a pint each, where several gallons were thus drunk and paid for by the purchaser, and that it sufficiently showed a series of sales in quantities less than a quart at a time. *Klein v. State*, 76 Ind. 333.

When Quantity Is Material. — An indictment as drawn under the *Missouri Groceries and Dram-shops Act* of 1845 charged the defendant with selling one quart of liquor, to be drunk at the place of sale, without a license, and it

(5) *As to Place.* — Where place is a material allegation it must be proved as alleged, or the variance will be fatal.¹

(6) *As to Name of Purchaser* — **In General.** — An allegation of the sale of liquors to one is not supported by proof of sale to another;² nor a charge of a sale to an unknown person, by proof of a sale to one known to complainant at the time he made the complaint.³ But proof of a sale to either of two named pur-

was held that the charge was against the defendant as a grocer. The court further held that such indictment could not be sustained by proof of selling a half pint of liquor without license, as the offense proved was an entirely different one from that charged. Under the act above mentioned a grocer could not lawfully sell in a quantity less than a quart, nor suffer the same to be drunk at the place of sale, while a dram-shop keeper with a license therefor might sell any quantity less than ten gallons and suffer it to be drunk at the place of sale. *State v. Weiss*, 21 Mo. 493.

1. *Bryant v. State*, 62 Ark. 459.

An indictment charging the defendant with the offense of selling intoxicating liquors without a license, to be drunk in or about his house, etc., was not supported by proof of a sale from an open wagon, in a public highway, in a county different from that in which the defendant lived and carried on the business. *Schilling v. State*, 116 Ind. 200.

And an allegation that the defendant unlawfully retailed spirituous liquor without a license, in the county of W., will not be supported by proof that the selling was on a wharfbat in the city of V. *Botto v. State*, 26 Miss. 108.

Place as Affecting Disposition of Fine. — In *Mississippi* a defendant was indicted for selling intoxicating liquor in less quantities than one gallon within the city of Vicksburg, without a license therefor, and it was proved that he sold the liquor at a place four miles from the city. The court held that under the statute of 1842, which appropriated all money accruing from the granting of licenses to retail, and from fines for a violation of the statute committed within the city of Vicksburg, to such city, the particular place where the offense was alleged to have been committed became a fact and circumstance constituting the offense, and it was incumbent on the state to prove it as charged in the indictment. *Legori v. State*, 8 Smed. & M. (Miss.) 697.

Local Description. — An indictment alleged that an unlawful sale of intoxicating liquor was made at the grocery of M., in the township of A., and the only proof was of a sale in the township of G., and it was held that the variance between the allegation and the proof was fatal. The name of the place having been mentioned, not as a matter of venue, but of local description, it became necessary to prove it as laid, although it was not necessary to state it. *Moore v. State*, 12 Ohio St. 387.

2. *Com. v. Blood*, 4 Gray (Mass.) 31; *State v. Hays*, 36 Mo. 80.

Name Acquired by Reputation. — Where the indictment charged the sale of liquor to "John Brown," and the evidence showed that such was not his true name, but that he was formerly a slave of a man named Brown, and had since been known by that name, it was held to be no variance. *Henry v. State*, 113 Ind. 304.

Undisclosed Agency. — An allegation of a sale to a certain person is supported by proof that such person, when he made the purchase, was acting for another, if the agency was not disclosed. *Com. v. Gormley*, 133 Mass. 580.

New Surname Acquired by Marriage. — An indictment charged an unlawful sale of intoxicating liquor to "a certain person whose name is Mary Garland." Upon this indictment the defendant was convicted. The proof showed that, since the alleged sale the said Mary Garland had been married, and that, at the time of finding the indictment, her name was Mary Morrison. The court held that the indictment described the person to whom the sale was made by her name at the time when the indictment was found, and that the conviction could not be supported. *Com. v. Brown*, 2 Gray (Mass.) 358.

3. *Moore v. State*, 79 Ga. 498. See also *Blodget v. State*, 3 Ind. 403. *Contra*, *Hulstead v. Com.*, 5 Leigh (Va.) 724, holding that where the indictment alleges the name of the purchaser to be unknown, proof that the name was

chasers,¹ or proof of a middle name where none is charged, will not constitute a fatal variance.²

Idem Sonans — Where an allegation and the proof as to the name of the purchaser do not come within the rule of *idem sonans*, it will be a fatal variance.³

(7) *As to Sale to or by Agent* — **Sale to Agent of Undisclosed Principal.** — A charge of an unlawful sale of intoxicating liquor to a named

known to the grand jury is not a material variance, for the reason that it was not necessary to make any allegation as to the purchaser, and the allegation may be rejected as surplusage. *State v. Ladd*, 15 Mo. 430, to the same point. See also *Com. v. Luddy*, 143 Mass. 563, where a complaint charged the sale to a person whose name was unknown to the complainant, and the court held that it was not necessary for the state to prove that the name of the alleged purchaser was in fact unknown to the complainant.

An allegation that the liquor was sold "to a certain person whose name is unknown to the complainant," is supported by evidence of a sale to a person whose name was known to the complainant, if the complainant, at the time of making the complaint, did not know that the sale was to that person. *Com. v. Hendrie*, 2 Gray (Mass.) 503, holding that it was "a question of tense, grammatically speaking."

An indictment charging the name of the purchaser to be unknown to the grand jury is supported by testimony of a person who swears that the defendant sold liquor to him, unless it appears from the evidence that the grand jury knew that the witness was the unknown purchaser referred to in the indictment. *Hays v. State*, 13 Mo. 246; *State v. Bryant*, 14 Mo. 340.

1. *Hall v. State*, 87 Ga. 233. *Contra*, *Tyler v. State*, 69 Miss. 395, where an indictment charged an unlawful sale of intoxicating liquor to R. and B. The proof was that the sale was to B. only. It was held that the variance was fatal, and that although the allegation of a sale to any particular person was unnecessary, yet having been made, it was descriptive of the offense charged, and must be proved as laid.

An information charging a sale of intoxicating liquor to A and to "divers other persons whose names were to the affiant unknown," is sustained by proof showing a sale to other parties, but none to A. *State v. Wolff*, 46 Mo. 584.

So a charge that the liquor was sold "to certain persons whose names are unknown," if not objected to on the trial for multiplicity, will be supported by proof of a sale to one unknown person. *Com. v. Early*, 161 Mass. 186.

Diminutive Name. — An indictment charged a sale of liquor to "Jack Murphy," and the proof showed that his true name was "John Murphy." The court held the variance not material, and said: "The rule fairly deducible from the authorities is that if two names are taken promiscuously to be the same name in common use, though they differ in sound, there is no variance between them. Where two names are derived from the same source, or where one is an abbreviation or corruption of the other, but both are taken by common use to be the same, though differing in sound, the use of the one for the other is not a misnomer. * * * Jack and Jock are ordinarily only diminutive names for John, and Jack, *prima facie* at least, stands for John." *Walter v. State*, 105 Ind. 589.

2. *State v. Feney*, 13 R. I. 623.

In *Com. v. Gormley*, 133 Mass. 580, where the purchaser was charged as Thomas Casey, it was held that he might be convicted by proof of a sale to Thomas F. Casey, provided he was as well known by the one name as by the other.

Where Middle Initial is Alleged. — A complaint charged a sale of intoxicating liquor to George E. Allen, and the proof disclosed a sale to George Allen. The court held that the variance was fatal, where there was no evidence that the names were applied to the same person. *Com. v. Shearman*, 11 Cush. (Mass.) 546.

3. An indictment charged an unlawful sale to have been made to one "Hairholtser," and the court held that it was not supported by proof of a sale to one "Hairholts." *Mitchell v. State*, 63 Ind. 276, 574.

person is supported by proof that such person was acting as an agent of an undisclosed principal in making the purchase.¹

Sale by Agent.—An indictment charging the defendant with unlawfully selling intoxicating liquor will be supported by proof that it was sold by the defendant's agent,² or that the defendant was an agent.³

(8) *As to Local Option District.*—An allegation that the offense was committed in a local option district is not supported by proof that the defendant sold the liquors in the county without proof identifying the district.⁴

(9) *As to Purpose of Sale.*—An indictment charging a sale for other than scientific, medical, or mechanical purposes is not supported by proof of selling intoxicating liquor for medical, scientific, or mechanical purposes in an irregular manner.⁵

(10) *As to Joint and Separate Sales.*—If an indictment charges a joint sale by two or more persons, it will not be supported by proof of a separate sale by each.⁶ So a charge of a sale to a named person is not supported by proof of a joint sale to two persons.⁷

(11) *As to Sale to Minor.*—An indictment for unlawfully selling to a minor will not be supported by proof which does not show that the sale was made with the knowledge and consent of the defendant;⁸ and to support the indictment, where a gift to a minor is charged, the proof must show that the alleged gift was to the person named, and that he was a minor.⁹

1. *Com. v. Kimball*, 7 Met. (Mass.) 308; *Com. v. Fowler*, 145 Mass. 398.

Where an indictment charges a sale to have been to a named person, it will be supported by proof that the sale was made to him through his servant or messenger, and the indictment need not mention such servants by name or otherwise. *Hall v. State*, 87 Ga. 233.

2. *State v. Curtiss*, (Conn. 1897) 36 Atl. Rep. 1014; *Com. v. Park*, 1 Gray (Mass.) 553; *Parker v. State*, 4 Ohio St. 565.

A Charge of a Sale to a Minor will be supported by proof that the sale was made by the defendant's agent. *State v. McCance*, 110 Mo. 398.

Sale by Agent Against Orders.—But the principal cannot be convicted by proof of a sale by agent where the sale was made against the express orders, and in the absence, of the principal. *Wadsworth v. State*, 35 Tex. Crim. Rep. 584.

3. A complaint charging the defendant with unlawfully selling liquor on the Lord's day, without license, will be supported by proof that the defendant was an agent or barkeeper of the licensee

of the premises where the sale was made, and was authorized to make the sale. *Com. v. Hoyer*, 125 Mass. 209.

4. *Morgan v. Com.*, 90 Va. 80.

5. *State v. White*, 31 Kan. 342.

6. *Farrell v. State*, 3 Ind. 573.

7. *Brown v. State*, 48 Ind. 38.

8. *Ihrig v. State*, 40 Ind. 422.

Proof of Sale to Minor for Use of Adult.—A complaint charging a sale of liquor to a minor is supported by proof that the sale was made to a minor for the use of an adult, even where the fact that it was for such adult was disclosed at the time of the sale. *Com. v. O'Leary*, 143 Mass. 95.

9. An indictment charged an unlawful giving of intoxicating liquor to "Edward Gresh," a minor, and it was shown by the evidence that the liquor was given to "Gresh," and that "Gresh" was nineteen years old. The court held that the evidence did not show that the liquor was given to the person named in the indictment and did not sufficiently show that such person was a minor. *Meyer v. State*, 50 Ind. 18. See *Dolke v. State*, 99 Ind. 229.

2. Averments Peculiar to Particular Offenses — a. RETAILING WITHOUT LICENSE. — An indictment for unlawfully retailing need not allege that the liquor was sold to be drunk on the defendant's premises,¹ nor that the liquor sold might have been used as a beverage,² nor that it was delivered and carried away all at one time,³ but should charge that the accused did engage in and carry on the business for which a license was required, where that fact is essential to constitute the offense.⁴ An indictment charging a retailing of liquor without license in a county where no license could be granted is insufficient,⁵ and an indictment against a retailer for selling without obtaining a license from the parish, need not affirmatively show that the parish had a right to issue a license.⁶

b. UNLAWFULLY SELLING AT PROHIBITED TIME — (1) On Prohibited Day — Sale on Sunday. — In charging an unlawful sale on Sunday the facts necessary to constitute the offense under the particular statute should be averred; as, for instance, that the defendant was a liquor dealer,⁷ or dram-shop keeper,⁸ or that the liquor was sold to be drunk on the premises where sold,⁹ or that it was to be drunk as a beverage,¹⁰ or that it was sold

1. *Clark v. State*, 34 Ind. 436.

If an indictment contains an allegation that the liquor was to be drunk in the house, out-house, stable, yard, and garden, where sold, it will not invalidate the indictment, but may have the effect of enlarging the proof to be made by the state. *Leary v. State*, 39 Ind. 360.

Not to Be Drunk Where Sold. — If the words "not to be drunk where sold" are not in the statute, such allegation need not be made in the indictment. *Com. v. Young*, 15 Gratt. (Va.) 664.

2. *State v. Carpenter*, 20 Ind. 219.

3. *Com. v. Leonard*, 8 Met. (Mass.) 530.

In Indiana, in a prosecution for retailing without license, charging a sale of a less quantity than a quart at a time, the indictment need not allege that the sale was made at one time. *Mullen v. State*, 96 Ind. 304.

4. *Ulmer v. State*, 61 Ala. 208.

5. *Cost v. State*, 96 Ala. 60.

6. *State v. Kuhn*, 24 La. Ann. 474.

7. Under *Texas* Penal Code, art. 186, providing that if any "dealer in merchandise" shall barter or sell the same on Sunday, he shall be punished, etc., the defendant may be convicted of unlawfully selling "on Sunday * * * to certain persons to affiant unknown, certain drinks of whiskey, said A. being

then and there a liquor dealer," on the theory that liquor is an article of merchandise within the meaning of the statute. *Day v. State*, 21 Tex. App. 213. See *Archer v. State*, 10 Tex. App. 482.

8. In *Missouri* it is held that an indictment charging an unlawful sale on Sunday is insufficient if it does not allege that the defendant was a dram-shop keeper. *State v. Lisles*, 58 Mo. 359. See also *Archer v. State*, 10 Tex. App. 482.

9. *Morris v. State*, 47 Ind. 503.

10. *Morel v. State*, 89 Ind. 275; *Allman v. State*, 69 Ind. 387; *Dowdell v. State*, 58 Ind. 333.

Where a sale of liquor which is ordinarily drunk as a beverage is shown to have been made on Sunday, if the defendant claims that it was not sold to be drunk as a beverage, that is matter of defense. *Morel v. State*, 89 Ind. 275.

Judicial Notice. — So where liquor is sold in a saloon on Sunday in the ordinary manner, and nothing is said at the time of the sale as to what the liquor is to be used for, it will be a *prima facie* case of a sale of liquor to be used as a beverage, for the courts take judicial notice that liquor is sold in saloons to be drunk as a beverage. *Zapf v. State*, 11 Ind. App. 360.

without a prescription from a regular practicing physician,¹ as the case may be. In charging a sale on Sunday, it is not necessary to aver that the liquor was sold in a house kept for retailing.²

Sale on Legal Holiday. — An indictment for unlawfully selling on a legal holiday must charge that the sale was made on some one of the days mentioned in the statute,³ but it is not necessary to charge that the liquor was sold to be drunk as a beverage.⁴

Sale or Gift on Election Day. — In charging an unlawful sale or gift on election day it has been held that the indictment must show the purpose for which the election was held,⁵ and that the election was held,⁶ but it is not necessary to state the facts constituting the person to whom the unlawful sale or gift is alleged to have been made, a qualified voter,⁷ nor to allege any special criminal intent.⁸

(2) *At Prohibited Hour.* — In charging a sale at a prohibited hour, it was held necessary under an *Indiana* statute to charge that the liquors were sold to be drunk on the premises where sold,⁹ but that it need not be alleged that the defendant had a permit or license.¹⁰

c. UNLAWFUL SALE TO MINOR — Necessary Allegations. — In a prosecution for unlawfully selling liquor to a minor, the fact of minority must be averred,¹¹ and the consent of the parent,

1. Clerical Error. — Under the statute forbidding a sale on Sunday, "unless the person to whom the same is sold * * * shall have first procured a written prescription therefor from some regular practicing physician of the county where the same is so sold," it is not a fatal error to omit the word "therefor" in negating a prescription from a physician. *Shepler v. State*, 114 Ind. 194.

2. Burchard v. State, 2 Oregon 78, construing the Oregon statute.

3. Shepler v. State, 114 Ind. 194.

4. Herron v. State, (Ind. App. 1897) 46 N. E. Rep. 540.

5. Borches v. State, 33 Tex. Crim. Rep. 96, holding an indictment sufficient which alleged the gift of liquor on a certain day, such day "being an election day in which an election was then and there being held, under and by lawful authority, for the purpose of voting for presidential electors, congressmen, state, district, county, and precinct officers, the same being a general election."

6. State v. Irvine, 3 Heisk. (Tenn.) 155, holding, however, that an indictment which charges that the unlawful sale was made on election day suffi-

ciently charges that the election was held on the day alleged, without any further averment.

7. State v. Pearis, 35 W. Va. 320.

8. State v. Pearis, 35 W. Va. 320, holding that it is sufficient to charge generally a criminal intent, or scienter, that the defendants knowingly and wilfully did the unlawful act.

9. Layton v. State, 49 Ind. 229.

10. Crone v. State, 49 Ind. 538.

11. Com. v. Fowler, 145 Mass. 398.

Sufficient Allegation of Minority. —

Where an indictment charging a sale of liquor to a minor alleged that the sale was unlawfully made to A B, "a minor," it sufficiently alleged the minority of the person to whom the sale was made. *Waller v. State*, 38 Ark. 656, holding that it is sufficient in an indictment for such an offense if the charge be that the person to whom the liquor was sold was a "minor," without further allegation as to age. See also *State v. Boncher*, 59 Wis. 477.

Selling to White Minor. — Under a statute which provided against the selling of liquor "to any white person under the age of twenty-one years," it was held necessary to allege that the minor to whom the liquor was sold was

guardian, or person having the management and control of the minor, where such consent is required by statute, must be negated.¹ An indictment charging the defendant with furnishing liquor to a minor, without alleging a sale of the same, or that it was to be drunk by the minor, is insufficient.²

Unnecessary Allegations.—In charging a sale of liquor to a minor it is not necessary to allege that the accused had or had not a license to sell liquors,³ nor that the defendant's occupation was one of those named in the statute, to wit, saloon keeper, etc.;⁴ nor is it necessary to allege a delivery of the liquor to the minor, or aver for whose use the liquor was purchased.⁵ And in charg-

a white person. *Com. v. Ewing*, 7 Bush (Ky.) 105, on the ground that the indictment did not contain a sufficient "statement of the facts constituting the offense" as required by the Criminal Code.

"Father" Not Equivalent to "Parent."—Where an indictment in negating consent uses the word "father" instead of "parent," it is not sufficient, for the word "father" or "mother" is not equivalent to the word "parent." In negating consent it is the better practice to follow the form of the statute defining the offense, or if other words are used, the words substituted should be equivalent to the statutory term, or be of a more comprehensive signification. *Lantzner v. State*, 19 Tex. App. 320; *Newman v. State*, 63 Ga. 533.

Failure to Negative Consent of Guardian.—Where an indictment charging an unlawful sale of liquor to a minor alleged that it was made without his parent's consent in writing, but failed to negative the consent of his guardian, it was held that consent was not sufficiently negated, where it was not alleged that the minor had a parent and not a guardian. *State v. Emerick*, 35 Ark. 324; *State v. Shoemaker*, 4 Ind. 100.

Omission of Word "Master."—An indictment charging a sale of liquor to a minor was held sufficient on demurrer though it omitted the word "master," as used in the statute, after the word "guardian," in charging the want of consent. *Weed v. State*, 55 Ala. 13, *overruling Bryan v. State*, 45 Ala. 86.

Written "Request" in Addition to "Consent."—In *Kentucky*, under the Act of March 2, 1860, which prohibited the sale of liquors to white minors "without the written consent or request" of the father, mother, etc., an indictment

was held insufficient which charged the defendant with selling without "the written consent and request" of the father, mother, or guardian. *Com. v. Hadcraft*, 6 Bush (Ky.) 91.

1. *Freiberg v. State*, 94 Ala. 91; *Page v. State*, 84 Ala. 446.

Written Order of Parent or Guardian.—Where the statute makes it unlawful for any person, licensed or unlicensed, to sell, barter, or give away within certain limits spirituous or fermented liquors in any quantity, to any person under the age of twenty-one years, without the written order of the parent or guardian of such minor, consent is sufficiently negated if the indictment charged the defendant with giving liquor to a minor "without the written order of the parents and guardian" of such minor. *Parkinson v. State*, 14 Md. 184.

Written Prescription of Physician.—Where the statute makes it an offense to sell liquor to a minor without the written prescription of a physician, it will not invalidate the indictment if it charges that the sale was made without the written prescription of a "licensed physician." *Dean v. State*, 100 Ala. 102.

That Minor Had Parents or Guardian.—In charging a sale of liquor to a minor it is not necessary to allege that the minor had parents or a guardian, for if he had neither parents nor guardian no consent could be procured, and a legal sale could not be made to such minor. *Waller v. State*, 38 Ark. 656.

2. *Grunkemeyer v. State*, 25 Ohio St. 548.

3. *Meyer v. State*, 50 Ind. 18; *State v. Hamilton*, 75 Ind. 238; *Johnson v. State*, 74 Ind. 197; *Com. v. O'Brien*, 134 Mass. 198.

4. *State v. McGinnis*, 30 Minn. 52; *Johnson v. People*, 83 Ill. 432.

5. *Com. v. Murphy*, 155 Mass. 284.

ing a barter of liquor to a minor it is not necessary to allege the value of the thing bartered, nor that it had any value.¹

d. SELLING LIQUOR TO BE DRUNK ON THE PREMISES. — In charging a sale of liquor to be drunk on the premises where sold it must be alleged that the sale was by retail,² and that it was the intention of the seller that the liquor should be drunk on the premises where sold.³

e. SALE WITHOUT HAVING PAID SPECIAL TAX OR POSTED RECEIPT. — In charging a sale of liquor without having paid the special tax, the indictment must allege that the defendant was a liquor dealer, and specify the particular taxes which were not paid.⁴

f. SALE TO HABITUAL DRUNKARD — Averment as to Habit. — In charging a sale to an habitual drunkard it must be averred that the person to whom the liquor was sold was, at the time of the alleged sale, in the habit of getting intoxicated.⁵

1. *Forkner v. State*, 95 Ind. 406.

2. *Boyle v. Com.*, 14 Gratt. (Va.) 674, where, however, the statute made it an offense so to sell "by retail."

3. *State v. Freeman*, 6 Blackf. (Ind.) 248; *Layton v. State*, 49 Ind. 229; *State v. Williamson*, 19 Mo. 384; *Bilbro v. State*, 7 Humph. (Tenn.) 534; *Pickett v. State*, 22 Ohio St. 405.

Suffering and Permitting to Be Drunk, etc. — *The Place.* — It is not sufficient to allege that the sale was made and that the defendant suffered and permitted the liquor to be drunk in and about the house where sold, under a statute providing against the selling of liquor to be drunk in and about the premises of the seller. *Blough v. State*, 121 Ind. 355.

The Act. — Under a statute making it an offense to sell "to be drunk" in and about certain premises, an indictment is insufficient which alleges only that the defendant did "suffer and permit" the liquor so to be drunk, the gist of the offense being the selling. *Vanderwood v. State*, 50 Ind. 26, 295.

4. *State v. Martin*, 34 Ark. 340.

The indictment need not allege specific sales or gifts, but it will be sufficient to charge that the accused was engaged in the business of selling and offering for sale intoxicating liquor. *People v. Breidenstein*, 65 Mich. 65. See *People v. Wade*, 101 Mich. 89.

Where an information charged, in the language of the statute, that the defendant engaged in the business, "not being then and there a druggist who sells," etc., it was held sufficient although it omitted the words "in

strict compliance with law" after the clause first quoted. *People v. Gault*, 104 Mich. 575. See also *People v. Telford*, 56 Mich. 541, which was a prosecution for failing to post receipt.

Selling Without Paying Tax and Posting Receipt. — If an information charges the accused, in the language of the statute, with being engaged in the business of selling intoxicating liquors without having first paid the county treasurer the annual tax, and without posting the notice of the tax receipt in the place where the liquors were sold, he not being a druggist, it is sufficient. *People v. Paquin*, 74 Mich. 34.

Rate of Taxation. — Where the indictment alleged that the occupation of selling liquor was one taxed by law, that the defendant was indebted to the state in the sum of three hundred dollars occupation tax for pursuing such business, and that he was pursuing such occupation at a named time, it sufficiently alleged that that rate of taxation was in existence at the time named. *Monford v. State*, 35 Tex. Crim. Rep. 237.

5. *Zeiger v. State*, 47 Ind. 129.

It Is Not Enough to Aver Generally that the person to whom the liquor was sold was in the habit of getting intoxicated. *Wiedemann v. People*, 92 Ill. 314.

Gift. — An indictment charged that the defendant gave away to a named person a certain quantity of liquor, the donee being a person in the habit of becoming intoxicated, and it was held that it was sufficiently averred that the gift was to a person in the habit of be-

Averment as to Notice. — The indictment must also aver that the defendant was notified or warned as provided by statute.¹

Occupation of Defendant. — The indictment should also allege that the defendant was a tavern keeper, merchant, distiller, etc., as the case may be.²

§. VIOLATION OF LOCAL OPTION LAW. — In some jurisdictions the statute provides a general form of indictment which it declares shall be sufficient for an offense of retailing without license, and also for violation of any special local laws;³ and in

coming intoxicated at the time of the alleged gift. *Dolan v. State*, 122 Ind. 147.

1. **Thus in Indiana** it must be averred that the defendant was notified by a citizen of the township of the habit of the person to whom the liquor was given or sold. *Werneke v. State*, 50 Ind. 22; *Miller v. State*, 107 Ind. 152; *Dolan v. State*, 122 Ind. 147. And if the indictment simply charges a sale to a person who was in the habit of becoming intoxicated, without any averment as to notice, it is insufficient. *Geraghty v. State*, 110 Ind. 103.

If an information simply charges that the wife of a citizen of the township gave the defendant notice of the habit of the person to whom the alleged sale was made, it is not a sufficient averment as to notice. To be sufficient the indictment should also aver that the wife was a citizen of the township. *Engle v. State*, 97 Ind. 122. An affidavit on information, charging that the employee of a saloon keeper sold intoxicating liquor to a person in the habit of getting intoxicated, after notice in writing had been served upon the proprietor by a citizen of the township that the person to whom the liquor was sold was in the habit of becoming intoxicated, and that the notice was left in and at the saloon, is not a sufficient averment as to notice. It should be averred that the notice was served on the defendant, and it would then become a question of proof whether serving the notice on the proprietor and leaving a copy thereof in the saloon was sufficient notice to the employee. *State v. Smith*, 122 Ind. 178.

Averment as to Residence. — And it must appear from the indictment that the residence of the person giving the notice and the residence of the person to whom the liquor was sold were in the same township at the time the notice was given. *Geraghty v. State*, 110 Ind. 103.

2. *State v. Heitsch*, 29 Minn. 134.

3. *Cost v. State*, 96 Ala. 60; *Olmstead v. State*, 89 Ala. 16; *Bogan v. State*, 84 Ala. 449; *Sills v. State*, 76 Ala. 92.

Indictment Based on General Law. — Where it is apparent that the indictment is adapted to the general law, and not to the local option law in the county in which the indictment is found, and the grand jury finds the bill to be true, and that the offense was committed "contrary to the laws of said state," the indictment must be deemed to be for a violation of the general law and not of the local option law of such county. *Patton v. State*, 80 Ga. 714.

Giving Away Liquor. — In *Alabama* the general form of indictment prescribed by statute is sufficient to cover a sale in violation of any special or local law regulating or prohibiting the sale of spirituous and vinous liquor, yet it is not sufficient for the offense of giving away such liquors, although the gift is provided against in the special statute. *Williams v. State*, 91 Ala. 14.

Particular Part of County. — In *Alabama* the general statute provides against sales of spirituous, vinous, or malt liquors, while the local law which applies to certain parts of the county only prohibits the sale, gift, or other disposition of such liquors or "intoxicating bitters." An indictment charging that the defendant "did sell, give away, or otherwise dispose of spirituous, vinous, or malt liquors, intoxicating bitters, or intoxicating drinks, without a license, and contrary to law," mentioning no particular part of the county, was held insufficient as charging no offense. *Roberson v. State*, 100 Ala. 123.

Charge of Selling Without License in a Local Option District. — In *Minnesota*, where a town had voted against licensing in pursuance of Gen. Stat. 1878, c. 16, § 1, it was held that a person might

some states the adoption of the special law suspends the operation of the general law in the local option district, and an indictment will lie only for a violation of the special law.¹

Allegation as to Adoption of Local Option Law.—In most jurisdictions the indictment must show that the local option law has been adopted in the district where the sale is alleged to have been made, and a general allegation to that effect is usually sufficient,²

be prosecuted for violation of section 4 for selling in the town without license, the vote of the town not affecting the offense described by the latter section. *State v. Funk*, 27 Minn. 318.

Sale After Vote Against License.—If the sale was in a territory where no license could under any circumstances be obtained, the indictment should charge the offense as selling after a vote against license, and not as selling without license. *State v. Hanley*, 25 Minn. 429. Compare *Hodgman v. People*, 4 Den. (N. Y.) 235.

In *Michigan* a written complaint for a violation of the local option law is not necessary, but if it is reduced to writing it will be sufficient, unless it precludes the inference that a valid oral complaint was made; and generally, where no form of written complaint is taken, the complaint amounts to little if any more than an information to the justice that, in the opinion of the party complaining, an offense has been committed; and taken in conjunction with his subsequent statements made upon oath in relation to the details thereof, it may be presumed that such complaint is rarely so complete as to contain all the statements necessary to prove the offense, but it must be supplemented by others. *People v. Bennett*, (Mich. 1895) 65 N. W. Rep. 280; *People v. Berry*, (Mich. 1895) 65 N. W. Rep. 98.

1. *Norton v. State*, 65 Miss. 297.

In *Virginia* it was held that one may be prosecuted under the general law for selling without license, notwithstanding the adoption of the special law. *Webster v. Com.*, 89 Va. 154.

2. In *Florida* the facts and circumstances sufficient to show that such election was held in pursuance of the provisions of the statute are necessary, and if the indictment fails so to charge, it is fatally defective. *Cook v. State*, 25 Fla. 698, holding also that where an indictment charged that an election held in a named county was held "in the manner prescribed by law," the

allegation meant that the election was conducted under the general election law, but that it did not show or tend to show that the election was held pursuant to the provisions of the local option law. Compare *Butler v. State*, 25 Fla. 347.

In *Michigan*, where an information charged selling of fermented cider contrary to the provisions of a resolution adopted by the board of supervisors of the county, pursuant to the provisions of the local option law, it was held that it sufficiently charged that the law had been made and was in operation in such county at the time of the sale. *People v. Adams*, 95 Mich. 541.

In *Missouri* the indictment need not recite in detail the manner in which the law was adopted, but it will be sufficiently pleaded if it states that the local option law had been duly adopted, and was in force at the time and place of the sale. *State v. Searcy*, 46 Mo. App. 421; *State v. Watts*, 39 Mo. App. 409; *State v. Searcy*, 111 Mo. 236; *State v. Dugan*, 110 Mo. 138.

In *Mississippi*, under Acts 1886, p. 35, which is known as the local option law, the verified report of the election commissioners is the sole evidence of the result of the election, and under such act an indictment for unlawfully selling intoxicating liquors which avers that the report of a result "against the sale," verified by affidavit, was returned and spread on the minutes of the board of supervisors, but does not allege that the commissioners of election had determined and reported to the board that a majority of the votes cast were against the sale of liquor, is fatally defective. *McDonald v. State*, 68 Miss. 728. And under the foregoing statute the indictment must allege that an election was held in such county, and the result thereof and such fact must be proven on the trial before there can be a conviction. *Norton v. State*, 65 Miss. 297.

In *North Carolina* the indictment under the local option law must allege

while in others such allegation is dispensed with, the court taking judicial notice of the adoption of the law.¹ The indictment should charge that the act was contrary to law.²

Division of District.—If a part of the local option district be cut off and formed into another district, without changing the name of the old district, it is not necessary, in a prosecution for an offense committed in the old district, for the indictment to state that the offense was not committed in that part of the district cut off.³

that the election adopting such law had been held. *State v. Chambers*, 93 N. Car. 600.

In Texas an indictment for violation of the local option law need not allege that the petition for election was signed by the statutory number of qualified voters. *Gaines v. State*, (Tex. Crim. App. 1897) 38 S. W. Rep. 774. But it should allege that the election adopting the provisions of such law was held in accordance with the laws of the state within the district where the offense is charged to have been committed, and that the result of such election was declared by the commissioners' court. *Stewart v. State*, 35 Tex. Crim. Rep. 392; *Hall v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 117; *Williams v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 664; *McMillan v. State*, 18 Tex. App. 375. And also, that publication was made as required by law. *Hall v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 117; *Williams v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 664; *Stewart v. State*, 35 Tex. Crim. Rep. 392; *McMillan v. State*, 18 Tex. App. 375. *Contra*, *Key v. State*, (Tex. Crim. App. 1897) 38 S. W. Rep. 773. It is also held that the information need not allege that the election was ordered by the commissioners' court. *Brown v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 578; *Willis v. State*, (Tex. Crim. App. 1897) 38 S. W. Rep. 776.

In Kentucky an indictment for a violation of the local option law must allege that the petition for election was signed by the required number of legal voters in such district, and an allegation that the petition was signed by a number of legal voters equal to twenty-five per cent. of the votes cast is not sufficient. *Com. v. Shelton*, (Ky. 1896) 35 S. W. Rep. 128. Neither is an allegation that the election was ordered upon "proper" petition, without stating the facts sufficient to show that the law was in force. *Com. v. Pippin*, (Ky.

1897) 40 S. W. Rep. 252; *Com. v. Green*, 98 Ky. 21. It is necessary to allege that the local option law was submitted to the voters of the county and adopted. *Com. v. Throckmorton*, (Ky. 1895) 32 S. W. Rep. 130; *Com. v. Boyd*, (Ky. 1895) 32 S. W. Rep. 132; *Com. v. Howe*, (Ky. 1895) 32 S. W. Rep. 133; *Com. v. Shelton*, (Ky. 1896) 35 S. W. Rep. 128. And if the indictment fails to state that the certificate of the board of county commissioners was received and recorded by the clerk, it is fatally defective. *Throckmorton v. Com.*, (Ky. 1896) 35 S. W. Rep. 635. It is not sufficient to allege that the election was ordered at "a regular term," for the statute requires the order for election to be made at "the next regular term" of the court after receiving a petition. *Com. v. Green*, 98 Ky. 21. But see *Young v. Com.*, 14 Bush (Ky.) 161.

1. *Combs v. State*, 81 Ga. 780; *Jones v. State*, 67 Md. 256; *Slymer v. State*, 62 Md. 237; *State v. Bertrand*, 72 Miss. 516. *Contra*, *Norton v. State*, 65 Miss. 297; *Loughridge v. State*, (Miss. 1888) 3 So. Rep. 667; *West v. State*, 70 Miss. 598; *Hargrave v. Com.*, (Va. 1895) 22 S. E. Rep. 314; *Thomas v. Com.*, 90 Va. 92; *Savage v. Com.*, 84 Va. 582.

2. "General as are the words of the local prohibition statute, there are sales or gifts which do not contravene them, and such sales or gifts the indictment, when in the alternative, must negative by the averment that each was contrary to law; otherwise it does not disclose an indictable offense." *Hubbard v. State*, 109 Ala. 1; *Tarkins v. State*, 108 Ala. 17; *Williams v. State*, 91 Ala. 14.

Where a local law applies to a whole county, it is sufficient to charge that the liquor was sold or given away "contrary to the form of the Act of Assembly in such case made and provided." *Slymer v. State*, 62 Md. 237.

3. *Jones v. State*, 67 Md. 256.

Where a local option district was di-

Gift or Exchange.—If the indictment charges a gift or exchange of liquors as well as a sale, it will be fatally defective where the law does not prohibit a gift or exchange of liquor.¹

1/2. VIOLATION OF THREE-MILE LAW.—In charging a violation of a three-mile law, so-called, the indictment must be framed with reference to the special act,² which, however, need not be specially pleaded, as the court will take notice of it,³ and the charge must be that the sale was made within three miles of the institution named.⁴

Centre of District.—The indictment will be insufficient if it designates more than one point as the centre of the district.⁵

Order of Court.—In *Arkansas* the offense must be alleged and proved to have been committed after the order of court forbid-

vided and a new number applied to a division thereof, an indictment which charged that the offense was committed in the sixth, formerly the third, election district of the county, in violation of the prior act known as the local option law, was held sufficient and not inconsistent on its face. *Higgins v. State*, 64 Md. 419.

1. *Ninenger v. State*, 25 Tex. App. 449; *Flock v. State*, (Tex. App. 1892) 18 S. W. Rep. 414; *Croom v. State*, 25 Tex. App. 556. See also *Stallworth v. State*, 16 Tex. App. 345; *Jordan v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 110.

2. *Camp v. State*, 27 Ala. 53.

Sale by Manufacturer.—An indictment charged a sale by a manufacturer "within four miles of an incorporated institution of learning," and that the defendant sold the liquor "in quantities not less nor under a quart, and not to be drunk upon the premises of the place of sale." The court held that the allegation did not negative the idea of a lawful sale, as the facts alleged might be true and yet liquor have been sold to a dealer by the barrel and carried to another state, and that the indictment in this respect was insufficient; the act not being unlawful within itself, and becoming so only under peculiar circumstances which must be set forth. *State v. Tarver*, 11 Lea (Tenn.) 658.

3. *State v. Wallace*, 94 N. Car. 827, holding that the statute prohibiting the sale of liquor within a certain district of a named institution is a public local statute, and need not be pleaded in an indictment for a violation of its provisions.

4. In *Mississippi* an indictment for

violation of an act of the legislature approved February 1, 1889, entitled "An Act to incorporate Providence College," etc., charged a sale of liquors "at Nettleton," and did not allege that the sale was made within three miles of Providence College, and it was held defective for not alleging that the sale was made within three miles of Providence College. *Regan v. State*, 67 Miss. 332.

5. In *Gazola v. State*, 45 Ark. 458, the indictment charged the defendant with selling intoxicating liquor "within three miles of the church-house and schools in the town of Brinkley," and alleged that the county court had prohibited the sale of such liquor "within said limits." The court held that more than one point was designated as the centre of the district, as it could not be inferred that the locality of the church and that of the schools were the same.

In *Arkansas* it was originally held that the adoption of the special law displaced the general law which prohibited a sale without license in such district, and that the indictment for selling within the prohibited district must be framed with reference to the special law, and not under the general law for selling without license. *State v. Cathey*, 41 Ark. 308; *State v. Orton*, 41 Ark. 305; *De Bois v. State*, 34 Ark. 381. "But the third section of the Act of March 26, 1883, amendatory of the license law, contains a drag-net proviso that the penalties imposed by any special act forbidding the sale of liquors in particular localities shall be merely cumulative of the penalties imposed by the License Act, and that the License Act shall apply to the territory embraced in the three-mile law and all

ding the sale,¹ and it will be sufficient to allege that the order was made in compliance with the statute,² and it must be charged that the sale was not for medical purposes.³

Description of College, etc.—An indictment for selling within three miles of an institution of learning may describe it as an academy, college, university, or institution of learning, giving the name, if any, by which it is known in the community where it is situated.⁴

i. VIOLATION OF PROHIBITION LAW.—An information for violation of the prohibition law should charge a sale without a permit, or that, having a permit, the defendant sold in a manner prohibited by law.⁵ Where the offense consists in being the owner or keeper of a place in which liquor is sold, the place must be distinctly charged and described.⁶

j. COMMON SELLER OF LIQUOR.—The offense of being a common seller of liquor, or presuming to be a common seller, may be charged in general terms in order to avoid unnecessary prolixity.⁷

special acts, and that a party may be proceeded against under either act." *Chew v. State*, 43 Ark. 361.

1. *State v. Witt*, 39 Ark. 216.

2. *Wilson v. State*, 35 Ark. 414, holding that it is not necessary to allege that the order was made on the petition of the majority of the adult residents of the township, nor that the college or academy is within the county where the indictment was found.

3. *State v. Scarlett*, 38 Ark. 563.

4. *Blackwell v. State*, 36 Ark. 178, holding also that it is not necessary to allege that the institution was incorporated. But see *State v. Odam*, 2 Lea (Tenn.) 220.

Name of Institution.—If the name of the institution be changed by the trustees, though illegally, a description by the new name will be sufficient. *Blackwell v. State*, 36 Ark. 178.

Defunct College—Objection, How Taken.—If a college referred to and named in the indictment has ceased to exist, advantage of such fact can only be taken by proof on plea of not guilty. *State v. Heldt*, 41 Tex. 220.

Description of Church.—Where a special statute prohibited the sale of liquor "within three miles and a half of a Methodist church situated in Macon county, * * * known by the name of the White church," and an indictment thereunder charged the sale "within three miles and a half of White church in Macon county," it was held that the description of the church was sufficient. *Block v. State*, 66 Ala. 493.

So where an indictment charged a sale of liquor within "three miles of the old site of Rutherfordton Baptist church," it was held not to be such a description as would vitiate the indictment, the words "old site" being surplusage, and that the defect was cured by verdict. *State v. Eaves*, 106 N. Car. 752.

5. *State v. Burkett*, 51 Kan. 175; *State v. Conley*, 1 Kan. App. 124.

6. *State v. Nickerson*, 30 Kan. 545.

7. *State v. Stinson*, 17 Me. 154; *State v. Cottle*, 15 Me. 473; *Com. v. Odlin*, 23 Pick. (Mass.) 275; *Com. v. Pray*, 13 Pick. (Mass.) 359; *Com. v. Kendall*, 12 Cush. (Mass.) 414; *Com. v. Hoyer*, 11 Gray (Mass.) 462; *State v. Nutt*, 28 Vt. 598.

General Averment.—In charging the offense of being a common seller of liquor it is sufficient to charge generally that at a named time and place the defendant was a common seller of intoxicating liquors, not having first been duly licensed, without setting forth the special acts. *Com. v. Wood*, 4 Gray (Mass.) 11; *Com. v. Pray*, 13 Pick. (Mass.) 359; *Com. v. Hart*, 11 Cush. (Mass.) 130.

And if specific sales are alleged defectively they may be rejected as surplusage. *Com. v. Hart*, 11 Cush. (Mass.) 130.

Defective Charge Good for Single Sale.—An indictment charged that on Sunday the defendant "did presume to be a seller of wine, brandy, rum, and other spirituous liquors, to be used in and about his dwelling house, then and there

Unnecessary Allegations. — In charging such offense it is not necessary to aver that the liquors were not imported and sold in the original package,¹ nor that they were sold in the defendant's dwelling house or other building,² and it need not be alleged that the defendant was a common innholder or common victualer,³ nor that the indictment was found at the instance or upon the application of any city or town officer, nor that it is prosecuted for the revenue of a town.⁴

Joinder of Defendants. — Two or more persons may be jointly guilty of being common sellers of intoxicating liquors, and may be jointly indicted therefor.⁵

Proof. — Proof of three unlawful sales is sufficient to establish the offense of being a common seller.⁶

situate, without being first licensed, according to law, as an innholder or common victualer, with authority to sell spirituous liquors; and did then and there sell to one C. one half gill of spirituous liquor, to be used in and about his dwelling house." It was held that the charge was not sufficient for being a common seller, but that the words which charged that the defendant presumed to be such seller could be rejected as surplusage, and the charge would then be sufficient for a single sale. *Com. v. Stowell*, 9 Met. (Mass.) 569. See also *Com. v. Pray*, 13 Pick. (Mass.) 359.

Omission of Word "Common." — It is not necessary to allege that the defendant was a "common seller" of liquor, but it will be sufficient to charge that the defendant on a certain day, and during all the time between that day and the day of finding the indictment, was a seller of rum, etc., without being licensed therefor. *Com. v. Leonard*, 8 Met. (Mass.) 529.

1. *State v. Gurney*, 37 Me. 149; *Com. v. Hart*, 11 Cush. (Mass.) 130.

Surplus Averment. — Surplus averments in an indictment need not be proved. So an averment, in an indictment for being a common seller of liquor, that the liquor was sold "by retail and in less quantities than the revenue laws of the United States prescribe for the importation thereof," need not be proved. *State v. Robinson*, 39 Me. 150.

2. In *Com. v. Stowell*, 9 Met. (Mass.) 569, it was objected that the indictment was defective in that it did not charge that the liquor was sold in the defendant's dwelling house. The court held that the objection was not tenable, as

the offense consisted in selling to be used in the house of the defendant, and that such sale may be made at a place other than the defendant's house. See also *Com. v. Clapp*, 5 Gray (Mass.) 97.

3. *Com. v. Pearson*, 3 Met. (Mass.) 449.

4. *Com. v. Baker*, 2 Gray (Mass.) 78.

5. *Com. v. Tower*, 8 Met. (Mass.) 527.

Where an indictment averred that two persons at a certain time and place "was then and there a common seller of intoxicating liquors," it was held sufficient to sustain a conviction of one after a *nolle prosequi* as to the other. *Com. v. Colton*, 11 Gray (Mass.) 1.

Nolle Prosequi After Verdict. — In *Com. v. Jenks*, 1 Gray (Mass.) 490, the indictment contained a count charging the defendant with being a common seller of intoxicating liquor during a certain period, and also counts for single sales within the time covered by the first count. The court held that a *nolle prosequi* might be entered on all the counts except the first, after a general verdict of guilty, and that judgment might then be rendered thereon for the commonwealth.

Removal to United States Court. — A prosecution for being a common seller of intoxicating liquors, or one for keeping and maintaining a tenement used for illegal sales and illegal keeping of intoxicating liquors by one holding a license to sell liquors under the internal revenue laws of the United States, cannot be removed to the United States court, under the United States Circuit Court Act of 1883, c. 57, § 3. *State v. Elder*, 54 Me. 381.

6. *State v. Day*, 37 Me. 244; *Com. v. Lamere*, 11 Gray (Mass.) 319; *Com.*

Conviction on Two Indictments for Different Periods. — And the defendant may be convicted at the same term of court upon two indictments covering successive periods of time.¹

k. VIOLATION OF MUNICIPAL ORDINANCE. — See article ORDINANCES.

l. KEEPING TIPPLING HOUSE. — The mere charge that the defendant, prior to finding the indictment, was guilty of keeping a tippling house, is generally a sufficient statement of the offense.² In some jurisdictions, however, it is held that the

v. Burns, 9 Gray (Mass.) 287; *Com. v. Armstrong*, 7 Gray (Mass.) 49.

Where three glasses of liquor were bought and paid for during the same evening, each of the first two being drunk and paid for before the third was delivered, it was held sufficient to establish the offense of being a common seller, upon a finding by the jury that there were three distinct and independent transactions. *Com. v. Rumrill*, 1 Gray (Mass.) 388.

1. *Com. v. Cain*, 14 Gray (Mass.) 9, holding, however, that the last period of time must have expired before the finding of either indictment.

2. *Com. v. Riley*, 14 Bush (Ky.) 44; *Com. v. Campbell*, 5 Bush (Ky.) 311. See also *Webster v. Com.*, 7 Dana (Ky.) 215; *Overshiner v. Com.*, 2 B. Mon. (Ky.) 344; *Com. v. Turner*, 4 B. Mon. (Ky.) 4; *Com. v. Harvey*, 16 B. Mon. (Ky.) 1; *Barth v. State*, 18 Conn. 432; *State v. Collins* 48 Me. 217; *State v. Rollins*, 77 Me. 380; *State v. Casev*, 45 Me. 435; *Yankton v. Douglass*, (S. Dak. 1896) 66 N. W. Rep. 923.

Negating License. — In *Com. v. Allen*, 15 B. Mon. (Ky.) 1, the court said: "The indictment in this case charges the defendant with having kept a tippling house, but it does not allege that she had no license which authorized her to sell spirituous liquors. * * * This question is made under the revised statutes. They declare that 'any person, unless he shall have a license therefor, who shall sell, in any quantity, wine or spirituous liquors, etc., shall be deemed guilty of keeping a tippling house.' The averment that the defendant has kept a tippling house necessarily implies that she has no license, for it is the fact of selling to be drank in the house, or on the adjacent premises, without a license, that constitutes her the keeper of a tippling house. * * * It is not necessary,

therefore, to allege in an indictment or presentment for keeping a tippling house that it was done without a license, for the selling must have been so done or the charge of keeping a tippling house is not true."

In *Pennsylvania* the indictment should negative license in charging the offense of keeping a tippling house. *Com. v. Baird*, 4 S. & R. (Pa.) 141. See also *State v. Hadlock*, 43 Me. 282.

In *Texas* the statutory ingredients of keeping a tippling house were held to be: (1) one of the description of establishments named in the statute; (2) that the defendant sold, delivered, or otherwise disposed of, wine, rum, brandy, whiskey, or other spirituous liquors, in quantities less than a quart; (3) that the establishment must have been kept and the liquors sold without first having obtained a license therefor. *Bush v. Republic*, 1 Tex. 455.

Charge of Retailing Only. — Where an indictment charged that the defendant kept "a tippling house in the town of P., by then and there selling ardent spirits by the retail," etc., it was held to charge only the retailing in that town, and not that it was in a house kept by the defendant for that purpose. *Our v. Com.*, 9 Dana (Ky.) 30.

A charge that B "did * * * in the county, etc., then and there presume to keep a tippling house, by then and there selling ardent spirits by the retail (viz., whiskey, brandy, and gin), without first having obtained a license to keep a tavern," is not a charge of keeping a tippling house, but only amounts to a charge of retailing without license. *Woods v. Com.*, 1 B. Mon. (Ky.) 75.

Under a charge of retailing merely, a defendant cannot be convicted of keeping a tippling house. *Roninson v. Com.*, 6 Dana (Ky.) 288.

indictment should allege that the liquor was sold to be drunk or permitted to be drunk in the house or on adjoining premises.¹

m. UNLAWFUL SALE BY DRUGGIST OR PHARMACIST.—If the unlawful sale charged to have been made was by a druggist or pharmacist, the indictment must so characterize the defendant.²

Sold as a Beverage.—In some jurisdictions it is necessary to charge that the liquor was sold as a beverage.³

Unnecessary Averments.—The indictment need not allege that the defendant did or did not keep a record of the sale, nor state whether it was at wholesale or retail,⁴ nor whether the defendant was a registered pharmacist;⁵ nor need the indictment allege that the defendant did not sell the liquor to some other druggist.⁶

n. KEEPING AND EXPOSING WITH INTENT TO SELL — Certainty.—The facts should be alleged with such certainty that the defendant may know with what offense he is charged.⁷

1. *State v. Hadlock*, 43 Me. 282; *Com. v. Dean*, 21 Pick. (Mass.) 334.

In *Herine v. Com.*, 13 Bush (Ky.) 295, which was an indictment against a distiller charging him with selling intoxicating liquors at his residence in less quantities than a quart at a time, the court held the indictment insufficient for failure to charge that the liquor was sold to be drunk in a house or premises adjacent thereto.

2. *State v. Rafter*, 62 Mo. App. 101.

Sufficiency of Allegation.—An allegation that the defendant was a druggist must be proved, and the defendant is insufficiently characterized by the allegation "being then and there a dealer in drugs and medicines." *State v. Baskett*, 52 Mo. App. 389.

Prescription of Physician.—In *Mississippi* an indictment for selling without the prescription of a physician must allege that the quantity sold was less than a gallon. *Blakely v. State*, 57 Miss. 680.

Sold as a Beverage.—An allegation that a druggist sold liquor to be used as a beverage sufficiently charges that he was engaged in a business that required the payment of a special tax as a retail liquor dealer. *Luton v. Newaygo Circuit Judge*, 69 Mich. 610.

3. *State v. Buckner*, 20 Mo. App. 420; *State v. McAdoo*, 80 Mo. 216; *People v. Quinn*, 74 Mich. 632; *People v. Curtis*, 95 Mich. 212.

Sufficient Charge of Sale as a Beverage.—If an indictment charged that the defendant sold the liquor "as a beverage," it is equivalent to a charge that

the liquor was sold "to be used as a beverage," and is sufficient. *People v. Hinchman*, 75 Mich. 587. See also *People v. Curtis*, 95 Mich. 212.

Multifariousness.—An indictment in one count charged that the defendant unlawfully sold intoxicating liquors in less quantities than one gallon, to wit, one gill of whiskey for five cents, one gill of brandy for five cents, one gill of gin for five cents, and allowed the same to be drunk on the premises where sold, and the court held that it was not objectionable for multifariousness. *State v. McAdoo*, 80 Mo. 216.

4. *Luton v. Newaygo Circuit Judge*, 69 Mich. 610.

5. *State v. Carnahan*, 63 Mo. App. 244, holding, however, that the proof to establish the fact that he was a druggist must show that he was a registered druggist or pharmacist, as none but a registered pharmacist is recognized by statute.

6. *State v. Hunt*, 29 Kan. 762.

7. *Com. v. Certain Intoxicating Liquors*, 138 Mass. 506.

Under the *Rhode Island* statutes in force in 1877 it was held that a complaint should allege that the liquor was not kept for sale for exportation, and a complaint alleging that the liquor was kept for sale, "and not for the purpose of exportation," was quashed for insufficiency. *State v. Campbell*, 12 R. I. 147.

Either of Two Distinct Offenses.—An indictment which charged that certain intoxicating liquors intended for sale were kept and deposited in a certain

Intent. — The unlawful intent with which the liquors are kept should be charged,¹ but it need not be averred that the liquor was intended for sale elsewhere than in the state where kept.²

place by the defendant, or by some other person with his consent, was held insufficient and void for uncertainty, in that it did not appear whether the defendant was charged with keeping or with selling the liquors. *State v. Moran*, 40 Me. 129.

But it was held that an allegation that the defendant unlawfully exposed and kept for sale intoxicating liquors with intent to sell them in the state where they were kept was supported by proof that he kept the liquors with the alleged intent. *Com. v. Atkins*, 136 Mass. 160; *Com. v. Welch*, 140 Mass. 372.

Time, Place, and Purchaser. — If the information states the time, the place, and the name of the person charged with keeping the liquor for sale as a beverage, it contains all the essential elements of the offense. *State v. Brennan*, 2 S. Dak. 384. See also *State v. Hartwick*, 49 Conn. 101; *Com. v. Keefe*, 143 Mass. 467; *Com. v. Sprague*, 128 Mass. 75; *Com. v. Hanley*, 121 Mass. 377; *Com. v. Certain Intoxicating Liquors*, 116 Mass. 27; *Com. v. Gilland*, 9 Gray (Mass.) 3; *Hornberger v. State*, 47 Neb. 40; *State v. Jenkins*, 64 N. H. 375.

Liquors Intoxicating in Fact, or Intoxicating by Statute. — Where a complaint charged that the defendant did unlawfully "keep and suffer to be kept on his premises, in his possession and under his charge, ale, wine, rum, and other strong and malt and intoxicating liquors, and mixed liquors, a part of which was ale, wine, rum, and other strong and malt and intoxicating liquors, with intent," etc., the court held that it should be quashed for uncertainty because it did not appear that the liquors charged to have been so kept were intoxicating in fact, or were intoxicating by statute. *State v. McKenna*, 16 R. I. 398.

Proof. — If a complaint charges that the defendant did keep "ale, wine, rum, and other strong and malt liquors and mixed liquors," it will be supported by proof of keeping "lager beer." *State v. Campbell*, 12 R. I. 147.

Place of Intended Sale. — Where a complaint alleged that the liquors were kept in a dwelling house, with intent to sell the same unlawfully, it was held

not necessary to prove that the sales were intended to be made in the dwelling house, but it was sufficient to show that the place was a magazine or warehouse where liquor was being stored, and from which it was intended to be sold in a saloon in the neighborhood. *Com. v. Certain Intoxicating Liquors*, 116 Mass. 27.

Liquor in Wagon — Selling from House to House. — An allegation of keeping with intent to sell will be supported by proof that the defendant had the liquor in a wagon attached to a horse, under circumstances tending to show that he was selling it from house to house, although it would not have supported an indictment for illegal transportation from place to place. *Com. v. McConnell*, 11 Gray (Mass.) 204.

1. *State v. Learned*, 47 Me. 426, where the court said: "The person charged as thus keeping liquors cannot be convicted simply from the fact that the liquors are found in his possession, or that they were intended for unlawful sale by somebody. He may be an innocent depository. He can only be a guilty one, under this statute, by having this possession with an intent on his part to sell the same in this state in violation of law, or with the intent that the same should be so sold by any person, or with intent to aid or assist any person in such unlawful sale; the intent being * * * an essential element, in either case, in the offense charged against the individual."

Sufficient Averment of Intent. — An allegation that the liquor was kept "for the purpose of sale" is equivalent to an allegation that the defendants kept it "with intent to sell," and is sufficient. *State v. Mohr*, 53 Iowa 261. See also *State v. Prescott*, (N. H. 1892) 30 Atl. Rep. 342.

A complaint charging the defendants with keeping certain intoxicating liquors, "which liquors are intended by the said A and B for sale in this commonwealth, said A and B not being authorized to sell the same in this commonwealth," sufficiently charges the intent to sell in violation of the law. *Com. v. Certain Intoxicating Liquors*, 4 Allen (Mass.) 593.

2. *State v. Perkins*, 63 N. H. 368.

Negating Authority. — The indictment should contain an averment denying the defendant's right to make the contemplated sales.¹

Unnecessary Allegations. — The various modes and contingencies in which it would be lawful to sell such liquors or expose them for sale need not be negated.²

o. UNLAWFULLY MANUFACTURING AND DISTILLING. — An indictment for unlawfully manufacturing or distilling must describe with reasonable certainty the offense created by the statute,³ and it is not sufficient to follow the language of the

1. Sufficient Averment. — An allegation that the defendant kept intoxicating liquors with intent unlawfully to sell the same in the commonwealth, he "not being authorized to sell the same in this commonwealth for any purpose * * * or by any legal authority whatever," sufficiently negatives the defendant's authority to make the sale without specifying the kind of intoxicating liquor. *Com. v. Grady*, 108 Mass. 412. See also *Com. v. Lynn*, 107 Mass. 214; *Com. v. Chisholm*, 103 Mass. 213; *Com. v. Dunn*, 14 Gray (Mass.) 401.

Reference to Repealed Statute. — A complaint alleged that the defendant kept the liquors for sale without any legal authority whatever, and further alleged that he was not authorized to sell the same under the provisions of a certain statute, but such statute had in fact been repealed. It was held that the allegation as to the statute might be rejected as surplusage and the complaint remain sufficient. *Com. v. Peto*, 136 Mass. 155.

2. *Com. v. Gagne*, 153 Mass. 205.

Thus it need not be alleged that the liquors were not cider kept for special purposes other than a beverage, nor "fruit of the vine for the Lord's Supper." *Com. v. Edwards*, 12 Cush. (Mass.) 187. Nor that the liquors were not imported in the original packages, or were within the commonwealth where the accused intended to sell them. *Com. v. Purtle*, 11 Gray (Mass.) 78; *Com. v. Edwards*, 12 Cush. (Mass.) 187.

The complaint need not aver that the licensing board had required the defendant to remove the blinds and curtains from the licensed premises. *Com. v. Brothers*, 158 Mass. 200.

3. Under the United States Statutes, Rev. Stat., § 3281, which provides against the violation of the internal

revenue laws, an indictment was held sufficient which charged that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller, within the intent and meaning of the internal revenue laws of the United States, with the intent to defraud the United States of the tax on the spirits distilled by him, against the peace," etc., and the court held that the indictment need not state the particular means by which the United States was to be defrauded. *U. S. v. Simmons*, 96 U. S. 360.

Negating Authority to Manufacture.

— Under the *Massachusetts Stat.* of 1855, c. 215, § 15, which related to the manufacture of intoxicating liquor for sale, an indictment sufficiently negated authority so to manufacture which alleged that the defendant, "without any license, appointment, or authority therefor, was a manufacturer of intoxicating liquor for sale." *Com. v. Clark*, 14 Gray (Mass.) 367.

Police Official — Interest in Manufacture of Liquor. — Under *New York Laws* 1890, c. 163, § 1, providing that it shall be unlawful for any "police commissioner, police inspector, captain, sergeant, roundsman, patrolman, or other police officials, or subordinate of any police department * * * to be either directly or indirectly interested in the manufacture or sale of spirituous or malt liquors," etc., an indictment charging that the defendant did "engage in the manufacture and sale of spirituous liquors and malt liquors * * * while holding the office of mayor, * * * and acting as such, and as head of police under the provisions of said charter," etc., without any statement of the time, place, or manner, is insufficient. The indictment was also insufficient in failing to charge that the defendant was directly interested in either the manufacture or

statute if such certainty is not thereby attained.¹

p. **UNLAWFUL PRESCRIPTION BY PHYSICIAN.** — In charging a physician with unlawfully prescribing liquor, the indictment or information must meet all the requisites of the statute under which it is drawn; as, that the person for whom the prescription was made was not actually sick,² that the local option law had been adopted,³ that the prescription was false and fraudulent,⁴

sale of spirituous or malt liquors, etc.; and the fact that he was mayor of a city, and, as such, head of the police, does not bring him within the statute as being a police official. *People v. Gregg*, 59 Hun (N. Y.) 107. See also *People v. Burns*, 53 Hun (N. Y.) 278.

1. Procuring Other Person to Use Still. — In a prosecution under U. S. Rev. Stat., § 3266, making it an offense to cause or procure to be used a still, boiler, or other vessel for the purpose of distilling, it is not sufficient to charge the offense in the language of the statute. The name of the person so procured to use the still should be stated, or if his name is unknown to the grand jury, such fact should be averred. And it should appear from an indictment based on such section (which makes it an offense to cause or procure to be used a still and boiler for the purpose of distilling on premises where vinegar is manufactured) that the vinegar was manufactured or produced on such premises at the time the still and other vessels were used for the purpose of distilling; but it is not necessary to aver that the liquor distilled was alcoholic. *U. S. v. Simmons*, 96 U. S. 360, where the court said: "The averment that the defendant caused and procured them to be used implies with sufficient certainty that they were in fact used." On which point, see also *U. S. v. Mills*, 7 Pet. (U. S.) 138.

It is not necessary to state the means used to effect the alleged unlawful procurement. *U. S. v. Simmons*, 96 U. S. 360. See also *U. S. v. Gooding*, 12 Wheat. (U. S.) 460.

Statutory Form of Complaint. — Under the *Vermont* Gen. Stat., c. 94, § 18, an indictment for being a manufacturer of intoxicating liquor contrary to such statute is sufficient when in the form prescribed by such section although it omits to state that the liquor was intended for sale contrary to law. *State v. Lovell*, 47 Vt. 493.

2. Frank v. Com., (Ky. 1891) 15 S. W. Rep. 877, decided under the *Kentucky* local option law, which provided that no physician shall make or sign any such prescription unless the person for whom it is made is actually sick and such liquor is absolutely required as a medicine.

In *Texas* the statute enacts that "if any physician should give a prescription to be used in obtaining any intoxicating liquor in such county * * * to any one who is not actually sick, and without a personal examination of such person, he shall be punished," etc., and the court held that "under the peculiar phraseology of this statute, * * * the indictment, in order to be good, should charge that the prescription was given to one who was not actually sick, and without a personal examination of such person." *Stovall v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 934.

3. Alford v. State, (Tex. Crim. App. 1896) 35 S. W. Rep. 657, where the court said: "It will be observed that the indictment * * * undertakes to charge an offense by a physician in giving a prescription in violation of the statute in a territory in which local option prevails. In order to charge this offense, it must be shown by proper averments that local option was in force within the given territory; that is, that a special election was held within said territory, etc."

4. In North Carolina the indictment should not only set out that the prescription was false or fraudulent, but should state in what the falsity or fraud consisted. *State v. Farmer*, 104 N. Car. 887, where the prosecution was based on *North Carolina Stat.* 1887, c. 215, § 4. The court said: "The law does not impose upon the state the burden of charging in the indictment and proving on the trial that the defendant was a 'reputable physician,' as well as that he gave a false and fraudulent prescription."

or that it was given for the purpose of enabling the party to obtain the liquor to be used as a beverage.¹

Prescription — How Pleaded. — It is not necessary to set forth the prescription *in hæc verba*.²

g. KEEPING OPEN AT PROHIBITED TIME — (1) On Prohibited Days — Sunday. — An indictment charging that the defendant, at a certain time and place, did unlawfully keep open a tippling house on the Sabbath day is sufficient;³ but it should appear from the indictment that the place kept open was not a drug store, where such a store is excepted from the operation of the Sunday law.⁴ It is not necessary, however, to allege that the defendant owned the saloon or had charge or control of it, or of the matter of opening and closing it,⁵ nor that it was kept open with criminal intent.⁶

Election Day. — An indictment for keeping open on election day should allege the purpose for which the election was held,⁷ and that it was held by lawful authority.⁸

1. *State v. Umphrey*, 40 Mo. App. 327, where the statute forbade the issuing of a prescription for liquor "to be used otherwise than for medicinal purposes," etc., and the court held that it was not sufficient to charge that the liquors "were then and there used" as a beverage and not for medicinal purposes.

2. *State v. Anthony*, 52 Mo. App. 507, where it was held sufficient to state the date of the prescription, the name of the person to whom issued, and that it was to enable the party to procure the liquor "to be used otherwise than for medical purposes."

3. *Hall v. State*, 3 Ga. 18; *Kroer v. People*, 78 Ill. 204; *Fant v. People*, 45 Ill. 259.

Licensed Place. — It should appear that the place kept open at the prohibited time is one wherein a license has been granted to sell liquor. *State v. Peterson*, 38 Minn. 143. See also *People v. Wheeler*, 96 Mich. 1; *People v. Sullivan*, 83 Mich. 355.

Statement of Place. — The prosecutor is not bound to state the particular location of the saloon before testimony is introduced. It is sufficient to charge in the information that the saloon was located in a certain city and county within the jurisdiction of the court. *People v. Ringsted*, 90 Mich. 371.

Keeping Open on a Legal Holiday. — In *People v. Hobson*, 48 Mich. 27, it was held that an indictment for keeping a saloon open on a legal holiday is sufficient if it alleges that the defendant kept a saloon, that he kept it open on a

legal holiday named, and that he then and there sold spirituous and intoxicating liquors.

4. *People v. Wheeler*, 96 Mich. 1.

Saloon Not a Drug Store. — Section 2283e, 3 Howell's *Michigan Stat.*, provides that saloons and other places except drug stores where intoxicating liquors are sold or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday. It is not necessary to aver in an indictment for keeping a saloon open on Sunday that the saloon was not a drug store; for the words "except drug stores" are used only in connection with "other places." *People v. Taylor*, (Mich. 1896) 68 N. W. Rep. 303.

5. *State v. Gluck*, 41 Minn. 553.

6. *Warwick v. State*, 48 Ark. 27, where the court said: "The keeping it open on that day is the gist of the offense. When the fact of keeping the dramshop open on Sunday is established, the law presumes a criminal intent, and proof of justification or excuse must come from the defendant."

7. *Hoskey v. State*, 9 Tex. App. 202, where the court said: "It is a necessary part of the description and certainty of the offense that the character of the election, or the object and purpose for which the election was held, should be distinctly stated and averred, in order that it may be made to appear what, if any, offense has in fact been committed."

8. *Geib v. State*, 31 Tex. Crim. Rep. 514.

In *Janks v. State*, 29 Tex. App. 233,

(2) *At Prohibited Hours.* — The averment as to time is sufficient if it appears that the keeping open was at a prohibited hour on a named day.¹ The indictment should allege that the place kept open was not a hotel, where the statute excepts hotels,² but need not allege that a saloon kept open was not a drug store,³ nor that the common council had not extended the time for closing, as permitted by a proviso to the statute.⁴

r. UNLAWFUL TRANSPORTATION OF LIQUORS. — A complaint for an unlawful transportation of liquors must allege an intent to sell the same within the state,⁵ and that the defendant knew that the liquors he was transporting were intoxicating.⁶ It need not be alleged that the liquors were in the original imported packages,⁷ nor need authority to sell be negatived.⁸

Place. — The complaint should state the place from which and the place to which the liquors were transported.⁹

it was held not necessary that the indictment should allege that the election was a special one, nor that it had been ordered by the city council at a regular or called session for the particular day or time named; nor that ten days' notice had been given previous to the election. All such matters were embraced in the allegation "held by lawful authority."

Joinder of Defendants. — The indictment may join two or more defendants without alleging a partnership between them, and without alleging that they or either of them owned or controlled the saloon. *Janks v. State*, 29 Tex. App. 233.

Collateral Attack on Validity of Election. If an election is held under the forms of law, its validity cannot be collaterally attacked by motion to quash on the ground of its invalidity. *Wear v. State*, 35 Tex. Crim. Rep. 30.

1. In *People v. Husted*, 52 Mich. 624, the complaint charged that the defendant did not close his saloon "at the hour of nine o'clock" on a certain day, and kept it open "until twenty minutes past eleven o'clock in the afternoon of said day," and the court held that it was not insufficient for failing to show that nine o'clock at night was meant, nor for using the word "afternoon" in connection with "eleven o'clock."

2. *State v. Jarvis*, (Minn. 1896) 69 N. W. Rep. 474.

3. *People v. Sullivan*, 83 Mich. 355; *People v. Robbins*, 70 Mich. 130.

4. *People v. Richmond*, 59 Mich. 570.

5. *State v. Murch*, (Me. 1886) 7 Atl. Rep. 115.

But, in *Massachusetts*, under the Act of 1869, c. 415, § 37, making it an offense to receive for transportation to another person liquors intended for sale contrary to such statute, the gist of the offense was the receiving for transportation to another, and thus completing the intended sale. The purchaser's intention with regard to the liquors was immaterial, and it was not necessary that his name should be alleged, or that his authority to sell should be negatived. *Com. v. Locke*, 114 Mass. 288. See also *Com. v. Blanchard*, 105 Mass. 173.

6. *State v. McDonough*, 84 Me. 488.

7. *Com. v. Waters*, 11 Gray (Mass.) 81.

8. *Com. v. Locke*, 114 Mass. 288, where the court said: "The illegality underlying this offense is that of the sale which has been or is intended to be made, and to be thereby carried into effect. It is immaterial whether the purchaser intends to sell again or not; and, of course, immaterial whether the purchaser has a license, or would be authorized to sell."

9. *State v. Lashus*, 79 Me. 541, holding that it is not sufficient to aver that the defendant, at a named town and county in the state, conveyed the liquors from place to place with the intention that the same should be sold in violation of law, although such allegation is in the language of the statute. And in *Com. v. Reily*, 9 Gray (Mass.) 1, it was held that an allegation that the defendant "at Blackstone, in the county of Worcester, did convey from place to place within said commonwealth intoxicating liquor," was not a

s. VIOLATION OF SCREEN LAW.—A complaint for violation of the screen law should allege that the defendant, at a certain time and place, was duly licensed to sell intoxicating liquors in certain described premises, in which he carried on the business of liquor selling, and that he maintained screens and blinds in such a manner as to interfere with the view of the business conducted on the premises and of the interior of the premises.¹

3. **Joinder of Offenses**—*a.* IN SEPARATE COUNTS.—In charging misdemeanors, several distinct offenses of the same general character may be joined in the same indictment in separate counts,² and a separate sentence may be imposed for each offense

sufficient statement of place. The case last cited was *distinguished* in *Com. v. Hutchinson*, 6 Allen (Mass.) 595, where it was held that an allegation that the liquor was carried from one place to another within the city of Worcester described the places with a reasonable degree of certainty and was therefore sufficient.

Venue.—In *State v. Bushey*, 84 Me. 459, an indictment charged an illegal transportation of liquors from a place in Waldo county to Clinton and Waterville in Kennebec county, and it was held that it did not charge a commission of any part of the offense in Kennebec county, for the latter places were towns in Kennebec county, on the line between the two counties, there being no averment of venue in the indictment.

Defect Cured by Verdict.—Where a complaint averred that the defendant, at a certain place within the commonwealth, unlawfully conveyed intoxicating liquors in a wagon to another person, who intended to sell them in violation of law, and that the defendant had reasonable cause to believe that the liquors were so intended for illegal sale, the defect of failing to allege that the liquor was transported "from place to place within the commonwealth" was merely a formal one, and objection came too late after verdict. *Com. v. Doherty*, 116 Mass. 13.

1. *Com. v. Gibbons*, 134 Mass. 197; *Com. v. Auberton*, 133 Mass. 404.

Unnecessary Allegations.—In a complaint for violation of the *Massachusetts* screen law it is not necessary to allege that the licensing board required the defendant to remove the blinds, *Com. v. Brothers*, 158 Mass. 200; nor that the defendant has violated the conditions of his license, nor that he has sold in-

toxicating liquor in violation of law. *Com. v. Costello*, 133 Mass. 192.

Failure to Remove Screen.—Where the statute provides that on days when saloons are prohibited from selling liquor the screens, curtains, etc., which obstruct the view of the bar from the sidewalk, street, or alley must be removed, an information which alleged that the defendant obstructed "the view from said sidewalk, street, and alley * * * by not removing said curtains * * * that then and there obstructed the view so as aforesaid," is sufficient. *People v. Kennedy*, 105 Mich. 75.

Proof.—Where a complaint for violation of the screen law describes the place as one room in a certain building, the fact that the license produced in evidence covers such room and also a cellar under the same does not constitute a fatal variance. *Com. v. Keefe*, 140 Mass. 301.

2. **Separate Misdemeanors May Be Joined.**—*Jones v. State*, 67 Miss. 111; *People v. Polhamus*, 8 N. Y. App. Div. 133; *Com. v. Liebtreu*, 1 Pearson (Pa.) 107; *Mitchell v. Com.*, 93 Va. 775; *Peer's Case*, 5 Gratt. (Va.) 674.

Offenses of the same nature may be joined. *Lord v. State*, 37 Me. 177; *Martin v. State*, 30 Neb. 507; *Tillery v. State*, 10 Lea (Tenn.) 35; *Lewis v. Com.*, 90 Va. 843.

Distinct Violations of the Local Option Law may be joined in separate counts. *South v. Com.*, 79 Ky. 493.

Miscellaneous Instances of Proper Joinder.—A count for being a common seller may be joined with a count for distinct sales. *Com. v. Moorhouse*, 1 Gray (Mass.) 470; *Com. v. Mead*, 10 Allen (Mass.) 396; *Com. v. Gillon*, 2 Allen (Mass.) 505; *Com. v. Clark*, 14 Gray (Mass.) 367.

of which the defendant may be found guilty.¹

b. IN THE SAME COUNT. — If the statute makes either of two or more different offenses, connected with the same general offense and subject to the same penalty, indictable separately as distinct crimes when committed by different persons at different times, they may, when committed by the same person, at the same time, be joined in the same count as constituting one offense.²

4. Amendments. — The general principles governing the amendment of indictments, informations, and complaints have been so fully discussed in a preceding article³ that it will here suffice to

A count for illegal sales may be joined with a count for unlawfully keeping for sale, *Hans v. State*, 50 Neb. 150; or with a count for maintaining a nuisance, *Gitchell v. People*, 146 Ill. 175; *State v. McLaughlin*, 47 Kan. 143; or with a count for giving away, *Bruguier v. U. S.*, 1 Dakota 5.

A count for violation of the dram-shop law may be joined with a count for a violation of the wine and beer house license. *State v. Klein*, 78 Mo. 627.

A count for selling to be drunk on the premises may be joined with a count for selling less than five gallons. *People v. Charbineau*, 115 N. Y. 433.

A count charging the defendant with assisting in maintaining a place for the purpose of selling intoxicating liquors to members of a club may be joined with a count charging him with maintaining a place for the illegal sale of intoxicating liquors, or the illegal keeping for sale of intoxicating liquors. *Com. v. Jacobs*, 152 Mass. 276.

One Indictment with Separate Counts — The Better Practice. — If a person is indicted at the same term of court for successive violations of the statute prohibiting the sale of intoxicating liquors without license, it is the better practice to draw the indictment in several counts, stating each violation separately. *State v. Wilson*, 39 Mo. App. 184.

Joinder in Informations. — If several misdemeanors be joined in the same information it will not, in general, vitiate it, at any stage of the proceedings. The practice of quashing an information on account of misjoinder of offenses, or calling on the prosecution to elect on which charge it will proceed, does not prevail in prosecutions for misdemeanors. *State v. Schweiter*, 27 Kan. 499. See *State v. Crimmins*, 31 Kan. 376.

Justice of the Peace. — A justice may permit several counts for the same or distinct offenses to be joined in the same information or complaint, and may impose the fine prescribed by statute for each offense. *Barnes v. State*, 19 Conn. 398; *Deveny v. State*, 47 Ind. 208.

Separate Trials of Separate Complaints. — A complaint for maintaining a tenement for the illegal sale of intoxicating liquors and a separate complaint for unlawfully selling such liquors cannot be tried together over the defendant's objection, although both charges might have been joined in one complaint. *Com. v. Bickum*, 153 Mass. 386.

Misjoinder of Offenses. — Offenses of a different character or degree of punishment, and upon which different judgments must be imposed, should not be joined. *Storrs v. State*, 3 Mo. 9.

Where an indictment charged illegal sales of liquor on four different occasions, and to as many different persons, it was held demurrable on that account. *People v. O'Donnell*, 46 Hun (N. Y.) 358.

1. *Nichols v. State*, 49 Neb. 777; *State v. Leis*, 11 Iowa 416; *State v. Walters*, 5 Iowa 507.

2. *State v. Schweiter*, 27 Kan. 499; *State v. Brown*, 36 Vt. 560; *State v. Woodward*, 25 Vt. 616; *State v. Smith*, 61 Me. 386.

Motion to Compel Separate Charges. — If two distinct offenses are joined in the same count, the court, on motion, should require the state to charge the offenses in separate counts. *State v. Lund*, 49 Kan. 209, where the defendant was charged in one count of the information with the offenses of selling and of maintaining a liquor nuisance.

3. Article AMENDMENTS, vol. 1, pp. 688, 696, 699.

set forth in the notes particular instances in which questions relating to amendments have arisen in prosecutions for violation of liquor laws.¹

5. Election as to Counts or Offenses — *a.* **AS TO COUNTS.** — If an indictment charges several misdemeanors of the same general character in separate counts, the state will not usually be compelled to elect between them.² But whether the state will be

1. The Caption of an Indictment may be amended so as to show the correct time of its finding and return. *Allen v. State*, 5 Wis. 329. See also *State v. Jenkins*, 64 N. H. 375; *State v. Blaisdell*, 49 N. H. 81. And article AMENDMENTS, vol. I, p. 690.

Name of Purchaser. — If a person is charged in an affidavit or indictment with unlawfully selling liquor to certain persons, the names of the persons to whom the liquor was sold, although unnecessary, become a part of the description of the offense, and the state will not be permitted to strike out the names and prove sales to different persons. *Hudson v. State*, 73 Miss. 784; *Blumenberg v. State*, 55 Miss. 528.

Occupation of Defendant — Description of Place. — In *People v. Sullivan*, 83 Mich. 355, it was held that an information may be amended by inserting words negating that the defendant was a druggist, and that the place kept open was a drug store, where such words were in the complaint and warrant, although it was considered doubtful whether such amendment was necessary at all.

Averment of Former Conviction. — An information may be amended by inserting the word "liquor" in an allegation of former conviction, where such allegation would be sufficient without the clause so amended, which was mere surplusage. *State v. Nulty*, 57 Vt. 543.

Price of Liquor Sold. — An information may be amended by inserting the price. *Miles v. State*, 5 Ind. 215.

Name of Accused. — An information may be amended as to the name of the accused, but, if not amended in the trial court, it will not be considered on appeal as having been made. *Keiser v. State*, 78 Ind. 430.

Charging Different Offense. — In *State v. Emberton*, 45 Mo. App. 56, it was held that where the information as originally drawn charged the defendant with a violation of the local option law, but was amended so as to charge a violation of the dram-shop law, it was

insufficient, and should be quashed for charging a different offense.

In Appellate Court. — In *State v. Kennedy*, 36 Vt. 563, the Supreme Court, in the exercise of its discretion, refused to allow the amendment of a complaint by alleging with certainty the date of the alleged offense and the date of an alleged former conviction.

2. Mitchell v. Com., 93 Va. 775.

Selling at Different Times. — An indictment contained two counts, the first charging the defendant with selling intoxicating liquors without license, and the second a sale without license at a different time, and the court held that the state should not be compelled to elect on which count it would rely for conviction. *Taylor v. State*, 100 Ala. 68.

Sufficiency of Election. — On the trial of a complaint charging the defendant, in separate counts, with unlawful sales of intoxicating liquor, the state was required to elect upon which sale it would rely for conviction. It elected to rely upon one count, charging the sale of two glasses of whiskey made by the defendant to one W., for which W. paid twenty cents; and on another count, upon the sale of one glass of whiskey and one bottle of beer, made by the defendant to C., for which C. paid twenty-five cents; and the evidence showed that but one sale of the kind indicated was made to said W. and C., and fixed definitely the date of each of such sales. It was held that the election was sufficiently definite and certain under each count. *State v. Saxton*, 2 Kan. App. 13.

Defect Cured by Election. — If a count of an indictment charges two offenses precisely alike, the defect will be cured by the election of the prosecutor to proceed upon one charge only, and entering a *nolle prosequi* as to the other. *Com. v. Holmes*, 119 Mass. 195.

Modifying Election Once Made. — If the state, at the close of its evidence, elects, in writing, on which count it will rely for conviction, it should not

required to elect as to counts is a matter largely in the discretion of the court.¹

b. AS TO OFFENSES. — Where the evidence for the prosecution shows that several offenses of the nature of the one charged have been committed by the accused within the time covered by the indictment, the defendant may require the state to elect on which offense it will rely for a conviction, before introducing his evidence.²

Sufficiency of Election. — In making his election the prosecutor should point out with reasonable certainty the particular offense or offenses upon which he relies for conviction.³

be permitted to modify such election after the evidence is all admitted. *State v. Falk*, 46 Kan. 498.

Failure to Require Election. — A defendant who fails to require the prosecutor to elect on which count he will rely for conviction cannot, on appeal, object to a finding on the whole indictment. *Wreidt v. State*, 48 Ind. 579.

1. *State v. Smith*, 22 Vt. 74. See also *State v. Farmer*, 104 N. Car. 887; *Osgood v. People*, 39 N. Y. 449; *State v. Mueller*, 38 Minn. 497.

Several Counts in the Same Language. — An indictment contained several counts charging illegal sale of intoxicating liquor in the same language, and the court held that the prosecution should have been ordered to elect upon which count it would rely for conviction, or a demurrer should have been sustained to all the counts but one. *State v. Von Haltschuherr*, 72 Iowa 541.

Keeping Place and Selling. — In *People v. Keefer*, 97 Mich. 15, certain counts of the information charged the keeping of a saloon where liquors were stored for sale, sold, and furnished, and others charged a sale to a person named. It was held, on the authority of *Tiedke v. Saginaw*, 43 Mich. 64, that the court erred in refusing to order the people to elect on which count or counts of the information they would proceed.

2. *Long v. State*, 13 Ind. 566; *Lebkovitz v. State*, 113 Ind. 26; *Com. v. O'Hanlon*, 155 Mass. 108.

In Kansas, Ohio, South Dakota, and Tennessee it is held that where the evidence discloses several sales within the time covered by the indictment, and only one is charged, the state should be required to elect upon which offense it will rely for a conviction. *State v. Lund*, 49 Kan. 663; *State v. Schweiter*, 27 Kan. 499; *Stockwell v. State*, 27

Ohio St. 563; *State v. Valentine*, 7 S. Dak. 98; *State v. Boughner*, 5 S. Dak. 461; *Murphy v. State*, 9 Lea (Tenn.) 373.

In Missouri it is held that in prosecutions for misdemeanor where the evidence develops several offenses, the state will not be compelled to elect upon which offense it will rely for conviction. *State v. Heinze*, 45 Mo. App. 403.

Difficulty in Fixing Date. — If the evidence shows more than one sale within the time covered by the indictment, but no particular date can be fixed as to any of them, it is not error for the court to refuse to compel the state to elect as between the offenses. *Sanders v. State*, 88 Ga. 254; *State v. Kerr*, 3 N. Dak. 523.

When Discretionary with the Court. — In *State v. Mueller*, 38 Minn. 497, the court said, in substance, that assuming that the furnishing of each glass of liquor might have been treated as a separate offense, all were so connected together as to form one transaction, which it would be inconvenient to separate, and each part of which would tend to show the nature of the others; that under such circumstances evidence might be given of the whole transaction; that even if it constituted several offenses of the same kind, it was in the discretion of the court whether the state should be required to elect, and that if no election was made, a verdict would be a bar to any further prosecution for any offense of the same kind included in it.

3. *State v. Guettler*, 34 Kan. 582.

Insufficient Election. — Where a witness for the state testified, in a prosecution under an indictment in a single count, that at different times during the year preceding the finding of the indictment the defendant sold to him both beer and whiskey, and the county

Effect of Election. — Where the state has made its election it will be held to such election throughout all subsequent proceedings and on a second trial.¹

6. Defects Cured by Verdict — Indefiniteness or Informality. — Mere indefiniteness in an information, where it contains enough to inform the defendant of the nature of the offense with which he is charged,² or formal defects which might have been cured by amendment, will not sustain objections first made after verdict.³

attorney, when called on to elect what particular sale he would rely upon, said that he would stand upon the sale made to the witness as testified to by him, but failed to designate the time of the sale or the kind of liquor sold, the election was held too indefinite. *State v. Guetler*, 34 Kan. 582. See *State v. O'Connell*, 31 Kan. 383.

What Does Not Amount to an Election.

— The first witness for the state in a prosecution for retailing spirituous liquors was asked by the prosecuting attorney whether, in the period covered by the indictment, he had ever obtained liquor from the defendant's store in less quantities than a quart, and he answered that he had never bought any liquor there, but that on one occasion, while in such store with others, the defendant's wife gave them a drink of liquor, for which he paid no money, nor was any money paid. The court held that this did not amount to an election on the part of the prosecution to proceed only for a violation of the statute for selling in less quantities than a quart. *Seibert v. State*, 40 Ala. 60.

Offering evidence as to particular sales, in a prosecution for unlawfully keeping liquors for sale, will not amount to an election to rely on the sales for conviction. *State v. Hartwick*, 49 Conn. 101.

Multifariousness Cured by Election. —

An information charged the offense of keeping a place where liquors were sold, and also of selling on a specific day. The people were required to elect before submission to the jury, and a subsequent objection for multifariousness was overruled. *People v. Rice*, 103 Mich. 350.

1. *Elam v. State*, 26 Ala. 48. *Contra*, *State v. Dow*, 74 Iowa 141, holding that where the state has made its election to rely upon a particular sale, it may, upon a subsequent trial of the case, elect to rely for conviction upon a different sale than that upon which the

first trial was had, the *Iowa Code*, § 4488, providing that "the granting of a new trial places the parties in the same position as if no trial had been had."

2. *State v. Marshall*, 2 Kan. App. 792.

An information charged that at a certain time and place the defendant "did then and there unlawfully sell and barter spirituous, malt, vinous, fermented, and other intoxicating liquors, contrary to the statutes in such cases made and provided," and the court held that the information was sufficient where objection for indefiniteness was first made after verdict, on a motion in arrest of judgment. *State v. Ratner*, 44 Kan. 429.

3. *Com. v. O'Keefe*, 123 Mass. 253.

Where it will be presumed from the issue that the verdict would not have been given without proof of certain facts, defective allegations or omission of such facts in the information will be cured by verdict. *State v. Hodgson*, 66 Vt. 134.

Omission of Word "Liquors." — Where the preliminary proceedings on an information for keeping a saloon open on Sunday were formally correct, but the information omitted the word "liquors," the court held that since it was in the power of the trial court, under the statute, to amend such formal defect, it must be held, after verdict, that the defendant was not prejudiced by the omission. *People v. Case*, 105 Mich. 92.

Failure to Allege Price. — Where an indictment failed to allege the price for which the liquor was sold, an objection after the defendant had been convicted was held too late where no objection was made at the trial. *Hare v. State*, 4 Ind. 241; *Miles v. State*, 5 Ind. 239.

Omitting Day and Month. — Where an indictment for selling intoxicating liquors without a license does not allege the day or month on which the alleged sale was made, an objection

II. ACTIONS FOR RECOVERY OF PENALTIES AND FORFEITURES —

1. **Certainty in Declaration or Complaint.** — More particularity is required in a declaration for recovery of the statutory penalty than in some other common-law actions where general counts are allowed,¹ and the declaration must not be more general than is allowed by statute.²

2. **Complaint by Overseer of the Poor.** — In *New York* a complaint by overseers of the poor for a statutory penalty for violation of the liquor law should state the names of the persons to whom the sales were made, or allege an excuse for not doing so.³

III. **VERDICT** — 1. **General Verdict.** — Where there is a general verdict of guilty it will be presumed that all the facts charged as constituting the offense have been found to be true.⁴

comes too late after verdict, no objection having been made at the trial. *Phillips v. State*, 86 Ga. 427.

1. A complaint to recover a penalty fixed by an ordinance for violation of the liquor law is sufficient if it recites the number of the section violated without setting it out; and if the defendant rests his defense on the invalidity of the ordinance it is his duty to bring it forward. *Frankfort v. Aughe*, 114 Ind. 77.

See *Benalleck v. People*, 31 Mich. 200, holding that in an action to recover the statutory penalty, the declaration must, in the absence of statutory provisions to the contrary, set out with substantial certainty the facts which bring the defendant within the terms of the statute, so that there may be no liability of mistaking them; and it must aver the obligation to have arisen under the statute, and that a declaration which only refers generally to the whole statute, and not specifically to the section for a violation of which the action is brought, is insufficient on demurrer, and also, apparently, where objection is taken to the admission of evidence under it. But compare *Kee v. McSweeney*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 229, where it was held that a complaint will be sufficient, on motion to make it more definite and certain, if it refers to the act giving the penalty, although the particular section thereof is not pointed out. See generally article PENALTIES AND FORFEITURES.

Reference to Statute Relating to Party Plaintiff. — Where the complaint referred to the statute and section imposing the penalty, an omission to refer to an amendatory statute giving the officer who was the plaintiff the right to sue was held not to vitiate the com-

plaint. *Prussia v. Guenther*, 16 Abb. N. Cas. (Orleans County Ct.) 230.

To Whom Penalty Would Go. — A complaint for the recovery of a penalty for violation of the liquor law need not aver to whom the penalty, if recovered, would go. *Com. v. Burding*, 12 Cush. (Mass.) 506; *Com. v. Tuttle*, 12 Cush. (Mass.) 502.

Other Pending Action. — The complaint need not aver that an action for the same penalty has not been brought in the name of the city or town where the offense is alleged to have been committed. *Com. v. Murphy*, 2 Gray (Mass.) 510.

2. *Benalleck v. People*, 31 Mich. 200.

3. Where the names of the persons are not alleged, but an excuse is averred therefor, such circumstances should be stated as will, to some extent, identify the transaction complained of, or the complainant will be compelled to make the complaint more definite or to furnish a bill of particulars. *Kee v. McSweeney*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 229.

Action in Name of Overseer. — Before a person can bring an action in the name of the overseer of the poor to recover such penalty, he must make complaint to the overseer of the poor with reasonable proof thereof. The complaint made to the overseer should be so definite, and should be accompanied with such proof, as to satisfy the overseer that a penalty has been incurred, or to enable him to investigate and decide whether or not the penalty has been incurred. *Jobbitt v. Giles*, 22 Hun (N. Y.) 274; *Hess v. Appell*, 62 How. Pr. (N. Y. Marine Ct.) 313.

4. *Rhoads v. Com.*, (Pa. 1886) 4 Cent. Rep. 725.

Keeping for Illegal Sale. — In prosecu-

Several Counts of Same Nature. — If the indictment contains several counts of the same nature, based upon the same section of the statute, upon which the same judgment can be rendered, a general verdict will be sufficient if the evidence sustains any of the counts.¹

One Good Count. — A general verdict under an indictment containing several counts will be sufficient if there is one good count sustained by evidence.²

Irreconcilable Counts. — A general verdict on an indictment containing irreconcilable counts is erroneous.³

2. Special Verdict. — A special verdict must contain all the facts essential to support the charge.⁴

tions for keeping intoxicating liquor for illegal sale a general verdict is usually sufficient. *State v. Nowlan*, 64 Me. 531; *State v. McCann*, 61 Me. 116.

On a Count Joining Several Offenses, if the jury find a general verdict of guilty under an indictment properly joining several offenses in one count, and in fixing the punishment impose a penalty appropriate to only one of the offenses charged, it will be equivalent to an expressed finding of guilty of that particular offense. *Sampson v. State*, 107 Ala. 76.

Effect as Res Judicata. — If there is a general verdict of guilty upon an information containing several counts, but there is no specification as to count, the verdict will protect the defendant against any further prosecution on any of the counts contained in the information. *Powers v. People*, 42 Ill. App. 30.

1. *Frasier v. State*, 5 Mo. 536.

Failure to Designate Count. — If the indictment contains two counts and there is a general verdict of guilty under one of them, the penalty which may be imposed being greater on one than on the other, and the fine assessed is the lowest one that can be assessed under the indictment, the defendant cannot complain if the verdict fails to show under which count he was found guilty. *Taylor v. State*, 49 Ind. 555.

Charging Sale to Minor, and Also Retailing. — Where an indictment charged a selling of liquor to a minor in one count and unlawfully retailing in the other, and there was a general verdict of guilty as charged, a motion in arrest of judgment was overruled, for the verdict was a finding of guilty of both offenses, and if, in considering the whole case on motion for a new trial, the court should discover that the

evidence was sufficient to uphold a conviction on one count, but insufficient as to the other, it would be proper to impose sentence accordingly. *Jones v. State*, 67 Miss. 111.

Failure to Request Separate Verdicts. — If a general verdict be rendered on several counts, the defendant cannot complain of it in the absence of a request that the court order separate verdicts. *State v. Basserman*, 54 Conn. 88.

2. *People v. Davis*, 45 Barb. (N. Y.) 494; *Miller v. State*, 5 How. (Miss.) 250; *Jordan v. State*, 22 Fla. 528.

Judgment on Count Not Sustained. — An indictment contained four counts and the defendant was found guilty as charged in the indictment, and judgment and sentence were upon each count, but there was no evidence whatever to sustain one of such counts. The court held that the judgment was not proper. *Wleckie v. People*, 14 Ill. App. 447.

3. If some of the counts of an indictment are based on one system of law, and another count is based on another system of law, and the two systems cannot be in operation at the same time, in the same territory, and there is a general verdict of guilty, and the sentence imposed is of a character authorized in case of a conviction under either system, the verdict and sentence should be set aside, as it cannot be known on what law the verdict and sentence are based. *Butler v. State*, 25 Fla. 347.

4. **Failure to Show That Sale Was Authorized.** — In a prosecution for selling liquor without a license or other authority, a special verdict that "the sale was made, as set forth in the complaint," or that "the defendant made the sale, as set forth in the complaint," is not sufficient to authorize a judgment

3. Alternative Verdict. — A verdict rendered in the alternative is insufficient.

4. Specifying Count. — Where there is a verdict of guilty on a specified count and the verdict is silent as to the other counts, it will amount to an acquittal on the counts not referred to.¹

5. Separate Verdicts on Separate Counts. — There need not be separate verdicts upon each count of an information.²

6. Conviction of Included Offense. — In charging a second or subsequent offense, the first offense is necessarily included in the charge, and the accused may be properly convicted thereof upon the trial of an indictment charging the accused with a third offense,³ and a defendant may be convicted of selling on Sunday under an indictment charging him with selling in a dram-shop on Sunday.⁴

7. Variance. — An immaterial variance in the verdict will not vitiate it.⁵

IV. PROCEEDINGS FOR SEARCH, SEIZURE, AND FORFEITURE — 1. Nature of the Proceeding. — A proceeding solely for the search of premises and the seizure and condemnation of liquors is *in rem*, and is to be considered and tried as civil causes are tried,⁶ unless the statute makes it a proceeding in the nature of a criminal prosecution;⁷ and in some jurisdictions the possession of liquors with intent to sell them in violation of law constitutes a criminal

against the defendant, for the reason that it does not show that the sale was unauthorized. *Com. v. Dooly*, 6 Gray (Mass.) 360; *Rhoads v. Com.*, (Pa. 1886) 4 Cent. Rep. 725, holding that where the defendant was indicted specifically as a druggist for selling, without license, liquor to be used as a beverage, a verdict of "guilty of selling liquor without license" would not support a judgment, because it did not find the facts necessary to make a sale by a druggist unlawful.

Where an indictment charges that intoxicating liquors are kept in a specified place, it will not be supported by a verdict which finds that the liquors were owned or kept in such place, as the finding is in the alternative, and does not establish the fact of keeping as averred in the complaint. *Com. v. Certain Intoxicating Liquors*, 4 Allen (Mass.) 601.

1. *State v. Severson*, 79 Iowa 750; *Harvey v. State*, 80 Ind. 142.

Guilty on One Count, Acquittal on Others. — If, in a prosecution before a justice of the peace, the defendant is found guilty on one of several counts and is acquitted as to the others, he cannot, on appeal to the District Court,

be tried on a count of which he was acquitted. *State v. Malling*, 11 Iowa 239.

2. "It is necessary for a verdict definitely and clearly to show the finding of the jury upon each count, but such findings, separately stated, may be included in one verdict." *State v. Nield*, 4 Kan. App. 626.

3. *State v. Gaffeny*, 66 Iowa 262.

4. *State v. Heckler*, 81 Mo. 417.

5. An indictment charged a sale of spirituous liquor within two miles of Bethel Methodist Church, in Macon county, and the verdict described the church simply as "Bethel Church in Macon county," and it was held an immaterial variance, as the word "Methodist" in the indictment was harmless surplusage. *State v. Downs*, 116 N. Car. 1064.

6. *State v. Barrels of Liquor*, 47 N. H. 369, holding that all the issues were to be decided upon a preponderance of the evidence.

7. In *Com. v. Certain Intoxicating Liquors*, 115 Mass. 142, and *Com. v. Certain Intoxicating Liquors*, 105 Mass. 598, it was held that a proceeding under the statute of 1869, c. 415, for the forfeiture of liquors illegally kept, etc., was of a criminal nature, necessitating

offense for which the party may be arrested and tried on the same complaint which authorizes the seizure.¹

2. Requisites of Complaint or Information Generally. — The proceeding is ordinarily begun by filing a verified complaint with a magistrate,² which describes the premises to be searched and the

proof beyond a reasonable doubt of the allegations in the complaint.

1. See *State v. Connelly*, 63 Me. 212; *State v. Erskine*, 66 Me. 358; *State v. Learned*, 47 Me. 426, holding that in such a case the complaint may be sufficient as against the liquors and at the same time not contain sufficient averments as a criminal process against the person: *State v. Miller*, 48 Me. 576, pointing out that when the officer has arrested the person and seized the liquors the proceedings thenceforth become two entirely separate cases.

But in *State v. Robinson*, 49 Me. 285, followed in *State v. Intoxicating Liquors*, 80 Me. 91, it was held on construction of the statutes that the trial upon a libel against the liquors seized is a criminal proceeding, and that the rules applicable to criminal cases apply.

2. Designation of Person Keeping. — In a proceeding solely for condemnation of the liquor, the necessity of stating in the complaint the name of the person by whom they are intended for sale depends upon the statute. In *State v. Learned*, 47 Me. 426, it was held sufficient to aver that the liquor was kept and intended for sale. See also *State v. Kaler*, 56 Me. 88.

Under different statutory provisions in *Massachusetts*, the person by whom the liquors are owned or kept and intended for sale must be particularly designated. *Com. v. Certain Intoxicating Liquors*, 115 Mass. 142.

In *Iowa* the complaint must charge some specific person as owner or keeper with an illegal intent; otherwise the liquor cannot be forfeited. *State v. Certain Intoxicating Liquors*, 64 Iowa 300. See also *State v. Harris*, 36 Iowa 136. But actual unlawful sales need not be alleged. *State v. Blair*, 72 Iowa 591.

Averment that Complainant Is a "Credible Resident," etc. — Where a statute provided for a complaint by any "credible resident of the county," it was held that the failure of the complaint so to describe the complainant was not a jurisdictional defect. *Weir v. Allen*, 47 Iowa 482; *State v. Thompson*, 44 Iowa 399; *State v. Blair*, 72 Iowa 591.

Residence of Complainant. — The complainant's residence is sufficiently designated by setting forth the county in which he lives. *Com. v. Intoxicating Liquors*, 113 Mass. 13, holding further that his place of residence was immaterial.

Complaint for Search of Dwelling House. — Where a statute authorized a warrant to search a dwelling house only when a place of common resort was kept therein, a complaint and warrant describing it as "being a place of common resort" was held insufficient. *Com. v. Certain Intoxicating Liquors*, 97 Mass. 332. But it was held sufficient to describe it as a house occupied by the defendant "as a place of common resort kept therein." *Com. v. Leddy*, 105 Mass. 381.

Signature to Complaint. — In *Vermont*, under the Act of 1855, it was held not essential that the complaint should be signed by the complainant. *Gill v. Parker*, 31 Vt. 610.

As to the sufficiency of a signature under the *Massachusetts* statute, see *Com. v. Certain Intoxicating Liquors*, 142 Mass. 470.

Oath or Affirmation. — In *Maine* a complaint may be made on affirmation instead of oath, if the plaintiff is conscientiously opposed to taking an oath. *State v. Devine*, (Me. 1888) 13 Atl. Rep. 128; *State v. Welch*, 79 Me. 99.

In *Com. v. Certain Intoxicating Liquors*, 13 Allen (Mass.) 52, a complaint for search and seizure of liquor alleged to have been illegally kept in a dwelling house was held sufficient when supported by an oath of one of the complainants in the alternative form, to wit, that intoxicating liquor "has been sold in the house above mentioned by the occupant of said house, or with the consent and permission of the occupant of said house, contrary to law, within one month."

Amendment of Jurat. — In *State v. Smith*, 54 Me. 33, it was held that the jurat to a complaint for search and seizure might properly be amended after service by inserting the names of other witnesses which were inadvertently omitted.

property to be seized, and alleges the complainant's belief that the liquors kept or deposited are intended to be sold in violation of law, and prays that a warrant for search and seizure be issued.¹

3. Description of Place in Complaint and Warrant — In General. — Description of the place to be searched is sufficiently certain if it is such as would be necessary in a deed to convey the premises.²

Complaint, Libel, or Information after Seizure. — The statutes frequently provide for the filing of a complaint or libel or information against the liquors after they are seized. See *State v. Le Clair*, 86 Me. 522; *State v. Intoxicating Liquors*, 58 Vt. 594.

The complaint thus made relates back to the time of seizure. *Com. v. Certain Intoxicating Liquors*, 107 Mass. 386, holding that the complaint is not vitiated by describing the liquors as still in the possession of the person in whose custody they were seized. But this false recital was held unnecessary in *State v. Le Clair*, 86 Me. 522. See also *State v. McCann*, 59 Me. 383; *State v. Dumphy*, 79 Me. 104; *State v. Erskine*, 66 Me. 358.

In *Maine* the proceedings on the libel are separate from the search and seizure process. *State v. Intoxicating Liquors*, 80 Me. 91, holding that the libel need not recite the original proceedings more fully than the statutory form requires. See also *Guptill v. Richardson*, 62 Me. 257.

In *Rhode Island* an information for forfeiture of liquors kept within the state for sale in violation of law is sufficient without the addition of the words "with force and arms," "against the statute," or "with intent to sell." *In re Hoxsie's Liquors*, 15 R. I. 241, holding also that under Pub. Laws 1882, c. 87, § 29, now Gen. Laws 1896, c. 102, § 23, no negative allegations of any kind need be averred. And an information alleging that the liquors "were kept for the purpose of sale, without authority, within this state, against the statute," was held sufficient in *In re Young's Liquors*, 15 R. I. 243.

An information under the *United States* statutes for the forfeiture of distilled spirits because of the omission of the date on the warehouse stamp and inspection mark need not allege that the dates were not removed through accidental causes, such fact being matter of defense. *U. S. v. 9 Casks, etc.*, of Distilled Spirits, 51 Fed. Rep. 191. An information for forfeiture of distilled spirits imported by means of en-

try which was alleged to be false in that it stated that the spirits were "American whiskey, reimported in the same condition as when exported," was held sufficient as to the specific charge. *U. S. v. Fifteen Barrels of Distilled Spirits*, 51 Fed. Rep. 416.

1. Probable Cause for Relief. — In *Maine*, under the statute in force in 1874, it was held that the complaint need not contain an averment that the complainant "has probable cause to believe" that the defendant keeps liquors with intent to sell them in violation of law, and that it was enough to state that he does in fact believe that intoxicating liquors are thus kept by the defendant, without adding that his belief is a reasonable one. *State v. Nowlan*, 64 Me. 531; *State v. Devine*, (Me. 1888) 13 Atl. Rep. 128; *State v. Welch*, 79 Me. 99.

Grounds for Relief. — Under *Massachusetts* Stat. 1869, c. 415, § 45, the facts and circumstances constituting the grounds for the complainant's belief were required to be set forth. *Com. v. Certain Intoxicating Liquors*, 105 Mass. 595; *Com. v. Leddy*, 105 Mass. 381, holding that an averment that the facts and circumstances consisted of common report was sufficient. See also *Com. v. Intoxicating Liquors*, 110 Mass. 182; *Com. v. Certain Intoxicating Liquors*, 105 Mass. 181.

In *Connecticut* a warrant for the seizure of liquors was issued upon the oath of the complainants "that they have reason to believe, and do believe, to be substantially true the allegations in said complaint," and the court held that the oath was sufficient, it not being necessary to state the facts on which the belief was founded. *Lowrey v. Gridley*, 30 Conn. 450.

2. State v. Bartlett, 47 Me. 388; *State v. Robinson*, 33 Me. 564.

Where the complaint described the place to be searched as "a certain wagon on the fair ground on the easterly side of Union Hall, in Searsport," the place was sufficiently described. *State v. Knowlton*, 70 Me. 200.

If the officer is commanded to search

But the description should leave no discretion to the officer as to what place he will search.¹ It is sufficient to describe the premises as situated on a certain corner of two designated streets, alleging the character of the building or premises.²

a dwelling house for liquors, he is not authorized to search a barn for the same. *Jones v. Fletcher*, 41 Me. 254.

Insufficient Description. — A warrant for the search and seizure of certain liquors which averred that in W. certain liquors "are kept and deposited by R., of H., in a certain distillery there situate, about one and one-half miles northeasterly from H. Furnace," was held to be a sufficient description of the place to be searched. *Com. v. Certain Intoxicating Liquors*, 97 Mass. 334.

Extent of Constitutional Requirement. — "The constitutional requirement as to the description to be given of the place to be searched, and the persons or things to be seized, relates to the warrant and not to the complaint." *In re Horgan's Liquors*, 16 R. I. 552.

1. *State v. Intoxicating Liquors*, 44 Vt. 208.

Ownership and Place of Residence. — Where the place described was "the dwelling house of R. H., of Shrewsbury," it was held sufficiently certain, and imported that the house to be searched was in the town of Shrewsbury. *Lincoln v. Smith*, 27 Vt. 328.

Sufficient Descriptions. — Where the complaint described the premises to be searched as "a certain building situated in the rear of the tenement situate on the southerly side of Front street, and under the store of Alexander Pettigrew on said street," it was held sufficient. *Com. v. Intoxicating Liquors*, 113 Mass. 455.

Likewise, a complaint describing the premises to be searched as "a certain small wooden shed in rear of another shed or storehouse, in rear of Washington Hotel, so called, occupied by said White on north side of Westminster street, in said Taunton, and occupied by said White as a storehouse." *Com. v. Certain Intoxicating Liquors*, 113 Mass. 208.

A description in a complaint and warrant of the premises to be searched as "a certain grocery store, the cellar under the same, and the premises there situate, to wit, on the easterly side of Main street, and numbered three hundred and seventy-five on said street, in the city of Worcester, in said county,

and occupied by said A.," was held a sufficient designation of the place, although the grocery store and cellar only were occupied by A., and were in a block of four stories, and two other rooms in the first story bearing other numbers were occupied by other persons as stores. *Com. v. Intoxicating Liquors*, 113 Mass. 13.

Where the complaint and warrant described the place to be searched as "situate in Federal street, numbered two hundred and ninety-one and two hundred and ninety-three in said street, in said Boston, in the basement and first story of said building," the court held that the premises were sufficiently described. *Com. v. Certain Intoxicating Liquors*, 122 Mass. 36.

Misnomer of Street. — If a search warrant for intoxicating liquors so misnames one street in the description of the place where the liquors are kept as to make the application of the whole impossible, it will not invalidate the warrant if in other respects the place is truly described, so as to identify it with the place described in the complaint. *Downing v. Porter*, 8 Gray (Mass.) 539.

2. *Com. v. Intoxicating Liquors*, 110 Mass. 182.

At Corner of Designated Streets. — Where the complaint described the premises as "near the corner of E. street, in the borough of D., within said town of D., in a wooden building, occupied by J. H., of said D., consisting of a one-story building and a garden thereto attached and occupied as a saloon and place of public resort; also in another wooden building situated between the D. N. office and the said one-story building used as a saloon, and the cellar of the said wooden building described above, and used by the said J. H. as a dwelling house; all of said buildings being within the town and borough of D., and which said liquors are so owned and kept at said place," it is sufficient description of the premises, and the fact that the complaint used the word "place," while the warrant employed the word "places," did not vitiate the warrant for uncertainty. *Hornig v. Bailey*, 50 Conn. 40. And where the complaint

By Ownership. — The place to be searched may be sufficiently described by giving the ownership of the same.¹

By Name. — The premises may also be sufficiently described by name.²

Building Occupied by Defendant and Another. — Where the complaint and warrant described the building as occupied by the defendant and another person, and the whole building was directed to be searched, the description was held too general.³

By Occupancy, Street, and Number. — The premises may be sufficiently described by naming the occupant and the location as to street,⁴ or street and number.⁵

Repugnant Words of Description in the complaint and in the warrant may be rejected, if without them the description would still be sufficient.⁶

Description of Vehicle. — A complaint for search of a vehicle for liquors need not specify the kind of vehicle, if it be otherwise identified.⁷

Place a Traversable Allegation. — The allegation as to the place or

described the premises as "a certain tenement situated on the northeasterly junction of D street and C street, and known as the Portsmouth Ale Depot," in G., and occupied by A as a place of common resort, where liquors were intended to be sold by A in the commonwealth, contrary to law, it was held a sufficient description of the premises to be searched. *Com. v. Certain Intoxicating Liquors*, 122 Mass. 8.

1. *State v. Thompson*, 44 Iowa 399.

2. In *State v. Twenty-five Packages of Liquor*, 38 Vt. 387, the complaint described the premises to be searched for liquor as "the American Hotel and barns, sheds, and other outbuildings adjacent thereto and forming a portion of the premises of said hotel in Burlington," and the court held the description sufficiently specific, it being regarded as a designation of a single establishment. "The word 'place,'" in the statute, said the court, "must receive a reasonable interpretation, not so broad as to encourage a looseness of procedure, nor so narrow as to prevent the search of the entire premises occupied and used by a person in the ordinary course of his business as an innkeeper." See also *Com. v. Certain Intoxicating Liquors*, 146 Mass. 509.

In *Com. v. Certain Intoxicating Liquors*, 122 Mass. 8, a complaint described the place to be searched as a "certain tenement," known as the Portsmouth Ale Depot, occupied by A.

as a place of common resort, and at the trial there was evidence that the first floor of the building was occupied as a liquor store, but the three upper stories, having an independent stairway from the street, were used as a dwelling house, and the court held that the place directed to be searched was not a dwelling house within the meaning of the statute, and the fact that the upper floors of the building were used as a dwelling house was immaterial.

3. *Com. v. Certain Intoxicating Liquors*, 110 Mass. 499.

4. *State v. Minnehan*, 83 Me. 310.

5. *Com. v. Intoxicating Liquors*, 150 Mass. 164.

Building Bearing Two Numbers. — If a building is known by two numbers, and is as well known by one as by the other, it may be described by either in the complaint and warrant. *Com. v. Certain Intoxicating Liquors*, 6 Allen (Mass.) 596.

6. Where the complaint described the premises to be searched as formerly owned by A, and the warrant described them as formerly owned by B, the court held that such repugnant words of description might be rejected, there being a further and sufficient description. *State v. Bartlett*, 47 Me. 388.

7. *Com. v. Certain Intoxicating Liquors*, 107 Mass. 386, holding that if an unintelligible description of the kind of vehicle be added, such description may be rejected as surplusage.

premises where the liquors to be searched for are kept is a material and traversable allegation, and must be proved.¹

Proof and Variance. — The proof of the premises described to be searched must correspond with reasonable certainty to the description given in the complaint and warrant.²

4. Description of Liquors to Be Seized — Generic Name. — Liquors to be searched for and seized may be described by their generic name.³

Kinds of Liquor. — If the complaint and warrant designate for seizure "certain intoxicating liquors," and describe the particular species under a *videlicet*, the officer will not be authorized in taking any except those designated by their specific names.⁴

Quantity of Liquor. — If the quantities of liquor to be seized be stated under a *videlicet*, the officer's authority in seizing the

1. *Com. v. Certain Intoxicating Liquors*, 117 Mass. 427.

2. Where the premises to be searched were described as occupied as a place of common resort, the description was supported by proof that the place was a shop for the sale of intoxicating liquors, and that persons went there without restraint for the purpose of procuring liquors, although the sales were conducted in an orderly manner. *Com. v. Certain Intoxicating Liquors*, 107 Mass. 216.

Where the premises were described as a certain building in Boston, "situate in Washington street, and numbered one hundred and ninety-five and one-half on said street in said Boston, and the basement of said building," the description was held to be supported by proof that the basement was under a shop numbered 197 Washington street. *Com. v. Certain Intoxicating Liquors*, 117 Mass. 427.

Where the liquors were described as kept "in the cellar of a certain one and a half story wooden house," kept by the claimant as a "storehouse," proof that the liquors were kept in the cellar of his dwelling house was held sufficient. *Com. v. Certain Intoxicating Liquors*, 122 Mass. 14.

Fatal Variance. — Where the complaint and warrant were for keeping and depositing liquors in his shop and the appurtenances thereto, they were not supported by proof that the defendant unlawfully had such liquors upon his person. *State v. Therrien*, 86 Me. 425.

Where the place described to be searched was a dwelling house and its appurtenances, it was held that the de-

fendant could not be convicted on proof of keeping liquors in a stable which was not used in connection with the dwelling house, the stable being used exclusively by the defendant, while the dwelling house was in the exclusive use of another person. *State v. Kelleher*, 81 Me. 346.

A complaint describing the liquor as kept and deposited, by some unknown person, in a certain building, kept by such unknown person as a storeroom, was not supported by evidence that the liquors were deposited in a freight depot belonging to a railroad company, and that they were received and deposited there in the regular course of business like other freight, and were not otherwise kept or deposited. *Com. v. Certain Intoxicating Liquors*, 116 Mass. 26.

3. If the liquor be described as spirituous or intoxicating, it will be sufficient. *State v. Robinson*, 33 Me. 564.

A complaint and warrant for search and seizure of "intoxicating liquors, to wit, * * * a certain quantity of mixed liquors," sufficiently shows that the mixed liquors are intoxicating, for the word "intoxicating" must be taken as qualifying not only the word "liquors" before the *videlicet*, but the specific descriptions of different liquors which follow it. *Com. v. Certain Intoxicating Liquors*, 110 Mass. 416.

4. *Mallett v. Stevenson*, 26 Conn. 428. It is sufficient to describe the liquors in the search warrant as "certain spirituous and intoxicating liquors, to wit, rum, gin, brandy, whiskey, wine, alcohol, and ale." *State v. Whiskey*, 54 N. H. 164.

liquor will not be limited to the quantities thus specified.¹ And in alleging the quantity of the liquor to be seized, it is proper to state that it is a certain quantity of intoxicating liquor, being about, but not exceeding, a named quantity.²

5. Requisites of Warrant Generally.—The warrant must contain all of the material allegations expressly required by the statute,³ as, for instance, that probable cause has been shown,⁴ or a recital of the names of the complainants.⁵

Adopting Complaint as Part of Warrant.—The complaint may be adopted as part of the search warrant, and both may be issued together as one instrument.⁶

1. In *State v. Brennan's Liquors*, 25 Conn. 278, the complaint alleged that certain quantities of spirituous liquors, to wit, ten gallons of brandy, ten gallons of rum, etc., were kept at a certain place by B., and intended by him to be sold in violation of the statute; and by virtue of a warrant which recited the complaint, the officer seized a hogshead containing thirty gallons of rum, and a barrel containing eighteen gallons. The court held that the specification of the kinds and quantities of the liquors under the *videlicet* was intended as a description of them, and not to limit their quantities, and that the officer in making the seizure was not limited to the quantity specified in the complaint.

2. *In re Liquors of Fitzpatrick*, 16 R. I. 60; *Downing v. Porter*, 8 Gray (Mass.) 539, where the description was "a certain quantity of gin, being about and not exceeding one hundred gallons."

Where the liquor was described as "a certain quantity of whiskey, being about and not exceeding fifty gallons," and there was a like description of other kinds of intoxicating liquors, the description was held sufficient, although the quantity of whiskey actually found and seized was only two gallons, and although some of the kinds of liquors described were not found at all. *Com. v. Certain Intoxicating Liquors*, 13 Allen (Mass.) 52.

3. *Com. v. Certain Intoxicating Liquors*, 105 Mass. 178. See also *Jones v. Fletcher*, 41 Me. 254; *State v. Spencer*, 38 Me. 30.

Direction to Summon Complainant.—In *Massachusetts* the warrant need not direct that the complainant be summoned as a witness. *Downing v. Porter*, 8 Gray (Mass.) 539.

4. *Com. v. Intoxicating Liquors*, 110 Mass. 182; *Com. v. Certain Intoxicating Liquors*, 105 Mass. 178, holding that the omission of that averment required by statute deprived the officer of protection in serving the warrant, and *distinguishing* *Holland v. Seagrave*, 11 Gray (Mass.) 207, which was decided under a different collocation of statutes, afterwards revised, and held the averment to be unnecessary.

Where the clause "probable cause having been shown for the issuing of this warrant" is inserted at the close of the sentence which directs the officer to enter and search the premises described, it sufficiently shows that the court made an adjudication that there was probable cause, and believed that the complaint on which the warrant issued was true, and it supplies the place of an allegation to that effect in the jurat of the complaint. *Com. v. Intoxicating Liquors*, 113 Mass. 13.

5. *Guenther v. Day*, 6 Gray (Mass.) 490, decided under *Massachusetts Stat.* 1855, c. 215, § 25.

In *Hornig v. Bailey*, 50 Conn. 40, it was held that a warrant was not rendered invalid for omitting to allege that complaint had been made and by whom made where all this appeared in the complaint and certificate of the justice attached to it, both of which were on the same paper with the warrant and a part of the process.

6. *State v. Erskine*, 66 Me. 358, holding that in adopting the complaint as part of the warrant and issuing both together the complaint does not lose its identity, but the place and property described in the warrant are described in both.

Authority of Clerk to Issue Warrant.—In *Maine*, where the complaint stated that the judge was absent from the

Direction as to Time of Service. — The warrant need not direct that it be served in the daytime.¹

Directing Search of Several Places. — A search warrant for liquors may direct the search of several different places.²

Direction for Return of Writ. — A direction in the warrant for the officer to "make due return of this warrant" is sufficient.³

Liquors Seized Without Warrant. — Where liquors have been seized without a warrant it is not necessary, in a warrant subsequently issued, to command the officer to search for the liquors already seized.⁴

Amendment. — The warrant may be amended in matter of form in the discretion of the court until final judgment.⁵

6. Officer's Return. — The officer's return of seizure should indicate with sufficient certainty that the liquors seized are those against which the warrant is directed,⁶ and it should appear that they were seized in the place referred to in the complaint and warrant.⁷

Return of Warrant Issued After Seizure. — Where a warrant has been issued after seizure, the officer may make his return thereon that the liquors were seized by virtue of the warrant.⁸

7. Claim to Seized Liquors. — The statutes provide for the appearance of parties claiming an interest in the liquors seized⁹ who are afforded an opportunity to contest the alleged grounds

court room, it was held not necessary to repeat such affirmation in the warrant which referred to the complaint in order to authorize the clerk to issue the warrant. *Guptill v. Richardson*, 62 Me. 257.

1. *State v. Brennan's Liquors*, 25 Conn. 284, where the court said: "The presumption is that the officer will execute his precept at a proper time, and in a proper manner, although it contain no special direction to that effect."

2. *Gray v. Davis*, 27 Conn. 447.

3. *Com. v. Certain Intoxicating Liquors*, 97 Mass. 62.

4. *State v. LeClair*, 86 Me. 522.

5. Where the warrant was served by an officer legally authorized to serve it had it been directed to him, the omission of such direction was held to be mere matter of form and amendable until final judgment, especially in view of the *Maine* statute of amendments. *State v. Hall*, 78 Me. 37.

6. In *State v. Hall*, 81 Me. 34, the return was: "By virtue of the within warrant I have seized the following described liquors," and proceeded to describe them the same as in the warrant, but did not allege that they were the same. The court held that "the

return clearly imports, if it does not expressly declare, identity." See also *State v. Robinson*, 33 Me. 564; *State v. Twenty-Five Packages of Liquor*, 38 Vt. 387.

7. *Com. v. Certain Intoxicating Liquors*, 6 Allen (Mass.) 596.

The following return was held sufficient: "By virtue of this warrant I have searched the within described premises, and have seized therein * * * the liquors described in this warrant, with the vessels in which they are contained, to wit," describing the liquors. *Com. v. Intoxicating Liquors*, 113 Mass. 13.

Reference to Warrant. — The premises searched may be sufficiently described in the return of the officer by reference to the warrant. *State v. Twenty-Five Packages of Liquor*, 38 Vt. 387.

8. *State v. Dunphy*, 79 Me. 104. See also *State v. McCafferty*, 63 Me. 223.

9. *State v. Barrels of Liquor*, 47 N. H. 369, holding that the claimant may appear and plead by attorney.

Objection Waived. — Filing a claim to liquors which have been libeled is a waiver of defects in the motion and notice. *State v. Miller*, 48 Me. 576.

of forfeiture.¹ The claimant should state in writing the nature and extent of his claim, and traverse the allegations of the complaint or libel against the liquors.² The state may join issue on the allegation of property in the claimant,³ and the case proceeds to verdict on the issues and judgment for the forfeiture of the liquors or their return to the claimant.

1. In *New Hampshire* the proceedings are essentially civil in every respect. *State v. Barrels of Liquor*, 47 N. H. 369.

2. *State v. Barrels of Liquor*, 47 N. H. 369, where the proper pleadings and proceedings under the statute are prescribed by the court, with the form of a claim and plea.

In *Maine* a claimant of liquors need not set forth in his claim the person of whom, the place where, or the time when such liquors were purchased. *State v. Intoxicating Liquors*, 69 Me. 524.

3. *State v. Barrels of Liquor*, 47 N. H. 369.

INVENTIONS.

See article *PATENTS*.

IRRIGATION.

BY B. C. MATTHEWS AND C. L. HOGIN.

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CROSS-REFERENCES.

See also article *WATERS AND WATERCOURSES*, and cognate titles; articles *DRAINAGE*, vol. 7, p. 209; *LOCAL IMPROVEMENTS*.

I. IRRIGATION DISTRICTS.—In nearly if not quite all of the states in which irrigation prevails, there are irrigation districts, so called. The proceedings for the organization of these districts should be liberally construed,¹ and such districts being public corporations cannot be collaterally attacked.²

1. *Central Irrigation Dist. v. De Lappe*, 79 Cal. 351, where it was contended that the proceedings for the organization of irrigation districts should be strictly construed, but the court said: "So far as proceedings for the organization are concerned, we

think that a reasonably liberal rule of construction should be adopted to carry out the wise purposes of the law."

2. In *Quint v. Hoffman*, 103 Cal. 506, the organization of the Central Irrigation District was assailed, it being contended that the supervisors acted

Sufficiency of Bond. — A determination by the board of supervisors as to the sufficiency of the bond presented with the petition for the organization of an irrigation district is conclusive.¹

II. CONDEMNATION PROCEEDINGS — In General. — Condemnation of lands, waters, water rights, and other property necessary for the purposes of irrigation, is provided for by statute in the various states.

Proper Route. — In condemnation proceedings the fact need not be shown that there is no route except the one adopted, by which the water might be brought on the land.²

Public Use. — The question of public use is one of fact and must be decided by the court before which the action is brought, and its decision is final.³

without their jurisdiction in effecting its organization. The court, however, said: "An irrigation district of this character is a public corporation, formed under a general law, and its object is the promotion of the general welfare. *People v. Selma Irrigation Dist.*, 98 Cal. 206, and cases there cited. Corporations organized under the act of the legislature popularly known as the 'Wright Act' being public corporations, it is immaterial whether they be corporations *de jure* or *de facto*." Such corporations cannot be attacked collaterally.

1. *In re Madera Irrigation Dist.*, 92 Cal. 296, where the court said: "One of the objections to the sufficiency of the proceedings taken by the supervisors in authorizing a vote by the electors for the purpose of determining whether the district should be organized is that the bond which accompanied the petition was so defective as to deprive the board of jurisdiction to authorize such election. If it be conceded that the presentation to the board of a bond with the petition is a jurisdictional prerequisite to their consideration of the petition, we do not think that such element of jurisdiction was wanting in the present case. The bond which was presented, although informal, was not invalid, and was of binding obligation upon those who had signed it. In such a case the determination of its sufficiency by the board of supervisors was as conclusive as their determination respecting the pecuniary responsibility of its signers, or the amount for which the bond should be given."

2. *Rialto Irrigating Dist. v. Brandon*, 103 Cal. 384, holding that the fact that it was possible, as shown by the evidence, to accomplish the purpose

sought, by going a long way around and condemning other lands, at a much greater expense, was immaterial.

Sufficiency of Complaint. — In *Rialto Irrigating Dist. v. Brandon*, 103 Cal. 384, it is said: "The complaint, after alleging plaintiff's organization into an irrigation district and the purpose of its organization, shows that the object sought by the use is to provide water for irrigating lands within the district, particularly describing such lands; that the defendants own the land over which the right of way is sought, particularly describing it, and that such land adjoins plaintiff's district, and constitutes its boundaries on two sides, the north and west; that in order to properly irrigate the lands in the district it is necessary to construct the pipe line, which is particularly described, across the defendants' land at the point designated; and that the right of way is sought for the purposes of establishing and maintaining such pipe line. * * * This was sufficient to show that the use is a public one, and that the taking is necessary to such use." See also *Cummings v. Peters*, 56 Cal. 596.

Aliso Water Co. v. Baker, 95 Cal. 268, is an action wherein it was determined that the complaint in an action to condemn water rights, lands, etc., must show that the use for which the condemnation is sought is a public one. The complaint in this case was further held defective as not describing with certainty the property sought to be condemned, where it asked for the condemnation of all the water of a creek except that which was used by the riparian owners for domestic purposes and the irrigation of the riparian lands.

3. *Lindsay Irrigation Co. v. Mehrrens*, 97 Cal. 676.

III. PARTIES TO ACTIONS — 1. In General. — Any person may be a party to a suit involving water rights who is to be affected by the decree, and every person against whom relief is sought is a necessary party.¹

2. Proper Parties. — Any person whose rights are affected by an adjudication of priorities is entitled to be made a party.²

The Company May Appear for Absent Shareholders as well as for those who are present.³

An Assignee may maintain an action for the recovery of water rights; such suit is founded on the legal title.⁴

The Owner in Fee, but Not in Possession, may maintain an action for the wrongful diversion of water.⁵

A Tenant for Years has sufficient possession to enable him to maintain an action for an injunction.⁶

Tenants in Common may maintain a joint action to restrain the diversion of the waters of a stream, as such diversion is in the nature of a nuisance.⁷

1. See the next note, and generally article PARTIES.

2. *Nichols v. McIntosh*, 19 Colo. 22.

In *Charnock v. Higuerra*, 111 Cal. 473, it is said "that a final and satisfactory adjustment can never be had without the presence of every person having any right in the stream, and that all the facts which can possibly bear on the question should be laid before the court."

Parties in Equity. — Persons who merely use the waters of a stream, but against whom no relief is sought, and who do not claim adversely to the plaintiff, are proper but not necessary parties. *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 75.

3. *Riverside Water Co. v. Sargent*, 112 Cal. 230, wherein it is said: "It should be said, however, that appellant mistakes in assuming, as it apparently does, that the ditch company can defend only for the interests of those of its shareholders who appear and make proof of their several claims; its right, as trustee for all the shareholders, is to establish its claim to all the water owned and controlled by it for their benefit, whether the individuals to whom the water is apportionable are before the court or not." See also *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233.

4. *Smith v. Logan*, 18 Nev. 149, where the court said: "Defendants conceded upon the trial that plaintiff was the owner, in his own right, of a portion of the land described in the complaint. Other tracts of land were

conveyed to him immediately prior to the commencement of this suit by grantors, claiming to have acquired rights by appropriation to the waters of the creek, in connection with their ownership of the land. There was an oral agreement between grantors and grantee that upon the termination of the litigation the lands should be reconveyed to the grantors, respectively. Upon these facts appellant contends that plaintiff, as to the lands so conveyed, and the water rights appurtenant thereto, is not the real party in interest." The court held that the pleadings did not tender the issue whether the plaintiff held the property in his own right or that of another, and that the suit was founded on the legal title.

5. *Heilbron v. Last Chance Water Ditch Co.*, 75 Cal. 117, holding that an owner in fee of land, having leased it, may, while it is in the possession of the tenant for years, or life, maintain an action against a third party for the diversion of water from a natural stream running through the land, on the ground that it is an injury done to the inheritance.

6. *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, where the plaintiffs had a lease for certain lands bordering upon a stream. This was held to be sufficient possession to enable them to maintain a suit for a perpetual injunction, the injunction of course ceasing to operate on the termination of the estate.

7. *Parke v. Kilham*, 8 Cal. 78, where

But Several Persons with Separate Rights cannot unite in an action for damages.¹

Irrigation District as a Party.— Under the various statutes an irrigation district, though a *quasi*-public corporation, is a proper party in an action relating to water rights.²

In Action to Enjoin Collection of Assessments.— In such an action for the purpose of paying interest on bonds of a district which are alleged to be invalid, it is unnecessary to make the irrigation district, the agent for the sale of bonds, or the holder of illegal bonds, a party to the suit.³

3. Joinder of Parties—*a.* PLAINTIFFS. — In equity it is unnecessary for one tenant to join his co-tenant in order to maintain an action to restrain the infringement of his rights in the waters of a stream.⁴

b. DEFENDANTS. — In *Colorado* if a person actually has "the best right" to the waters of a stream he may join in an action all persons who interfere with his right.⁵

Persons Not Joint Owners.— Where persons divert water from a stream in their several capacity, in such a manner as to injure the plaintiff, they can be united as defendants in a suit in equity, although they make no joint claim to the water,⁶ but this is true in equitable actions only, and does not apply to actions for damages where no equitable relief is asked.⁷

the plaintiffs sued to recover possession of certain water rights. "The injury complained of in this case," says the court, "is in the nature of a nuisance. It is very similar to the obstruction of ancient lights. To turn aside a useful element from the premises is as much a nuisance as to turn upon them a destructive element. In both cases the injury may be equally material. A ditch to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood the premises." See *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Lytle Creek Water Co. v. Perdew*, 65 Cal. 447.

1. *Foreman v. Boyle*, 88 Cal. 290, *Foreman and Rodgers* brought a joint action for an injunction and for damages. The former claimed fifteen inches of water from a certain creek, and had a ditch to carry it off. The latter claimed thirty-five inches of water from the same creek, and also had a separate ditch to carry it off. The defendant diverted the water from the creek at a point above the heads of the plaintiffs' ditches. The court held that *Foreman and Rodgers* were not tenants in common, as they had no common interest in the damages, one

being injured much more than the other, and therefore they could not maintain a joint action for damages.

2. *Boehmer v. Big Rock Irrigation Dist.*, 117 Cal. 19.

3. *Hughson v. Crane*, 115 Cal. 404, holding that the collector was the only necessary party defendant.

4. *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 75.

5. *Saint v. Guerrero*, 17 Colo. 448.

If it is the duty of the executive officers of the state and the water division and irrigation district to enforce the plaintiff's rights, they may be properly joined as defendants. *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 514.

6. *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 75.

7. *Miles v. Du Bey*, 15 Mont. 340, which was an action against several defendants, the plaintiff demanding damages for the wrongful diversion of water to the injury of plaintiff's crops of hay, grain, vegetables, etc. The defendants filed separate answers, and after the plaintiff's testimony was in moved the court to grant a nonsuit, on the ground that the defendants were sued jointly, while the evidence did not

IV. JOINDER OF CAUSES OF ACTION.—Under the code practice an action to recover damages for injury to water rights may be properly joined with a cause of action to obtain an injunction,¹ but causes of action for damages, which are several, cannot be joined with causes of action for an injunction, which are common.²

V. PETITION OR COMPLAINT — 1. Sufficient Averments.—A complaint which avers the plaintiff's ownership of land, diversion of water to and upon it, the need of such water for agricultural purposes, and actual application of the water to the land for such purposes, sufficiently shows a right in the plaintiff.³ Other cases in which the sufficiency of allegations under particular circumstances was determined are cited in the notes.⁴

show that the defendants acted jointly in diverting the waters. The court granted the nonsuit, and the decision on appeal was affirmed.

1. *Watterson v. Saldunbehere*, 101 Cal. 107.

2. *Foreman v. Boyle*, 88 Cal. 290, where two persons were injured by the diversion of water from a stream, and the court held that it was proper for them to join in an application for the purpose of obtaining an injunction, as such diversion was in the nature of a nuisance, but that they could not properly unite in an action for damages, nor join an action for damages with an action for an injunction; there was no community of interest. See *Barham v. Hostetter*, 67 Cal. 272; *Blaisdell v. Stephens*, 14 Nev. 17.

Miller v. Highland Ditch Co., 87 Cal. 430, is a case where the plaintiff was the owner of a tract of land located a short distance below the mouth of a canon. The natural flow of water down the canon was dissipated before it reached his land. The defendants, by means of three different ditches, turned foreign water into this canon, causing the plaintiff's land to be overflowed, the sand and débris thus brought down doing great damage. Each ditch was owned and operated by part only of the defendants, who had no interest in the other ditches, and there was no concert of action. This action was brought for an injunction and for damages against all of the defendants jointly. The court held that such an action could not be maintained as there was an improper joinder.

Uniting Two or More Causes of Action in the Same Complaint.—In Nevada County, etc., *Canal Co. v. Kidd*, 37 Cal. 282, it

was determined that where parties entered upon a dam site and ousted the owners, and likewise wrongfully diverted the water which was claimed by the owners of the dam and canal, there were two separate causes of action, and consequently they must be separately stated in the complaint.

3. *Salazar v. Smart*, 12 Mont. 395, where the complaint alleged that the plaintiff was "the owner of and in the actual occupancy, possession, and enjoyment" of certain lands, which lands "and each and all thereof require water for the purpose of raising and growing thereon agricultural crops;" that plaintiff diverted water onto said lands, "and used and employed the same upon the said lands for agricultural purposes ever since, from year to year, uninterruptedly," and that the defendants wrongfully diverted said water. The court held these allegations sufficient.

4. **Action to Quiet Title.**—In *Hulsmann v. Todd*, 96 Cal. 228, the allegations in the complaint were: that there was a wrongful diversion by the defendants and a threatened continuation thereof, and "that the plaintiff is informed and believes that the defendants, and each of them, claim some interest in and to the waters of said stream adverse to plaintiff's title thereto." The court held that this complaint was not open to a general demurrer and entitled the plaintiff to some relief.

A complaint in an action to quiet title, which alleges ownership of the land, appropriation for beneficial uses, and that the defendants "entered upon said stream above said land, and above the head of the ditch of plaintiff, and made some claim to the whole of

2. Insufficient Averments. — A complaint which alleges the prior appropriation, without alleging diversion by the plaintiff and user, is defective and open to a demurrer.¹

the water flowing in said stream, and are making preparations to divert and use said water," is not open to a general demurrer. *Perego v. Sellick*, 79 Cal. 568; *Standart v. Round Valley Water Co.*, 77 Cal. 399. In *Perego v. Sellick*, 79 Cal. 568, it is also held that it is not necessary, in an action to quiet title to a water right, that there should be an actual interference with the plaintiff's right. The assertion of an adverse claim is all that is required.

In *Harris v. Harrison*, 93 Cal. 676, the allegations in the petition were substantially that the plaintiffs were owners of land; that a stream of water flowed naturally to and on the said land; that by reason of the plaintiff's riparian ownership they had the right to use said water, "also the right to divert from its natural channel, and to use for irrigating and domestic purposes, all the waters of that certain stream, etc." The court held this complaint good in the absence of a special demurrer.

In Action for Damages. — *Jerrett v. Mahan*, 20 Nev. 89, was an action to recover damages for the wrongful diversion of the waters of a certain creek, and for an injunction to restrain the further diversion. The defendant did not claim to be the riparian proprietor of the stream, but did claim the waters by prior appropriation and prescription. Each party asked for affirmative relief. The defendant objected that the plaintiff's petition did not state a cause of action, not alleging riparian ownership in the plaintiff. But the court held that "plaintiff's prior appropriation and defendant's diversion" were sufficient averments.

Mere Users of Water. — In an action by one irrigation company against another, it is unnecessary to set out in the complaint the names of the users of water from plaintiff's ditch, or any other facts relating to their individual appropriation. *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 514.

Title by Land Patent. — *Conkling v. Pacific Imp. Co.*, 87 Cal. 296, was an action by one riparian owner to enjoin another from a wrongful diversion of the waters of a stream. The plaintiff

claimed the land under a pre-emption right from the government, and held a receiver's certificate therefor. The court held that it was unnecessary to allege that the lands were subject to pre-emption, and that he was a qualified pre-emptor; that "it was enough to allege that he was the holder of the receiver's receipt and in possession thereunder."

In a Suit for an Injunction the complaint must allege that the injury to the plaintiff is continuing and threatening to be continued. *Ball v. Kehl*, 87 Cal. 505; *Coker v. Simpson*, 7 Cal. 340; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

Mandamus. — It was held in *Merrill v. Southside Irrigation Co.*, 112 Cal. 426, that the averments in a petition for mandamus were sufficient if they declared, 1st, the object of the organization, whether or not it holds itself out as furnishing water for irrigation purposes; 2d, the duty and the legal liability of the defendant to furnish such water to the complainants; and, 3d, a prayer for relief.

In *Price v. Riverside Land, etc., Co.*, 56 Cal. 431, it was held that the prayer and the judgment alike should be for specific and certain relief.

Action to Recover Assessment. — In *Tregea v. Owens*, 94 Cal. 317, it was held that in an action to recover an assessment paid under duress it was proper for the plaintiff to allege that such an assessment was made without a special election of the board of directors, in order to establish the illegality of the assessment.

1. *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111, wherein the court said: "It is well established that no mere diversion of water from a stream will constitute the constitutional appropriation. To make it such it must be applied to some beneficial use, and in case of irrigation it must be actually applied to the land before the appropriation is complete." See also *Schilling v. Rominger*, 4 Colo. 100; *Sieber v. Frink*, 7 Colo. 149.

In *Thomas v. Guiraud*, 6 Colo. 533, it is said: "The true test of appropriation of water is the successful application thereof to the beneficial use

Action by Stockholders. — It is not sufficient to allege merely the organization of a company for irrigation purposes, in an action by the stockholders against the directors; that the company is organized to sell water for profit, must be alleged as well.¹

VI. ANSWER — Estoppel. — It has been held that, under the code practice, estoppel by reason of the plaintiff's consent to an alleged injurious diversion of water may be proved under a general denial.²

Adverse Possession — Prescription. — If a defendant claims the right to the use of water by adverse possession, he must plead the

designed, and the method of diverting or carrying the same * * * is immaterial." See also *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582.

In *Crawford v. Minnesota, etc., Land, etc., Co.*, 15 Mont. 153, the complaint alleged that the defendant sold the plaintiff certain land on which the defendant was constructing an irrigating ditch. The defendant had represented that the right to the use of water from the irrigation ditch inured to the purchasers. The plaintiff entered into possession before the canal was completed. It was not alleged in the petition that the defendant had agreed to sell or grant any interest in the irrigating canal, nor was there any such grant in the deed of transfer. The court held that the complaint failed to show that the canal or any interest therein ever became or was appurtenant to the land sold by the defendant, and that the complaint did not state a cause of action sufficient to prevent the defendant from interfering with the plaintiff's use of the water.

In *Durkee v. Cota*, 74 Cal. 313, the complaint was held open to demurrer because the purpose of the water right was not stated.

Variance. — In *Greer v. Heiser*, 16 Colo. 306, a complainant claimed priority for a certain ditch. The allegations were that the ditch was constructed in April, 1875; that it had a width of one and one-quarter feet on the bottom, and two feet on the top, and was eighteen inches deep, with a fall of thirty inches to the half mile, and was eighty-nine rods in length, irrigating thirty or thirty-five acres; that the work was continued from the start with due diligence and without intermission. The proof was that the ditch, the dimensions of which did not correspond to those of the one set out in the

petition, was not constructed until 1887, and that a smaller ditch, with a capacity for irrigating fifteen or twenty acres, was built in 1874 or 1875. The court held that this variance between the allegations and the proof was fatal, setting aside a decree which fixed the date of priority at April 30, 1874.

Injunction. — *The Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 3 Colo. App. 255, was an action for an injunction in which the complaint was held demurrable because the names and number of the shareholders, the amount of the land owned by them, and the necessity for water were not shown.

In *Heintzen v. Binnering*, 79 Cal. 5, it was held that an allegation that "immediately prior to the diversion of said water" the plaintiff "had the undisputed usufructuary right to the use of all the waters," does not establish a right to the water by adverse possession. It does not show sufficient possession to stand for the basis of an injunction.

1. *Applegarth v. McQuiddy*, 77 Cal. 408, where the court said: "Because the complaint alleged that the corporation was organized for the purpose of irrigation, would not of itself compel the presumption that the corporation was organized for the purpose of selling the water in its canal or ditch for irrigation purposes. It would be entirely legal for an irrigating canal and ditch company to be incorporated to distribute water gratuitously."

2. *Churchill v. Baumann*, 95 Cal. 541, 104 Cal. 369. But see, on this point, and also as to the rule at common law, article ESTOPPEL, vol. 8, pp. 6, 7.

In *Lux v. Haggin*, 69 Cal. 255, it is held that a riparian proprietor is not estopped from objecting to the unlawful diversion of the waters of a stream, by reason of his laches.

same in his answer, or evidence introduced to support it will be excluded.¹ And if a right by prescription to divert water is pleaded, it is not a bar to pleading a greater right of a similar nature.²

Answer as an Admission.—An answer that defendants "wrongfully and illegally" diverted certain water is an admission of the fact of diversion.³

VII. AMENDMENTS.—The court may, in its discretion, permit amendments to the petition in cases involving irrigation as in other cases,⁴ and a defendant may generally set up as many defenses as he has. Hence it is proper for the defendant to amend by omitting the averments set out in the original answer and make entirely new averments.⁵

VIII. DECREES AND JUDGMENTS.—The language of a decree in cases involving water rights, as elsewhere, must be exact or it will be fatally defective.⁶

Modification of Decree.—A decree by a referee under the statute, as to priority of water rights, may be modified for error in his judgment upon the weight of the testimony.⁷

IX. MANDAMUS AND INJUNCTION.—Mandamus is an appropriate remedy to compel the delivery of water for the purposes of irrigation.⁸

1. *American Co. v. Bradford*, 27 Cal. 361.

2. *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553.

In California.—A prescriptive right is sufficiently pleaded if the section of the Code under which such right was acquired is set up. *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598.

3. *Harris v. Shontz*, 1 Mont. 212.

4. *Bean v. Stoneman*, 104 Cal. 49. See generally article AMENDMENTS, vol. 1, p. 458.

5. *Gould v. Stafford*, 101 Cal. 32.

6. *Smith v. Phillips*, 6 Utah 376, wherein it was held that where it is agreed between the parties that the defendant has an interest in the waters, but there is a question as to how great an interest he has, a decree that the defendant have the use of "one good irrigation stream of water" for a specified length of time is void for uncertainty.

In *Riverside Water Co. v. Sargent*, 112 Cal. 230, the court said: "The decisions of this court establish that in cases like the present the findings and judgment must fix the extent of the superior right, viz., the quantity of water to be allowed to the party whose claim is paramount; otherwise the judgment fails to attain the certainty

necessary to an estoppel upon the main subject of the litigation." See also *Dougherty v. Haggin*, 56 Cal. 522; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 604; *Lakeside Ditch Co. v. Crane*, 80 Cal. 182; *Blanc v. Paymaster Min. Co.*, 95 Cal. 533.

In *Barrows v. Fox*, 98 Cal. 63, it was decreed that an appropriator could not divert from a stream any more water than would pass through a pipe of a certain size, being the amount required to irrigate his land; but since he used an open ditch the amount of water that actually reached his land was less than the amount diverted at the head of the ditch. In view of this fact, the court held the decree erroneous as not having sufficient foundation.

Amendment of Decree.—In *Colorado* the court cannot amend a decree after the expiration of the time set within which a re-argument or review of an adjudication under the irrigation act may be had. *Child v. Whitman*, 7 Colo. App. 117.

7. *Dorr v. Hammond*, 7 Colo. 79.

8. *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; *Price v. Riverside Land, etc., Co.*, 56 Cal. 431.

If an owner of land grant a right of way to an irrigation company in consideration of the privilege of purchas-

Injunction. — The equitable remedy of injunction is the appropriate remedy in actions in which both parties claim the prior right to the use of waters. It is unnecessary to aver or prove actual damages if it appears that the diversion is wrongful.¹ In order to secure an injunction the plaintiff must show more than the mere deprivation of water;² he must be in a position to use the water,³ and a legal injury must be caused by the irrigation or diversion.⁴ Before a perpetual injunction will

ing water from it, mandamus will lie to enforce such agreement. *Merrill v. Southside Irrigation Co.*, 112 Cal. 426.

In *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, it was held that where a customer tenders the rate which is established and complies with other reasonable regulations, and the company has water undisposed of, mandamus will lie to enforce his demand.

In *Wilterding v. Green*, (Idaho, 1896) 45 Pac. Rep. 134, it is held that mandamus will not lie to force an irrigation company to furnish water to a party who tenders an apparently reasonable amount for its use, where the sufficiency of such amount is denied, and the company proposes other terms which are not accepted, and the courts have not passed upon what are "reasonable terms."

1. *Conkling v. Pacific Imp. Co.*, 87 Cal. 296.

In *Moore v. Clear Lake Water Works*, 68 Cal. 146, the court said: "Here the plaintiff complains of a continuous wrongful act, and consequent infringement of his rights, and therefore prays for an injunction to stay such continuous injury, and it is only in a court of equity, and by means of an injunction, that an adequate remedy can be had. And it was not necessary for the plaintiff to aver or prove actual damages. The interposition of a court of equity was required to prevent defendants' wrongful acts from ripening into a right, and on that ground alone the interference of a court of equity was properly asked and granted."

Other Instances of Use of Injunctions. — In *Lux v. Haggin*, 69 Cal. 255, one of the leading cases on irrigation, the court holds that a riparian proprietor is entitled to an injunction, for a threatened wrongful diversion of water, without recovering a judgment in damages. See also *Harris v. Shontz*, 1 Mont. 212; *Brown v. Ashley*, 16 Nev. 311; *Blaisdell v. Stephens*, 14 Nev. 17.

A riparian proprietor may restrain

the diversion of any water from a stream by one who has brought water into it from a foreign source, unless the defendant shows that he has not taken from the stream more water than he turned in. *Wilcox v. Hausch*, 64 Cal. 461.

When one person abandons a ditch and the land is owned by another, the former can be enjoined from opening up the ditch at a later time. *Smith v. Phillips*, 6 Utah 376.

2. *Ball v. Kehl*, 87 Cal. 505, holding that in addition to the finding that there was a deprivation of water, it must be found how long the deprivation continued, or whether the defendant threatened to continue it.

3. In Nevada County, etc., *Canal Co. v. Kidd*, 37 Cal. 282, when other parties used the water while the dam and ditch of the plaintiff were in process of construction, but were not yet in a condition to appropriate the water, the court held that such use of the water was no injury, and not a ground for legal or equitable relief.

4. *Heilbron v. 76 Land, etc., Co.*, 80 Cal. 189.

The complainant who has rights in the water of a stream cannot enjoin interference with such waters, when the continuous flow would not be sufficient to afford him any beneficial use. *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 75.

One having a junior water right cannot maintain an injunction to prevent the storage of water, if he does not at the same time show that such storage prevents him from having more water when needed. *Larimer, etc., Reservoir Co. v. Cache La Poudre Irrigating Co.*, 8 Colo. App. 237.

In *Modoc Land, etc., Co. v. Booth*, 102 Cal. 151, it is said: "A riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a non-riparian owner, when the amount diverted would not

be granted, the rights of the parties and the injury to be redressed must be conclusively established, as fully as if a jury had passed upon them.¹

be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it."

1. *Larimer, etc., Reservoir Co. v. Cache La Poudre Irrigating Co.*, 8 Colo. App. 237, wherein the court said: "In this case no facts were established by actual test or experiments. The evidence was theoretical, — based upon hypothetical questions. No facts were demonstrated to show any diminution by reason of the diversion and use. No rule of equity is more conclusive and better established than that, to warrant a perpetual injunction, the

right of the party, and the injury to be redressed, must clearly and conclusively be established, as fully as if found by the special verdict of a jury. An indispensable constitutional requirement is 'that the water must be applied to a beneficial use.' There is no violation shown of this fundamental requirement in this case."

In *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, an injunction was asked merely as ancillary to a claim of legal right. In such a case the parties have the right to have the legal issues determined by a jury before a final injunction can issue.

ISSUE.

See article *GENERAL ISSUE*, vol. 9, p. 881, and the references under this title in the General Index.

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CROSS-REFERENCES.

For other matters of practice connected with this subject, see articles: ANSWERS IN EQUITY PLEADING, vol. I, p. 863; INSANE PERSONS, vol. 10, p. 1169; JUDGMENTS; MANDAMUS; OPENING, AMENDING, AND VACATING JUDGMENTS; PROBATE AND ADMINISTRATION; QUO WARRANTO; REFERENCES; SHERIFF'S SALES; SPECIAL FINDINGS OF JURIES; STREET RAILWAYS; VERDICTS.

I. INTRODUCTION AND SCOPE OF ARTICLE. — This article is designed to deal with questions of practice relating to the submission to a jury of special issues of fact in actions, suits or proceedings in which the main trial is by the court, either by the consent of the parties or in pursuance of the law applicable to the case. Matters relating to issues in actions at law generally, in which there is regularly a jury trial, are not here treated.¹ Issues in equity cases have been taken as the basis, from which standpoint the variances in other cases are pointed out.

II. DEFINITION, NATURE, AND OBJECT — **1. Definition.** — An issue to a jury, as the term is used in this article, is a question of fact upon which the parties are at issue in an action or suit properly triable by the court, which has been submitted to the jury for determination either because the court is incompetent or unwilling or is prohibited by practice or statute to decide it.²

2. Nature — *a.* **FEIGNED ISSUES.** — Formerly in England and in this country, and still in some of the states, the practice was to use what are called feigned issues.³ For this purpose a series of pleadings is arranged between the parties, as if an action at law had been brought. Usually, in this action, the plaintiff by a fiction declares that he has laid a wager with the defendant in a certain sum, that a certain fact is so; then avers that it is so, and demands the sum. The defendant admits the feigned wager, but

1. See articles JURIES; NEW TRIALS; TRIAL; VERDICT.

2. See 1 Bouv. Law Dict., titles *Feigned Issue* and *Issue*.

3. This is still the practice in most of the states retaining the distinction between procedure in law and in equity. 1 Bouv. Law. Dict., tit. *Feigned Issue*.

It Is Called a Feigned Issue for the reason that its object is not the establishment of a legal right on which judgment should regularly follow, but the ascertainment by a formal trial of some issue of fact arising in another cause and material to the decision of the latter. *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266.

The Name Is a Misnomer, inasmuch as the issue itself is upon a real and material point in question between the parties, and the circumstances only are fictitious. 1 Bouv. Law Dict., tit. *Issue*.

Origin. — These feigned issues seem borrowed from the *sponsio judicialis* of the Romans. 3 Black. Com. 452. It is a mode of procedure adopted by the civil law and by courts of law as well as courts of equity as a means of having some questions of fact arising incidentally and to be made the foundation of some order or decree determined by the verdict of a jury. *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266.

avers the fact alleged by the plaintiff to be untrue. Issue thereupon being joined, the court directs it to be tried by a jury.¹

The Fiction of a Wager Not Absolutely Necessary. — If practicable, formal pleadings in an ordinary action at law may be resorted to, and the issue be in such form as to present the real subject matter in controversy, without losing its character as a feigned issue.²

b. ABOLITION OF FEIGNED AND SUBSTITUTION OF DIRECT ISSUES. — At the present time, in England and in a number of the United States, feigned issues are abolished or disused under statutes and reformed codes of procedure, and there has been substituted therefor a simple order for the trial by jury of the controverted facts so to be tried.³

1. 3 Black. Com. 452; 1 Bouv. Law Dict., titles *Feigned Issue and Issue*; American Dock, etc., Co. v. Public Schools, 37 N. J. Eq. 266.

Feigned Issue by Direction of Court — Contempt to Proceed Without Such Direction. — The feigned issue is proceeded with by direction of the court before which the main question is being litigated, and it is contempt of the court in which the action is brought to bring such an action except under the direction of the same court. 1 Bouv. Law Dict., titles *Feigned Issue and Issue*; Hoskins v. Berkeley, 4 T. R. 402.

2. American Dock, etc., Co. v. Public Schools, 37 N. J. Eq. 266. *Referring to Barrow v. Bispham*, 11 N. J. L. 110; *Decker v. Caskey*, 1 N. J. Eq. 427. See *infra*, X. 10. *General Form of Issues*.

3. In *Indiana*, under Rev. Stat. 1843, § 62, p. 841, feigned issues were dispensed with, but it was provided that whenever a question arises which, according to the usage, practice, and discretion of courts of chancery, ought to be referred to a jury for trial, the court may cause a comprehensive note and entry of the matter so to be tried to be made and the verdict of a jury to be taken for the information of the court. *Lapreese v. Falls*, 7 Ind. 695.

In *New York*, by the Code of Procedure, § 72, substantially re-enacted in Code Civ. Pro., § 971, it was provided that "feigned issues are abolished; and instead thereof, in cases where the power now exists to order a feigned issue, * * * an order for the trial may be made, stating distinctly and plainly the question of fact to be tried, and such order shall be the only authority necessary for a trial." See *O'Brien v. Bowes*, 10 Abb. Pr. (N. Y. Super. Ct.) 106; *Hatch v. Peugnet*,

64 Barb. (N. Y.) 189; *Brinkley v. Brinkley*, 56 N. Y. 192.

The order for trial by jury of specific questions of fact authorized by section 72 of the Code of Procedure, was borrowed from chancery practice, and in terms introduced as a substitute for the proceeding by feigned issue. The language of this section confined it by implication to actions of an equitable nature, but section 254 authorized the same proceeding in all actions not required to be tried by a jury, irrespective of their character. *Vermilyea v. Palmer*, 52 N. Y. 474.

Issue of Adultery in Divorce Cases. — By the Code of Civ. Pro., § 970, the trial in an action for divorce upon the ground of adultery is by a jury as matter of right. The method before the Code was to send feigned issues to a jury for trial, for which the present statute has provided as a substitute that in such cases the party may upon notice apply to the court for an order directing the questions of fact raised upon the face of the issues to be distinctly and plainly stated for trial by jury, and upon the hearing of the application the court must cause the issues to be distinctly and plainly stated. *Conderman v. Conderman*, 44 Hun (N. Y.) 181.

The Practice under the Foregoing Code Provisions substituting for the feigned issue a simple order for trial is in the main the same as prevailed under the former system. See *Hatch v. Peugnet*, 64 Barb. (N. Y.) 189; *Brinkley v. Brinkley*, 56 N. Y. 192; *Carroll v. Deimel*, 95 N. Y. 255; *Randall v. Randall*, 114 N. Y. 499; *Vermilyea v. Palmer*, 52 N. Y. 471; *Acker v. Leland*, 109 N. Y. 5.

In *South Carolina* the Code Civ. Pro., § 92, provides that "feigned issues shall not be allowed, and instead

3. Object. — Except in cases where the parties have a right to a trial by jury, the object of issues is to satisfy and inform the conscience of the chancellor or court upon matters of fact, and therefore, if a satisfactory decision can be arrived at without the aid of a jury, a decree may in general be rendered without sending an issue to them.¹

III. IN EQUITY CASES — 1. Generally. — It will be seen that issues to the jury are submitted in other than equitable cases and proceedings.² But from their frequency they have been taken as the basis upon which this subject has been analyzed. This section is intended to cover only the general power and discretion of the court and the rights of parties in the submission of issues, and for other matters relating to the subject the various divisions of this article are to be consulted.³

2. In England. — Formerly, where there arose a considerable controversy upon a question of fact it was usual for the court of chancery to direct an issue to be tried before a jury at common law, but if a mixed question of law and fact was involved it directed an action, or retained the bill in order that an action might be brought.⁴ Under both the former and present practice, except in case of an heir-at-law or a rector or vicar, in which cases the submission of issues was practically a matter of right,⁵ it is entirely a matter of discretion whether an issue shall be submitted or a jury called. If the court thinks it best that a question should be tried before a jury, a jury can be had; but if, in

thereof, or when a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial." See *Sloan v. Westfield*, 11 S. Car. 445; *Ivy v. Clawson*, 14 S. Car. 272.

1. *Kennedy v. Kennedy*, 2 Ala. 571; *Alexander v. Alexander*, 5 Ala. 517; *Carpenter v. Easton*, etc., R. Co., 26 N. J. Eq. 168; *Miller v. Wack*, 1 N. J. Eq. 204; *Hatch v. Peugnet*, 64 Barb. (N. Y.) 189; *Randall v. Randall*, 114 N. Y. 499 [referring to *Vermilyea v. Palmer*, 52 N. Y. 471; *Acker v. Leland*, 109 N. Y. 5]; *Loftus v. Maloney*, 89 Va. 605; *Hurley v. Oakley Land*, etc., Co., (Va. 1896) 24 S. E. Rep. 237.

To Enable a Party to Get Additional Evidence is not the purpose for which issues are directed. *Vangilder v. Hoffman*, 22 W. Va. 1; *Smith v. Betty*, 11 Gratt. (Va.) 752; *Beverley v. Walden*, 20 Gratt. (Va.) 154.

2. See *supra*, I. and II., and *infra*, IV., V., VI., and VII.

3. For equitable issues in legal actions, see *infra*, V. and VI.

For equitable issues in particular proceedings or for determination of particular facts, see *infra*, IX.

4. *Fernie v. Young*, L. R. 1 H. L. 78. In *Pomfret v. Smith*, 4 Bro. P. C. 700, it was said that courts of equity have for many years past adopted a practice which has been extremely beneficial to the suitors, for where they see the dispute between the parties is a mere question at law, and must be ultimately determined there, instead of putting the parties to a diffuse examination of witnesses in equity they have by interlocutory orders either directed an issue or given the party the liberty to bring an action within a limited time, and reserve the consideration of all further questions till after the verdict; and after a verdict has been found, it has been the uniform practice of the court for the party in whose favor the verdict has been obtained, to set down the cause for the further directions reserved by such interlocutory order.

5. 2 Daniell Ch. Pr. (1st Am. ed.) 730.

the opinion of the court, a trial without a jury is preferable, neither party can claim a jury as a matter of right.¹

3. **In the United States.** — *a.* IN GENERAL. — It will be observed by the two following subsections that in the vast majority of equity cases in this country, all issues of fact may be decided by the court or in its discretion submitted to a jury. In some states and cases, however, the parties have been given a right to a jury trial.²

b. IN THE FEDERAL COURTS. — In the federal courts the submission of issues in an equity case is discretionary with the court.³

c. IN THE VARIOUS STATES. — In Alabama, Arizona, and Arkansas, in the absence of statutes to the contrary, an issue to a jury, in an equity case, to try disputed questions of fact, has been held to be a matter within the discretion of the chancellor or judge.⁴

1. *Bovill v. Hitchcock*, L. R. 3 Ch. 417. See also *O'Conner v. Cook*, 6 Ves. Jr. 665; *Hopwood v. Derby*, 1 Kay & J. 255; *Bullen v. Michel*, 4 Dow. 318; *Davenport v. Goldberg*, 2 Hem. & M. 282; *Short v. Lee*, 2 Jac. & W. 464; *Boyse v. Rossborough*, 1 Kay & J. 124; *Peters v. Rule*, 5 Jur. N. S. 61; *Eaden v. Firth*, 1 Hem. & M. 573; *Freeman v. Tottenham*, etc., R. Co., 11 Jur. N. S. 254; *Jenkins v. Bushby*, (1891) 1 Ch. 484; *Mangan v. Metropolitan Electric Supply Co.*, (1891) 2 Ch. 551; *Collins v. Lawrey*, 4 Bro. P. C. 692; *Swindell v. Birmingham Syndicate*, 3 Ch. Div. 127; *Coote v. Ingram*, 35 Ch. Div. 117; *Sheppard v. Gilmore*, 53 L. T. 625; *George v. Whitmore*, 28 L. J. Ch. 720; *Bradley v. Bevington*, 4 Drew. 511; *Schneider v. Shrubsole*, 4 De G. F. & J. 52; *Back v. Hay*, 5 Ch. Div. 235; *Usil v. Whelpton*, 50 L. J. Ch. 511; *Spratt's Patent v. Ward*, 11 Ch. Div. 240; *Clarke v. Cookson*, 2 Ch. Div. 746; *Garling v. Royds*, 25 W. R. 123; *Ruston v. Tobin*, 10 Ch. Div. 558; *Clements v. Norris*, 26 W. R. 94; *Powell v. Williams*, 12 Ch. Div. 234; *In re Martin*, 20 Ch. Div. 365; *Timson v. Wilson*, 38 Ch. Div. 72; *Moore v. Deakin*, 53 L. T. 858; *Lynch v. Macdonald*, 37 Ch. Div. 227.

In *Davis v. Oliver*, 1 Ridgw. P. C. 9, it is said that courts of equity should send matters of fact to be tried by a jury. And in *St. Paul v. Morris*, 9 Ves. Jr. 155, the court said that it is the right of the court of chancery, to be very tenderly exercised, to decide upon facts without an issue.

2. The right of a party in certain states to a jury trial in equity cases

generally is discussed *infra*, III. 3. *c.* *In the Various States*; and the right of a party to a jury trial of the issues in certain equitable cases and proceedings will be found cross-referred from the various states and treated *infra*, IX. *In Particular Proceedings or for Determination of Particular Facts*.

3. *Wilson v. Riddle*, 123 U. S. 615; *U. S. v. Sampereyac, Hempst.* (U. S.) 118; *Garsed v. Beall*, 92 U. S. 684; *Goodyear v. Providence Rubber Co.*, 2 Cliff. (U. S.) 351; *Barton v. Barbour*, 104 U. S. 126.

It is not a matter of course to order a feigned issue; but the party applying must lay a foundation for it. It will not be granted unless the opinion of the jury is found to be needed. *Van Hook v. Pendleton*, 1 Blatchf. (U. S.) 187.

4. **Alabama.** — *Kennedy v. Kennedy*, 2 Ala. 571; *Alexander v. Alexander*, 5 Ala. 517; *Atwood v. Smith*, 11 Ala. 894; *Anonymous*, 35 Ala. 226; *Mathews v. Forniss*, 91 Ala. 157.

Under the statutory provisions of Alabama, relating to issues out of chancery, declaring that the court "must direct an issue to be made up whenever it is necessary for any fact to be tried by a jury" (Code, § 3890), although there may be cases in which, the evidence being plain and clear, it might be a reversible error for the chancellor to order the issue to be submitted to the jury, the question must necessarily be submitted to his discretion when the evidence is indeterminate or conflicting; and where the record shows that "the plaintiff's right of recovery depended largely on in-

In California and Colorado the court may or may not, in its discretion, refer issues to a jury in an equitable action.¹

In Delaware, except as controlled by statute,² the submission to the jury of issues of fact is discretionary.³

In Georgia all equity cases are tried by a special jury, under the direction of the court as to the law, and the judge cannot decide the facts and cannot give his opinion to the jury upon the preponderance of evidence.⁴

ferences to be drawn from suspicious circumstances, against positive testimony to the contrary," the appellate court cannot say that he erred in submitting the question of fact to a jury. *Adams v. Munter*, 74 Ala. 338.

Arizona. — *Cole v. Bean*, 1 Arizona 377.

Arkansas. — *Ringgold v. Patterson*, 15 Ark. 209.

1. California. — *La Société Française*, etc. *v. Selheimer*, 57 Cal. 623; *Cleg-horn v. Cleghorn*, 66 Cal. 309; *Cahoon v. Levy*, 5 Cal. 294; *Walker v. Sedgwick*, 5 Cal. 192; *Crocker v. Carpenter*, 98 Cal. 418; *Graham v. Stewart*, 68 Cal. 374; *Fish v. Benson*, 71 Cal. 428; *Lorenz v. Jacobs*, 59 Cal. 262; *Smith v. Rowe*, 4 Cal. 6; *Pfeiffer v. Riehn*, 13 Cal. 644.

Under the California Code Civ. Pro., it becomes the duty of the court to try and determine the issues raised by the pleadings in an equity case, subject to its power to order any or all of such issues to be tried by a jury. *Warring v. Freear*, 64 Cal. 54.

Colorado. — *Abbott v. Monti*, 3 Colo. 561. See *Rice v. Goodwin*, 2 Colo. App. 267.

The Colorado Code, § 154, provides as follows: "An issue of law shall be tried by the court, unless it be referred as provided in the title in regard to reference. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived or a reference is ordered as provided in the code. In other cases issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code." The question whether an issue of fact must be tried by a jury or by the court is not to be determined from the nature of the issue, but from the character of the action in which

such issue is joined. The code abolished forms of actions, but did not undertake to do away with the distinction between legal and equitable causes of action. The code provision recognizes the distinction which formerly existed between actions at law and bills in equity, and it has been held that the practice of trying chancery cases to the court without a jury is clearly established by the provisions of the section above quoted. *Danielson v. Gude*, 11 Colo. 87.

2. Construction of Statute. — But the statute which directs issues of fact in a chancery cause to be tried at the bar of the superior court must be understood as referring only to issues of fact which involve the merits of the case and are material to the decision of the cause, and the chancellor is not bound to order issues to be tried by a jury unless they are thus material. *Waters v. Comly*, 3 Harr. (Del.) 117, *affirming* 2 Del. Ch. 72. See *infra*, VIII. 4. *Materiality of Issues*.

3. Sparks v. Farmers' Bank, 3 Del. Ch. 225.

4. Brown v. Burke, 22 Ga. 574; *Mounce v. Byars*, 11 Ga. 180; *McDougald v. Dougherty*, 11 Ga. 570.

Union of Judge and Jury. — "This assumption, that there is a union in the judge and jury of all the powers of a court of chancery, involves also this other and further consequence, to wit, that the judge may and indeed ought to unite with the jury, in determining upon the facts; and that they can no more decree as to them without his concurrence, than he can decree on the law without their concurrence. That there [have] prevailed in Georgia opinions thus extreme, we are not ignorant. To these opinions we can give no countenance. We hold that in equity, as at law, the province of the jury is to try the facts; and that the judge has no more right in equity to pass upon the facts, than he has at law; and that it is the province of the judge, in equity as

In Illinois, in cases properly cognizable in equity, under any of the original heads of chancery jurisdiction, it is entirely discretionary with the court whether it will or will not submit issues of fact to a jury.¹ But it seems that where chancery jurisdiction has been conferred by statute, in a case cognizable at law before the adoption of the constitution, to which trial by jury attached, the court should, if asked, allow the issues in the chancery case to be tried by jury and thus give effect to the constitutional provision.²

In Indiana, prior to the Revised Statutes of 1881, a court of chancery might take the opinion of a jury as to any of the facts in controversy between the parties whenever it thought proper to do so.³ But, by the statutes just mentioned,⁴ it was provided that issues of law and issues of fact in causes which, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court;⁵ and that issues of fact in

at law, to adjudge the law; and that the jury have no more power to pass upon the law of the case in equity than they have at law." *Mounce v. Byars*, 11 Ga. 185.

Right Not Constitutional but Statutory. — The interposition of juries in the trial of chancery cases in Georgia is purely a matter of legislative regulation, and originated in the Judiciary Act of 1799. It is not a constitutional right or one guaranteed by Magna Charta. *Mahan v. Cavender*, 77 Ga. 118.

1. *Phillips v. Edsall*, 127 Ill. 537; *Brown v. Miner*, 128 Ill. 148; *Russell v. Paine*, 45 Ill. 350; *Dowden v. Wilson*, 71 Ill. 486; *South Park Com'rs v. Phillips*, 27 Ill. App. 380; *Davis v. Hall*, 92 Ill. 85; *Hahn v. Huber*, 83 Ill. 246.

Evidence Voluminous and Conflicting — Insanity. — In cases where the evidence is voluminous and conflicting, it is eminently proper that an issue should be framed and submitted to a jury, and such practice should be adopted by the courts in all cases involving the question of insanity. *Guild v. Hull*, 127 Ill. 523. See *infra*, VIII. 2. *Questions Relating to Doubt, Evidence, Disputed Facts, etc.*; and *infra*, IX. 16. *Insanity*.

2. *Gage v. Ewing*, 107 Ill. 11; *Woolverton v. George H. Taylor Co.*, 43 Ill. App. 428.

Constitution and Burnt Records Act. — But the constitution, preserving the right of trial by jury in all cases where that right had existed before its adoption, does not extend the right to cases

in equity, but confines it to cases at law. Therefore, the act known as the Burnt Records Act is not unconstitutional in depriving a party of a trial by jury. See *Heacock v. Hosmer*, 109 Ill. 245; *Heacock v. Lubuke*, 107 Ill. 396; *Harding v. Fuller*, 141 Ill. 308; *Bertrand v. Taylor*, 87 Ill. 235; *Mulvey v. Gibbons*, 87 Ill. 367; *Gage v. Caraher*, 125 Ill. 447; *Robinson v. Ferguson*, 78 Ill. 539.

3. *Ray v. Doughty*, 4 Blackf. (Ind.) 115.

Rev. Stat. Indiana 1843, p. 841, § 62, did not change this rule. It dispensed with feigned issues, and provided that whenever a question arose which according to the usage, practice, and discretion of courts of chancery, ought to be referred to a jury for trial, the court might cause a comprehensive note and entry of the matter so to be tried to be made; and the verdict of the jury should be taken for the information of the court. *Lapreese v. Falls*, 7 Ind. 695.

A Jury Is Not a Matter of Right in an equity case, but a circuit court sitting as a court of chancery may take the opinion of a jury upon a single question of fact. *Evansville, etc., R. Co. v. Miller*, 30 Ind. 209. See also *Lapreese v. Falls*, 7 Ind. 695.

4. Ind. Rev. Stat. 1881, § 409, now *Burns's Annot. Ind. Stat.* (1894), § 412.

5. See *Hendricks v. Frank*, 86 Ind. 278; *Lake Erie, etc., R. Co. v. Griffin*, 92 Ind. 487; *Lake v. Lake*, 99 Ind. 339.

Suit to Cancel, Set Aside, or Foreclose a Mortgage is of purely equitable cognizance, and there is no error in refusing

all other cases shall be triable as the same were triable at the date of the enactment.¹ The same statute further provides that in case of the joinder of causes of action or defenses which, prior to June 18, 1852, were of exclusive equitable jurisdiction, with causes of action or defenses which, prior to said date, were designated as actions at law and triable by jury, the former shall be triable by the court, and the latter by a jury unless waived;² provided, that in all cases triable by the court as directed by the statute, the court, in its discretion, for its information, may cause any question of fact to be tried by a jury, or the court may refer any such cause to a master commissioner for hearing and report.³

In Iowa the chancellor might formerly refer a doubtful question of fact to a jury or decide it himself, in his discretion.⁴ But it seems that the Code of 1873 changed the practice, and that issues of fact in equitable actions should now be tried by the

to submit the issues in such case to a jury. *Brown v. Russell*, 105 Ind. 46; *Voss v. Eller*, 109 Ind. 260; *Lane v. Schlemmer*, 114 Ind. 296; *Stix v. Sadler*, 109 Ind. 254; *Rogers v. Union Cent. L. Ins. Co.*, 111 Ind. 343; *Carmichael v. Adams*, 91 Ind. 526; *Brighton v. White*, 128 Ind. 320.

An Action to Foreclose a Mechanic's Lien is likewise equitable, in which it is proper to deny a jury trial of the issues. *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318.

A Suit on Notes, and to Set Aside a Conveyance as Fraudulent, is triable by the court without a jury, though the court has power to submit issues to them. *Hornbrook v. Powell*, 146 Ind. 39.

1. Only in Suits That Were Formerly of Exclusive Equitable Jurisdiction is a jury not demandable by either party for the trial of issues of fact. *Robertson v. McPherson*, 4 Ind. App. 595.

The Statutory Action to Quiet Title to Land was not an action of exclusive equitable jurisdiction, prior to 18th June, 1852, and in such case the issues are properly triable by jury. *Puterbaugh v. Puterbaugh*, 131 Ind. 288. See *Trittip v. Morgan*, 99 Ind. 269; *Spencer v. Robbins*, 106 Ind. 581; *Kitts v. Willson*, 106 Ind. 147; *Johnson v. Taylor*, 106 Ind. 89; *Martin v. Martin*, 118 Ind. 227. See also *infra*, IX. 5. *Quieting Title, and Partition*.

An Action by a Surety Against a Co-surety for Contribution is not such a cause of action as would have been, prior to the 18th of June, 1852, of exclusive equitable jurisdiction, and allegations in the complaint that some of the sureties were insolvent would not

convert the cause of action into one of that character. In such a case the action is properly triable by a jury, and the court does not err in awarding a jury trial. *Michael v. Allbright*, 126 Ind. 172.

2. Burns's Annot. Ind. Stat. (1894), § 412. See *infra*, V. *Legal and Equitable Issues in the Same Action or Suit*; VI. *Cross-complaint and Counter-claim*.

3. Israel v. Jackson, 93 Ind. 543; *Evans v. Nealis*, 87 Ind. 262; *Garard v. Garard*, 135 Ind. 15; *Koons v. Blanton*, 129 Ind. 383.

It is discretionary with the court whether any question shall be submitted to a jury, and it should only submit questions calling for information which may be more certainly gained through a jury. The object of such trial, like that of a feigned issue, is to satisfy the conscience of the court. The trial is by the court, and therefore the trial of questions of fact by a jury is not an incident. The difference between courts of law and courts of equity, in the mode of production of evidence, which once furnished one reason for sending questions of fact to a jury, no longer exists in Indiana. On the trial of questions of fact before the court, whether in actions at law or suits in equity, the witnesses may be examined and cross-examined orally within the presence of the court. *Pence v. Garrison*, 93 Ind. 345.

4. McDaniel v. Marygold, 2 Iowa 500; *Chamberlain v. Juppiers*, 11 Iowa 513; *White v. Hampton*, 10 Iowa 238. See also *State v. Orwig*, 25 Iowa 280; *Chambers v. Ingham*, 25 Iowa 225.

court and not submitted to a jury.¹

In *Kansas*, *Kentucky*, and *Maryland* the general rule before stated prevails.²

In *Massachusetts*, though a question has been made as to the constitutional right of trial by jury in an equity case, yet it seems

1. *Frank v. Hollands*, 81 Iowa 164. And of course, under the code it is not error to refuse to submit to the jury certain issues in an equity case. *Shontz v. Evans*, 40 Iowa 139.

In *Sherwood v. Sherwood*, 44 Iowa 192, and *Howe Mach. Co. v. Woolly*, 50 Iowa 552, there are dicta to the effect that it would have been competent for the court to submit certain equitable issues to a jury. These, however, are *disapproved* in *Hobart v. Hobart*, 51 Iowa 514, holding to the contrary.

For Issues in Divorce Cases, see *infra*, IX. 7. *Divorce*.

2. *Kansas*. — Under the Code of *Kansas*, parties are not entitled of right to a jury trial, in ordinary equitable proceedings, but the court may in its discretion send any or all of the issues in such actions to a jury. *Kimball v. Connor*, 3 Kan. 432; *Carlin v. Donegan*, 15 Kan. 495; *Emporia v. Soden*, 25 Kan. 602; *Carpenter v. Carpenter*, 30 Kan. 712; *Woodman v. Davis*, 32 Kan. 344; *McCardell v. McNay*, 17 Kan. 433; *Williams v. Elliott*, 17 Kan. 523; *Houston v. Cloud County*, 19 Kan. 396; *Delaney v. Salina*, 34 Kan. 535; *Morgan v. Field*, 35 Kan. 165; *Hixon v. George*, 18 Kan. 253; *Smith v. Wise*, 44 Kan. 742.

Kentucky. — The Civil Code of *Kentucky*, § 343, provides that issues of fact arising in equitable proceedings shall be tried by the court subject to its power to order any issue or issues to be tried by a jury. In this state the question has always been deemed a discretionary one. *Greer v. Powell*, 1 Bush (Ky.) 499; *Blakey v. Johnson*, 13 Bush (Ky.) 197; *Ayers v. Scott*, 1 Sneed (Ky.) 162; *Head v. Head*, 3 A. K. Marsh. (Ky.) 112; *Baltzell v. Hall*, 1 Litt. (Ky.) 97; *Kennedy v. Ten Broeck*, 11 Bush (Ky.) 254; *Lee v. Beatty*, 8 Dana (Ky.) 212; *Bentley v. Clark*, 3 Dana (Ky.) 564.

"The power of courts of chancery to order a matter of fact, strongly controverted, to be tried by a jury, has long been exercised. Formerly, in England, where no jury could be summoned to attend a court of chancery, contro-

verted facts were often ordered to be tried at the bar of one of the courts of common law or at the assizes, which was effected by a feigned issue. But with us, where the same judge has both chancery and common-law jurisdiction, where he, sitting as chancellor, in the exercise of a proper discretion, conceives that justice will be best obtained by submitting the controverted fact as to which the evidence is conflicting, to a jury, he has the power to do so." *Per Peters, J.*, in *Crabb v. Larkin*, 9 Bush (Ky.) 163.

Submission of Cause to Chancellor. — If a complainant in chancery introduces proof, and instead of having an issue made up for a jury, submits his cause to the chancellor, he must abide the consequences. *Patrick v. Langston*, 5 J. J. Marsh. (Ky.) 654.

Maryland. — In *Hilleary v. Crow*, 1 Har. & J. (Md.) 542, it was said that there is no doubt of the power of a court of chancery in Maryland to decide all points of law and all questions of fact which arise in the case, although it has always been the practice to refer important questions of law and fact to the decision of a court of law and a jury; that inasmuch as a point of law, if decided by the court of chancery, might afterwards come before the court of law, it appeared proper to refer it to the court of law in the first instance; and inasmuch as the trial by jury is justly considered far superior to a trial by any one person whatever on written depositions, it has always appeared proper, and therefore has been the practice, to direct issues in important questions of fact.

Circuit Court of Baltimore City. — In the execution of the special power vested in the Circuit Court of Baltimore City, by the 58th section of article 29 of the Code, is included as means necessary to the end the right of framing the issues and directing the position of the parties litigant; as plaintiffs or defendants; and the court would have the right to instruct the jury, and to admit or exclude the evidence offered. *Barth v. Rosenfeld*, 36 Md. 604.

that the best doctrine is that the ordering of an issue to a jury in a suit in equity is within the discretion of the court.¹

1. *Ward v. Hill*, 4 Gray (Mass.) 593; *Crittenden v. Field*, 8 Gray (Mass.) 621; *Elliott v. Balcom*, 11 Gray (Mass.) 286; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Ross v. New England Mut. Ins. Co.*, 120 Mass. 117; *Harris v. Mackintosh*, 133 Mass. 228; *Stratton v. Hernon*, 154 Mass. 310; *Bourke v. Callanan*, 160 Mass. 197.

Option to Proceed by Bill in Equity or Action at Law. — By a statute of *Massachusetts* an option was given the plaintiff to proceed by bill in equity, or by action at law. The court held that when the plaintiff elects to proceed by bill in equity, he has the full benefit of that remedy with all its incidents, and that an election to proceed by bill in equity is not a waiver of his right to ask for a trial by jury, where, in other respects, he would be entitled to it; but that it remained for the judge, at the hearing, to decide on the motion of the plaintiff for an issue, and such interlocutory order was not open to exceptions. *Ward v. Hill*, 4 Gray (Mass.) 595.

Statutory Equitable Jurisdiction for Relief Not Otherwise Obtainable. — In a suit in equity the plaintiff at least has no absolute right to a trial by jury; but when he avails himself of the jurisdiction in equity, conferred by the legislature upon the court of equity, to obtain a remedy which he could not otherwise have, he must take it subject to the rules which govern courts of chancery, and can have a trial by jury only at the discretion of the court. *Ross v. New England Mut. Ins. Co.*, 120 Mass. 117. *Citing Ward v. Hill*, 4 Gray (Mass.) 593; *Crittenden v. Field*, 8 Gray (Mass.) 621; *Elliott v. Balcom*, 11 Gray (Mass.) 286; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45.

Constitutional Right to Submission of Issues. — A question has been made in *Massachusetts* as to whether parties to a suit in equity have not a constitutional right to have issues of fact submitted to a jury. See *Harris v. Mackintosh*, 133 Mass. 228. *Powers v. Raymond*, 137 Mass. 483, *Merchants' Nat. Bank v. Moulton*, 143 Mass. 543; *Dole v. Wooldredge*, 142 Mass. 161. In *Franklin v. Greene*, 2 Allen (Mass.) 519, it was held that the right of trial by jury is secured by the constitution, and in suits in equity the issues do not grow out of the pleadings, as in suits

at law, but are framed by the court; yet in framing the issues the court will have regard to the constitutional provision and will allow parties to submit to a jury all such material facts as are proper to be decided by them; and when a verdict is rendered and not set aside for good cause shown, it will be regarded as settling the facts in issue conclusively. And in *Shaw v. Norfolk County R. Co.*, 16 Gray (Mass.) 407, it was held that under the constitution and statutes of *Massachusetts* the parties in cases in equity were entitled to trial by jury for the determination of all controverted questions of fact, and the court is authorized to frame issues and order a trial thereon; but that such trial can be had only when controverted questions of fact are shown to be pending in the case or when the final decision of it is to be made upon facts respecting which the parties are at variance; and there being no such facts, and the application not being seasonably made, the motion for a jury trial was refused.

In *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 47, the case of *Shaw v. Norfolk County R. Co.*, 16 Gray (Mass.) 409, cited in the foregoing paragraph, was commented on, and it was said that the dictum therein that there is no doubt that parties in equity are entitled to trial by jury, for the determination of all controverted questions of fact, was an unguarded concession not required by the case, for a trial by jury was there refused. *Franklin v. Greene*, 2 Allen (Mass.) 519, was also noticed and *disapproved*, and the conclusion was arrived at that there was no absolute constitutional right to trial by jury in an equity case.

In *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344, the point was queried as to whether a party to a suit in chancery has the constitutional right, in *Massachusetts*, to a trial by jury, but it was held that if such right existed the most that could be made of the provision was that all of the controverted facts deemed essential to the trial of the whole case shall be passed upon by the jury, if the parties, or either of them, require it. And whether the facts proposed to be so tried are essential or not, must of necessity be determined by the court. There

In Michigan, Minnesota, and Mississippi the submission of issues in an equity case is regulated by the court's discretion.¹

In Missouri and Montana the right of trial by jury in equity cases does not exist, though the court may, but is not bound to, submit issues.²

In New Hampshire a party to a bill in equity has a constitutional right to have matters of fact, alleged in the bill and denied by

may be many facts stated in the bill and denied by the answer, and also facts alleged in the answer which are wholly immaterial to the merits of the case, and such facts the court may refuse to put to the jury. If, however, upon inspecting the pleadings, it appears that important facts are asserted and denied, the court, in its discretion, may direct issues before a hearing.

Enforcement of Common-law Right by Equitable Proceeding. — It has been declared that the practice in Massachusetts has been generally to order issues to be framed upon the application of the defendant, where the right sought to be enforced by a proceeding in equity was essentially a common-law right, where the facts in dispute were such as were tried by a jury according to the use and practice at the time of and before the adoption of the constitution. It is deemed that this course best observes the spirit of the fifteenth article of the Bill of Rights. *Merchants' Nat. Bank v. Moulton*, 143 Mass. 543. *Referring to Franklin v. Greene*, 2 Allen (Mass.) 520; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Harris v. Mackintosh*, 133 Mass. 228; *Powers v. Raymond*, 137 Mass. 483.

1. **Michigan.** — *Wendell v. Highstone*, 52 Mich. 552.

Minnesota. — *Roussain v. Patten*, 46 Minn. 308.

In Mississippi a chancellor may, whenever his mind is in doubt, send an issue to the country. But the matter is entirely discretionary with him, and he has a right, with certain exceptions, to take upon himself the decision of every fact in the cause. *Iller v. Routh*, 3 How. (Miss.) 276; *Carrodine v. Carrodine*, 58 Miss. 286; *Truly v. Lane*, 7 Smed. & M. (Miss.) 325.

2. **Missouri.** — *Lackland v. Smith*, 5 Mo. App. 153; *Weil v. Kume*, 49 Mo. 158; *Nelson v. Betts*, 21 Mo. App. 219; *Gamble v. Johnson*, 9 Mo. 605; *Morris v. Morris*, 28 Mo. 114; *Gay v. Ihm*, 3 Mo. App. 588, *affirmed* in 69 Mo. 584; *Lock-*

wood v. Lunsford, 56 Mo. 68; *McCullough v. McCullough*, 31 Mo. 226; *Bronson v. Wanzer*, 86 Mo. 408.

By Burns's Annot. Mo. Pr. Code, §§ 505, 506, an issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury unless a jury trial be waived or a reference ordered. Every other issue must be tried by the court, which, however, may take the opinion of a jury upon any specific question of fact involved therein by an issue made up therein for that purpose, or may refer it. A case, therefore, which was formerly cognizable in equity is triable by the court, and there is no error in refusing to have the issues submitted to a jury. *Ellis v. Kreutzinger*, 31 Mo. 432; *Ragan v. McCoy*, 29 Mo. 365; *Conran v. Sellow*, 28 Mo. 321.

Montana. — *Fabian v. Collins*, 3 Mont. 215; *Simonton v. Kelly*, 1 Mont. 483; *Black v. Black*, 5 Mont. 15. See *Arnold v. Sinclair*, 12 Mont. 248.

In *Mantle v. Noyes*, 5 Mont. 287, the court said: "The provision of our Code of Civil Procedure is the same as that of California, and provides that in all cases issues of fact must be tried by a jury (R. S. 83, § 251); but the decision of the Supreme Court of the United States, since the Act of Congress of 1874, validating and confirming the codes and rules of practice in the territories which prescribe a uniform course of proceeding in all cases, whether legal or equitable, and the decision of our own Supreme Court before that act, under a code containing the same provision as to the trial of questions of fact, ought to be conclusive upon the question that an equity case should be tried by the court, and that it is discretionary with the court whether special issues be submitted to a jury to aid the court in arriving at the facts, and that such special issues and findings may be adopted or rejected by the court, as the evidence may require."

For issues in divorce cases, see *infra*, IX. 7. *Divorce*.

the answer, tried by a jury on motion therefor if these issues are material to the decision of the cause and the application is seasonably made.¹

In *New Jersey* questions of fact in a chancery cause may be determined by the court, or, in its discretion, by a jury on issues submitted.²

In *New York* the awarding of issues to a jury by the Court of Chancery was a matter of sound discretion; the chancellor could award an issue or determine the facts himself, as he deemed best.³ The adoption of the Codes of Procedure did not materi-

1. *Marston v. Brackett*, 9 N. H. 349; *Hoitt v. Burleigh*, 18 N. H. 389; *Tibbetts v. Perkins*, 20 N. H. 275. See also *Dodge v. Griswold*, 12 N. H. 573.

In *Tappan v. Evans*, 11 N. H. 334, it was held that in a controversy about a matter of fact in an equity case, it was discretionary with the court whether or not it should send an issue to a jury. This case was commented on and distinguished in *Tibbetts v. Perkins*, 20 N. H. 275, in which it was said: "The case of *Tappan v. Evans*, 11 N. H. 311, was one in which neither party moved for an issue, but in which the court saw fit to seek the aid of the jury as to matters of fact arising in it. The language of the court, therefore, is to be understood and interpreted by the case; and the propositions contained in the authorities cited should be taken with a like restriction, rather than in the unqualified extent of their terms."

2. *Carpenter v. Easton*, etc., R. Co., 26 N. J. Eq. 168; *Shields v. Arndt*, 4 N. J. Eq. 234; *Stafford v. Stafford*, 1 N. J. Eq. 525; *Miller v. Wack*, 1 N. J. Eq. 215; *Gawood v. Eldridge*, 2 N. J. Eq. 290; *Black v. Shreve*, 13 N. J. Eq. 455; *Newark Plank Road, etc., Co. v. Elmer*, 9 N. J. Eq. 790.

3. *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436; *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 258, note; *Smith v. Brush*, 1 Johns. Ch. (N. Y.) 459; *Townsend v. Graves*, 3 Paige (N. Y.) 453; *Munson v. Reed*, *Clarke Ch. (N. Y.)* 580.

Trial under Code of Suit Commenced in Court of Chancery. — In *Palmer v. Lawrence*, 5 N. Y. 392, the suit was commenced in the late Court of Chancery, and it was held that the court was right in overruling appellant's motion to impanel a jury for the trial of issues made by the pleading; the suit was triable by the court, unless, in its discretion, it saw fit to refer the issues to a jury or

referee. Code of 1849, §§ 253, 254, in force when the cause was tried, required every issue of fact, in an action for the recovery of money or of specific real or personal property, to be tried by a jury, and every other issue by the court. These sections were not made applicable to existing suits, and it was held that the cause was, therefore, properly heard by the court.

Summary of Statutes Prior to Code Civ. Pro. — "Before the Act of April, 1838 (Laws of 1838, p. 244, c. 258), regulating trial by jury and the taking of testimony in chancery, the Court of Chancery was not authorized to grant an issue, except in a few specified cases, until after the testimony was taken before examiners or commissioners in the cause. And it was not the practice of the court to grant an issue in ordinary cases unless there was conflicting evidence, so as to create a doubt in the mind of the chancellor upon some matter of fact. The Act of 1838 made it the duty of the court to award an issue upon the application of either party, in every case in which an issue of fact suitable for trial by a jury could be found; and there was no discretion given to the court to refuse the order. * * * The Act was repealed by the Act of May 2, 1839 (Laws of 1839, p. 292, c. 317), which, at the same time, allowed the chancellor to prescribe the manner of proceeding, both as to awarding and trying such issue as he might deem proper to have submitted to a jury. * * * Under this Act Rule 69 of the Court of Chancery was changed, prescribing the manner of settling and trying issues, but leaving the awarding of them discretionary in the court. * * * Where no order had been made before the hearing, it was still competent for the court, upon the trial, to award an issue for the determination of any question arising upon the evidence." Paul

ally change this practice, but left the awarding of issues to a jury in an equity case in the discretion of the court.¹

In Nevada it is held, where there is no strict constitutional right, that the calling of a jury is purely a matter of discretion with the

v. Parshall, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 138.

1. *Paul v. Parshall*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 138; *Zimmerman v. Schoenfeldt*, 3 Hun (N. Y.) 692; *Mackellar v. Rogers*, 109 N. Y. 468; *Cantoni v. Forster*, 12 Misc. Rep. (N. Y. Super. Ct.) 343; *Blunt v. Hibbard*, (C. Pl.) 3 N. Y. Supp. 121; *Brigham v. Gott*, (Supreme Ct.) 3 N. Y. Supp. 518; *Acker v. Leland*, 109 N. Y. 5; *Church v. Freeman*, 16 How. Pr. (N. Y. Supreme Ct.) 298; *Knickerbocker L. Ins. Co. v. Nelson*, 8 Hun (N. Y.) 21; *Carroll v. Deimel*, 95 N. Y. 255; *Ziegler v. Chapin*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 317; *Colman v. Dixon*, 50 N. Y. 572; *Brinkley v. Brinkley*, 56 N. Y. 192; *Brinckerhoff v. Bostwick*, 105 N. Y. 567; *Vermilyea v. Palmer*, 52 N. Y. 471; *Randall v. Randall*, 114 N. Y. 499; *American Primitive Methodist Soc. v. Brooklyn El. R. Co.*, 46 Hun (N. Y.) 530.

New York Code of Procedure, § 253, provides that actions for the recovery of money only, or for specific real or personal property, or for divorce on the ground of adultery, must be tried by a jury unless waived, as provided in section 266, or unless a reference is ordered. Section 254 provides that every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact therein, to be tried by a jury, or may waive it, etc. Under these provisions the submission of issues in equity cases is made discretionary with the court. *Parker v. Laney*, 58 N. Y. 469; *Paul v. Parshall*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 138; *O'Brien v. Bowes*, 10 Abb. Pr. (N. Y. Super. Ct.) 106; *Church v. Freeman*, 16 How. Pr. (N. Y. Supreme Ct.) 298.

Under these provisions an order of the court that all issues be tried by a jury, in an action brought to recover damages for alleged wrongful acts and to restrain the continuance thereof, is valid, irrespective of the question whether the issues might have been tried by the court or not. *Parker v. Laney*, 58 N. Y. 469.

General Construction of Code Provisions. — Construing these provisions, it

was stated that if the nature of the issue is such that a trial by jury would be likely to subserve the ends of justice and facilitate determination of the action, that mode of trial should be adopted. If not, the case should be tried without a jury, and it does not lie with the parties to determine whether the issue, or a specific question of fact, shall be tried by a jury. It is true that either party, if he desires a trial by jury, may, within ten days after the cause is in readiness for trial, give notice of application for that purpose, upon the hearing of which the court may or may not direct issues. This will depend very much upon the probable course of the trial and the nature of the question to be decided. But if the application for a trial by jury be denied, or if no application be made, the court still has the power, at the trial, to order the whole issue, or any specific question of fact involved therein, to be tried by a jury. Issues of fact in common-law actions must be tried by a jury, unless the parties choose to waive this right. But it is for the court to say in either case whether an issue of fact shall be tried by a jury or by the court without a jury, and it is the right of the court, in every case embraced in the 254th section of the Code, to have the aid of a jury upon the trial, and to submit to its determination as many or as few of the facts and questions presented by the pleading as it may deem expedient. *Church v. Freeman*, 16 How. Pr. (N. Y. Supreme Ct.) 298.

Discretion Not Enlarged by Rule of Court. — A rule of court providing that "if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue, or any specific question of facts involved therein, be tried by jury," was held not to enlarge the discretionary power of the court in the submission of issues to a jury, under the Code of Procedure, but only to prescribe the mode of proceeding by which the application may be made to the court, before the hearing, that an issue may be awarded. *Paul*

judge and not a matter of right in the parties, and a jury trial cannot be claimed in an equity case unless such issues be specially framed for a jury under direction of the court.¹

In North Carolina, formerly, if upon the hearing of a cause in equity a question of fact was rendered doubtful by conflicting testimony, the court had the power to direct an issue to a jury, and for this purpose might either cause a jury to be summoned before it or direct the issue to be sent to a court of law for trial.² And under the code issues of fact in equity cases may, in the discretion of the court, be submitted to a jury.³

In Ohio and Oregon the general rule obtains that the court may or may not, in its discretion, send issues of fact to a jury.⁴

In Pennsylvania and South Carolina the submission of issues to the jury in an equitable action rests in the discretion of the court.⁵

v. Parshall, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 138:

Cross-references. — For issues in proceedings for partition, see *infra*, IX. 5. *Quieting Title, and Partition*.

In divorce cases, see *infra*, IX. 7. *Divorce*.

In nuisance cases, see *infra*, IX. 11. *Nuisances*.

On damages, see *infra*, IX. 12. *Damages*.

On value of property, see *infra*, IX. 20. *Value of Property*.

1. *Lake v. Tolles*, 8 Nev. 285; *Van Vleet v. Olin*, 14 Nev. 95.

2. *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27; *Reid v. Barnhart*, 1 Jones Eq. (N. Car.) 142.

In *Jones v. Zollicoffer*, Term (N. Car.) 212, it was held that under the law in force in 1817 all disputed questions of fact in an equity case were triable by jury. So in *Taylor v. Person*, 2 Hawks. (N. Car.) 298, decided in 1832, it was held that issues of fact must be decided by a jury in equity as well as at law, and it must appear on the face of a decree that they were so decided, or it will be error, for which the decree will be rendered.

3. *Goldsborough v. Turner*, 67 N. Car. 403; *Quarles v. Jenkins*, 98 N. Car. 258.

By the Code of 1883, § 398 (Code Civ. Pro., § 224), it is provided that an issue of law must be tried by the judge or court, unless it be referred. An issue of fact must be tried by a jury, unless a trial by jury be waived or a reference be ordered. By section 399 (Code Civ. Pro., § 225), every other issue is triable by the court, or the judge thereof, who,

however, may order the whole issue or any specific question of fact involved therein to be tried by a jury, or may refer it. And when a compulsory reference is ordered, either party has the right to have the issues of fact tried by a jury.

4. In Ohio the chancellor may either send contested facts to a jury, refer them to a master, or, at his option, ascertain them himself. *Carlisle v. Foster*, 10 Ohio St. 198; *St. Clair v. Piott*, Wright (Ohio) 537.

Under the Code of Oregon the general rule is that issues both of law and of fact in an equity case should be tried by the court, but whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury, a statement of the question may be made and submitted to them, and their verdict read in evidence at the trial. *Swegle v. Wells*, 7 Oregon 223.

5. Pennsylvania. — *Byers v. Com.*, 42 Pa. St. 94; *Baker v. Williamson*, 4 Pa. St. 469; *Moore v. Small*, 19 Pa. St. 467; *Scheetz's Appeal*, 35 Pa. St. 88; *Flory v. Bangor Water Co.*, 4 Pa. Dist. Rep. 643; *Reno v. Moss*, 120 Pa. St. 49; *Hess v. Calender*, 120 Pa. St. 138.

The question whether an issue shall or shall not be awarded is purely personal to the judge presiding. If he deems an issue necessary for his own convenience, it is awarded; if not, the order for an issue is withheld. There is but one qualification to the wide discretion thus vested in the court — it must not be exercised so as to work injustice. *Flory v. Bangor Water Co.*, 4 Pa. Dist. Rep. 643.

By the Rules of Equity Practice promulgated by the Supreme Court of

In Tennessee, formerly, the granting of a jury, or ordering the submission of facts to a jury in an equity case, was largely a matter of discretion with the chancellor.¹ But under the code² either party to a suit in chancery may demand a jury to try and

Pennsylvania, July 1st, 1865, it was provided that the awarding of issues in chancery proceedings shall be substantially in accordance with the practice of the High Court of Chancery in England. Under that practice an issue is not of right as respects the parties to a bill; on the contrary, it is rather of grace or discretion on the part of the chancellor. *Genet v. Delaware, etc., Canal Co.*, 13 Phila. (Pa.) 534.

Extent of Constitutional Right to Jury Trial. — It is not competent for the legislature of Pennsylvania to confer on the Chancery Court, acting without a jury, jurisdiction over the legal rights of parties, unless there is some equitable ground for relief involved in the cause. See *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. St. 488; *Tillmes v. Marsh*, 67 Pa. St. 507; *Haines's Appeal*, 73 Pa. St. 169.

For Issues in Divorce Cases, see *infra*, IX. 7. *Divorce*.

South Carolina. — *Asbill v. Asbill*, 24 S. Car. 359; *Todd v. Clarke*, 1 Desaus. (S. Car.) 112; *Anonymous*, 1 Desaus. (S. Car.) 124; *Jaggers v. Estes*, 3 Strobb. Eq. (S. Car.) 34; *Peake v. Peake*, 17 S. Car. 421.

"The only remaining question is whether it was error to refer the case to the master against the protest of the defendants, who claimed the right to have certain issues of fact referred to a jury. The issues in the case, certainly as to Steedly and Walker, are on the equity side of the court, which has no machinery for jury trials, and as a rule, all questions, whether of law or of fact, are decided by the judge sitting as chancellor. If he desires the aid of a jury upon a question of fact, he may order an issue for that purpose merely to enlighten his conscience. This court has decided that § 274 (276) of the code specifies the classes of cases in which a jury trial may be demanded as a legal right. In all other cases it is discretionary with the circuit judge, and from his determination no appeal lies. *Rollin v. Whipper*, 17 S. Car. 32. The section referred to is as follows: 'An issue of law must be tried by the court, as also cases in

chancery,' unless they be referred as provided in chapter 5 of this title. An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial is waived,' etc. We do not regard this an action either for the recovery of money only, or of specific real or personal property." *Pelzer v. Hughes*, 27 S. Car. 408.

Interchange of Circuit Judges. — A circuit judge hearing a chancery cause submitted certain issues of fact to a jury. According to the laws of South Carolina providing for the regular interchange of circuit judges, the cause afterwards came on to be heard before the judge who had been assigned to that circuit. The latter judge submitted to a jury the issues which had been ordered by the preceding judge. On the coming in of the verdict upon the issues the judge made his decree and an appeal was taken. It was held that not only did the judge commit no error in submitting the issues to the jury, but since the order in the case was the order of the judge who preceded him; he could not disregard or reverse it. *Asbill v. Asbill*, 24 S. Car. 355. It is difficult to reconcile this decision with the provisions of Gen. Stat. S. Car. (1882), § 2116, incorporated in Rev. Stat. S. Car. (1893), § 2248, providing that "every judge, while holding the Circuit Court for any circuit pursuant to the provisions of the law of this state, shall be invested with powers equal to those of the judge of such circuit, and may hear and determine all causes and motions, and grant all orders in open court or at chambers, which it is competent for the judge residing in such circuit to hear, determine, or grant; any law, usage, or custom to the contrary notwithstanding." The decision would likewise appear to take away from the judge hearing the cause his discretion in the submission of the issue.

1. See *Simmons v. Tillery*, 1 Overt. (Tenn.) 281; *Allen v. Saulpaw*, 6 Lea (Tenn.) 479.

2. Code of Tenn. (1896), §§ 6282, 6286; *Allen v. Saulpaw*, 6 Lea (Tenn.) 479; *Cooper v. Stockard*, 16 Lea (Tenn.) 143.

determine any material fact in dispute, and the finding of a jury in the premises has the same force and effect as at law. And it is still competent for the chancellor to direct issues of fact *ex mero motu*, where the parties do not claim their right to a jury trial.¹

In Virginia and West Virginia, except in a few particular cases where by statute or practice a jury trial is a matter of right, though the discretion is less free from control by an appellate court than in many of the other states,² it is yet a matter largely within the sound discretion of the court whether or not an issue shall be submitted to the jury or the whole case be decided by the court.³

In Washington and Wisconsin the usual rule prevails, that the court may determine all the issues in an equity case, or may submit questions of fact to a jury if it sees fit so to do.⁴

A Proper Issue, however, must be submitted by the party. *Gass v. Mason*, 4 Sneed (Tenn.) 508.

Immaterial or Unnecessary Issue.—Where all the material issues have been submitted by the court to the jury, it is not reversible error to refuse to submit an immaterial issue, or one already embodied in those submitted. *Pearce v. Suggs*, 85 Tenn. 724.

1. See *London v. London*, 1 Humph. (Tenn.) 1; *Orgain v. Ramsey*, 3 Humph. (Tenn.) 580; *Timmons v. Garrison*, 4 Humph. (Tenn.) 148; *Lowe v. Traynor*, 6 Coldw. (Tenn.) 633.

2. See *infra*, XVI. *Appellate Review*.

3. **Virginia.**—*Robinson v. Allen*, 85 Va. 721; *Crebs v. Jones*, 79 Va. 385; *Keagy v. Trout*, 85 Va. 390; *Stannard v. Graves*, 2 Call (Va.) 369; *Beverley v. Walden*, 20 Gratt. (Va.) 154; *Carter v. Carter*, 82 Va. 624; *Hord v. Colbert*, 28 Gratt. (Va.) 49; *Nice v. Purcell*, 1 Hen. & M. (Va.) 372; *Rowton v. Rowton*, 1 Hen. & M. (Va.) 93; *Smith v. Betty*, 11 Gratt. (Va.) 752; *Pairo v. Bethel*, 75 Va. 825; *Ford v. Gardner*, 1 Hen. & M. (Va.) 72.

For issues on questions of usury, see *infra*, IX. 15. *Usury*.

West Virginia.—*Powell v. Batson*, 4 W. Va. 610; *Anderson v. Cranmer*, 11 W. Va. 582; *Jarrett v. Jarrett*, 11 W. Va. 585; *Setzer v. Beale*, 19 W. Va. 289; *Mahnke v. Neale*, 23 W. Va. 57.

The Code of West Virginia, c. 131, § 4, providing that "a Circuit Court wherein a chancery case is pending may direct an issue to be tried in such court, or in any other Circuit Court," does not change the general chancery

practice as to the direction of issues. *Jarrett v. Jarrett*, 11 W. Va. 584.

For issues on questions of usury, see *infra*, IX. 15. *Usury*.

4. **Washington.**—*Wintermute v. Carner*, 8 Wash. 585; *Installment Bldg., etc., Co. v. Wentworth*, 1 Wash. 467.

In *Divorce Cases* the Code of Pro., § 776, dispenses with jury trials. *Prouty v. Prouty*, 4 Wash. 174. As to issues in divorce cases, see *infra*, IX. 7. *Divorce*.

Wisconsin.—*Gill v. Rice*, 13 Wis. 549; *Gunn v. Madigan*, 28 Wis. 158; *Mason v. Pierron*, 69 Wis. 590.

Even in the Absence of All Statutory Provisions on the subject, the Circuit Courts of Wisconsin have the power to award a feigned issue in a proper case, and when the application therefor is properly made. Such a power is necessarily incident to the general jurisdiction of the courts of equity of this state. Although the granting of feigned issues is said to be a matter resting in the sound discretion of the court, yet this discretion is exercised almost as a matter of course in a certain class of cases, by the English Court of Chancery and by the equity courts in this country. *Waterman v. Dutton*, 5 Wis. 413.

Equity Jurisdiction Fixed by Constitution.—The power of the Circuit Courts of Wisconsin sitting as courts of equity to award feigned issues, and the mode of exercising that power in the sound discretion of the judge, are the same now as anterior to the Code of Wisconsin. Indeed, so far as legislative action may go, the powers and jurisdiction of

IV. IN ACTIONS AND PROCEEDINGS AT LAW. — In actions and proceedings at law generally the parties have a constitutional right to a trial by jury of questions of fact, but there are many cases where, either because of the nature of the proceeding or by consent of the parties, the trial is by the court. In these cases special issues are frequently submitted to a jury.¹

V. LEGAL AND EQUITABLE ISSUES IN THE SAME ACTION OR SUIT — **In General.** — Where there are both legal and equitable issues raised in the same action or suit, they should be separately tried.²

The Legal Issues should be tried by a jury, unless a jury trial be waived.³

the Court of Chancery, as the same were known and in use at and before the time of the adoption of the constitution, are recognized and unalterably fixed by that instrument. Reporter's note to *Waterman v. Dutton*, 5 Wis. 413, referring to *Gill v. Rice*, 13 Wis. 549; *Soenksen v. Weyhausen*, 32 Wis. 521; *Truman v. McCollum*, 20 Wis. 360; *Callanan v. Judd*, 23 Wis. 343.

Cross-references. — For issues in divorce cases, see *infra*, IX. 7. *Divorce*. In suits on mortgages, and to foreclose liens, see *infra*, IX. 9. *Mortgages and Liens*.

1. *Montgomery v. Sayre*, 91 Cal. 206; *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266; *Vermilyea v. Palmer*, 52 N. Y. 474.

"Feigned issues * * * are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause." 3 Black. Com. 452.

Issue as to Ownership of Land in Action at Law. — In *Robertson v. Sharpton*, 17 S. Car. 592, an action at law was brought to recover a tract of land described by metes and bounds, and alleged to have been purchased by the defendants from a third person. The defendant asserted title to the land described by the same metes and bounds. An issue was submitted by consent as to the ownership of the land.

Refusal to Submit Particular Question of Fact. — In a case where no questions of equitable cognizance are made, and which is triable by a jury generally, it is not error to refuse to submit a particular question of fact to a jury. The request to submit a particular question, as whether a deed was executed, is a waiver of the right to a jury to try the case generally. *Spencer v. Robbins*,

106 Ind. 580, approved in *Martin v. Martin*, 118 Ind. 227, modifying and distinguishing *Trittupo v. Morgan*, 99 Ind. 269; *Johnson v. Taylor*, 106 Ind. 89; *Kitts v. Willson*, 106 Ind. 147. See *infra*, VI., VII. and IX.

2. *Chambers v. Jones*, 17 Mont. 156; *Adickes v. Lowry*, 12 S. Car. 97.

Issues Involving Both Legal and Equitable Defenses. — In *California* it is error for the court to frame special issues involving both legal and equitable defenses, and submit them all together to a jury. *Arguello v. Edinger*, 10 Cal. 160; *Weber v. Marshall*, 19 Cal. 447; *Lestrade v. Barth*, 19 Cal. 661.

Same Jury for Legal and Equitable Issues. — In *Nevada*, while it is proper to keep the two defenses separate, yet it is not proper practice to impanel one jury to try the equitable defense and another the legal defense. If special issues are submitted on the equitable side of the case, they should be given to the jury which is to try the law side of the case. *Low v. Crown Point Min. Co.*, 2 Nev. 75.

Order of Trial of Issues. — Whether the legal or equitable issues should be first disposed of, see *Swasey v. Adair*, 88 Cal. 179; *Arguello v. Edinger*, 10 Cal. 160; *Weber v. Marshall*, 19 Cal. 447; *Lestrade v. Barth*, 19 Cal. 661; *Treadway v. Wilder*, 12 Nev. 108; *Low v. Crown Point Min. Co.*, 2 Nev. 75; *Hennequin v. Butterfield*, 43 N. Y. Super. Ct. 411; *The Schooner Samuel T. Keese*, 38 N. Y. Super. Ct. 281, affirming 63 N. Y. 77; *Adickes v. Lowry*, 12 S. Car. 97; *Reams v. Spann*, 28 S. Car. 530; *McGee v. Hall*, 23 S. Car. 391.

3. *Peterson v. Ruhnke*, 46 Minn. 115; *Hennequin v. Butterfield*, 43 N. Y. Super. Ct. 411; *The Schooner Samuel T. Keese*, 38 N. Y. Super. Ct. 281; *Pennsylvania Coal Co. v. Delaware*,

The Equitable Issues are tried according to the equity practice, and may be tried by the court with or without the aid of a jury, in the court's discretion.¹

etc., Canal Co., 1 Keyes (N. Y.) 76; Adickes v. Lowry, 12 S. Car. 97; Smith v. Bryce, 17 S. Car. 544; Reams v. Spann, 28 S. Car. 530; McGee v. Hall, 23 S. Car. 391.

Kentucky.—Frazer v. Naylor, 1 Metc. (Ky.) 593.

The Civil Code of Kentucky, § 12, provides: "In an equitable action, properly commenced as such, either party may by motion have the case transferred to the ordinary docket for trial of any issue concerning which he is entitled to a jury trial; but either party may require every equitable issue to be disposed of before such transfer." See Hill v. Phillips, 87 Ky. 169; Meek v. McCall, 80 Ky. 371; Baxter v. Knox, (Ky. 1895) 31 S. W. Rep. 284.

Equitable Issues No Deprivation of Jury Trial on Legal Issues.—The fact that there are both legal and equitable issues involved in a case cannot deprive a party of his usual constitutional right to a jury trial of the legal issues. Smith v. Bryce, 17 S. Car. 544; Chapman v. Lee, 45 Ohio St. 356; Sommer v. New York El. R. Co., 60 Hun (N. Y.) 148.

And the court does not acquire the right to pass upon the legal defense without a jury trial by virtue of being first called upon to dispose of an equitable defense; but if the trial of the equitable defense does not obviate the necessity of a trial of the issues of law, these must be tried in the same manner as if no equitable defense had been interposed. Swasey v. Adair, 88 Cal. 179.

Difference Between Plaintiff and Defendant in Respect to Legal and Equitable Issues.—In *New York* it was held that as by the common law an action for damages and for the abatement of a nuisance was triable by a jury, the defendant could not be deprived of the right to a jury trial upon these issues, although the plaintiff, in his complaint, also demanded equitable relief. Hudson v. Caryl, 44 N. Y. 554.

But where the plaintiff elects to bring an action for both legal and equitable relief in respect to the same cause of action, the case is not one of right triable by a jury; by such election he submits to have issues tried by the court

alone, or with the aid of a jury, as the court in its discretion may determine, according to the practice in equity cases. Cogswell v. New York, etc., R. Co., 105 N. Y. 319, reversing 54 N. Y. Super. Ct. 92.

Necessity of Claim for Jury Trial.—A suit was in one aspect an action to recover the value of property, but the complainant asked as relief that the amount recovered should be declared an equitable lien against certain property. It was therefore triable as an equity case, but the court held that whether it was or not, the appellant did not ask for the case to be tried by a jury, nor was there any objection to the trial by the court; that a jury is advisory merely, and this being so it was too late, after verdict and finding, to question the correctness of the mode of the trial which was pursued by the court with the assent of the parties. Jarboe v. Severin, 112 Ind. 572. See also Sprague v. Pritchard, 108 Ind. 491.

1. *California.*—Crocker v. Carpenter, 98 Cal. 418; Fish v. Benson, 71 Cal. 428; Weber v. Marshall, 19 Cal. 447.

Colorado.—Tabor v. Sullivan, 12 Colo. 136.

Kentucky.—Smith v. Moberly, 15 B. Mon. (Ky.) 70.

Missouri.—Estes v. Fry, 94 Mo. 267.

Nevada.—Treadway v. Wilder, 12 Nev. 108; Low v. Crown Point Min. Co., 2 Nev. 75.

New York.—Megrue v. United L. Ins. Assoc., 71 Hun (N. Y.) 174.

South Carolina.—Adickes v. Lowry, 12 S. Car. 97; Moore v. Smith, 24 S. Car. 320; Reams v. Spann, 28 S. Car. 530; McGee v. Hall, 23 S. Car. 391.

United States.—Basey v. Gallagher, 20 Wall. (U. S.) 680.

The Iowa Code of 1897, § 3435, provides that "where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings; and, if all the issues were such [as were heretofore cognizable in equity], though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings." Section 3650 pro-

VI. CROSS-COMPLAINT AND COUNTERCLAIM — Cross-complaint. —

The doctrine appears to be that where the issues raised by a cross-complaint are of equitable cognizance, they are triable by the court in its discretion as in ordinary equity cases, but if they are legal, trial by jury is ordinarily a matter of right.¹

vides that "issues of fact in an ordinary action must be tried by jury, unless the same is waived. All other issues shall be tried by the court, unless a reference thereof is made." Under these sections it was held that in actions properly commenced by equitable proceedings, though a legal issue is tendered, the court may try the issue without the intervention of a jury. *Ryman v. Lynch*, 76 Iowa 587.

The Interposition of a Legal Defense in an equitable action does not carry with it all rights incident to such legal defense, so as to make it triable by jury. *Installment Bldg., etc., Co. v. Wentworth*, 1 Wash. 467.

Intimate Blending of Legal and Equitable Issues. — Where issues of both legal and equitable cognizance are so blended as to make the entire action properly an equitable one, it is not error to refuse a trial by jury. *Kortjohn v. Seimers*, 29 Mo. App. 271.

Demand for Jury Trial of All Issues. — Where some of the issues are legal, and triable by a jury, and some are equitable, and triable by the court, a demand for the submission of all the issues in the case to a jury is properly denied. *Greenleaf v. Egan*, 30 Minn. 316; *Lace v. Fixen*, 39 Minn. 46.

Necessity of Special Issues — South Carolina. — In a case assuming an attitude of a case in chancery, for partition, by the plaintiffs, met by a legal defense on the part of the defendants, the equitable issue is subject to a trial by the court and the other to a trial by jury. "In such a case," said the court, "under the old practice, an issue at law would no doubt have been ordered, but under the principles in the code, and the decided cases in our state since the adoption of the code, a special issue would be unnecessary, and the court, upon the pleadings, could proceed with the trial of both the issues—that raised in the answer before a jury, and that in the complaint by the court, unless the jury trial rendered the court trial unnecessary." It was therefore held reversible error on the part of the circuit judge to dismiss the complaint as to

the defendant. The proper practice would have been to transfer the issues of title raised in the answer to the proper calendar, so as to be tried by a jury, unless a jury trial was waived by the parties, leaving the equity question of partition to be determined by the court, dependent upon the result of the jury trial. *McGee v. Hall*, 23 S. Car. 388. See *infra*, X. 6. *Necessity of Framing Special and Distinct Issues.*

1. See generally article CROSS-COMPLAINTS, vol. 5, p. 685.

In Actions of Ejectment. — Where, in an action of ejectment, the cross-complaint states facts which constitute an equitable cause of action, and the relief is such as can be obtained in a court of equity and not elsewhere, the legal issues are the only ones for the trial of which a jury can be demanded, and the equitable issues may be decided by the court without complying with the request to submit such issues to a jury. *Fish v. Benson*, 71 Cal. 428.

Thus, in action of ejectment, where the defendant files a cross-complaint for the specific performance of a parol contract for a lease of land in controversy, the issues so raised constitute a case in equity, and a verdict of the jury thereon is merely advisory and may be disregarded by the court. *Haggin v. Raymond*, 67 Cal. 302.

In Proceedings to Quiet Title to Land — Indiana. — As to whether trial by jury is a matter of right in Indiana where there is a cross-complaint in proceedings to quiet title to land, see *Trittip v. Morgan*, 99 Ind. 269; *Johnson v. Taylor*, 106 Ind. 89; *Kitts v. Willson*, 106 Ind. 147; *Spencer v. Robbins*, 106 Ind. 580; *Martin v. Martin*, 118 Ind. 227. Whatever may be the rule in relation to the right to trial by jury in partition where there is involved the simple question of the right to partition and the quieting of title, yet where the cross-complaint and issues joined thereon involve matters of exclusive equitable jurisdiction, such as an application for an accounting between the tenants, such issues are triable by the court, and a trial of them by a jury is properly refused. *Peden v. Cavins*,

Counterclaim. — The practice governing the trial of issues arising on a counterclaim seems to be the same generally as that which is applicable to cross-complaints.¹

134 Ind. 494. But where, by a cross-complaint, the defendant seeks to recover possession of and quiet his title to land in an action to rescind the sale thereof, the issues are properly triable by a jury, and a demand that they shall be tried by the court should not be granted. *Ross v. Hobson*, 131 Ind. 166.

Rules Governing Making and Trial of Issues on Cross-complaint. — In making up the issues, and in the trial of questions of fact, the court is governed by the same principles of law and rules of practice as pertain to the original complaint. *Ewing v. Patterson*, 35 Ind. 326; *Tippecanoe County v. Lafayette*, etc., R. Co., 50 Ind. 85.

Demand for Trial of All Issues by Jury or Court. — Where the issues in a cross-complaint are of exclusive equitable jurisdiction, and a demand is made that all the issues, as well those as the legal ones in the original complaint, be tried by a jury, the demand is properly refused. A demand for a jury should include only a demand for the trial of such issues as are triable by a jury. *Peden v. Cavins*, 134 Ind. 494.

Vice versa, where the issues in the cross-complaint are legal, and the demand is that all the issues, including these and the equitable ones in the original complaint, be tried by the court, the demand is properly refused. *Ross v. Hobson*, 131 Ind. 166.

1. See generally article SET-OFF AND COUNTERCLAIM.

Equitable Issue on Counterclaim. — In an action upon a note and mortgage in which a cross-complaint or counterclaim is filed, wherein it is alleged that the note and mortgage were executed by the party as surety for her husband and that she had acquired the land mortgaged by gift from her father, the counterclaim praying cancellation of the mortgage, the issue joined on the counterclaim is of equitable cognizance, and the court does not err in denying the request for trial by jury. *Johnson v. Johnson*, 115 Ind. 112.

In New York it is provided by the Code of Civ. Pro., § 974, that where the defendant interposes a counterclaim and thereupon demands an affirmative judgment against the plaintiff, the

mode of trial of the issue of fact arising thereupon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim, and demanding the same judgment.

Where One of the Defendant's Counterclaims Is a Common-law Claim, he has, by the foregoing code provision, a right to jury trial if application is made as prescribed by section 970 of the Code of Civ. Pro.; i. e., by moving to frame issues. *Roslyn Heights Land, etc., Co. v. Burrowes*, 76 Hun (N. Y.) 62.

Failure to Move for Issues — Jury Trial Waived. — The right to a jury trial is a purely statutory right, however, not mandatory on the defendant, and in order to exercise his option he must proceed under the Code Civ. Pro., § 970, which provides that where a party is entitled by the constitution, or express provision of law in an action not specified in section 968, he may apply, upon notice to the court, for an order directing all the questions arising upon those issues to be distinctly and plainly stated. Under Rule 31 of the General Rules of Practice, such motion should be made within ten days after joinder of issue. By failure to move for the framing of issues, and by noticing the cause for trial at a court at which a jury forms no part, the defendant waives any right he may have to a jury and consents to a trial by the court, and therefore the granting or refusing of a request to frame issues is a matter of discretion and is not reviewable on appeal. *Mackellar v. Rogers*, 109 N. Y. 468.

Counterclaim Involving Account. — In *Rutty v. Person*, 49 N. Y. Super. Ct. 55, it was held that though the granting of a motion to frame issues for a jury on a prayer for an accounting, where the answer contains a counterclaim, is in the discretion of the court, yet where it appears that the issues as framed are so minute and numerous, and so grouped, that confusion and mistake by the jury may be expected, the appellate court will reverse the order directing them.

In Brooklyn, etc., R. Co. v. Reid, 21 Hun (N. Y.) 273, the court considered that section 974 of the Code Civ. Pro. was not designed to send a counter-

VII. FROM PROBATE COURTS AND OTHER COURTS OF LIKE NATURE — Probate Courts. — Since Probate Courts exercise their powers by virtue of statutory provisions, the practice of submitting issues therefrom should, in general, accord with those provisions. By some of these authority is given the court to send issues to a jury whenever in its discretion it deems proper so to do,¹ while by others this power can only be exercised when a proper request therefor is made.² In still other cases the matter is not dependent on the discretion of the court, but the parties are entitled to an issue as of right, when properly applied for.³ The statutory provisions of some of the states, however, contain no authorization for sending issues to a jury from Probate Courts.⁴

claim made by a defendant to a jury, in an action which is referable for the reason that the trial will contain a long account.

In *Roslyn Heights Land, etc., Co. v. Burrowes*, 76 Hun (N. Y.) 62, the court held that if the defendant moves to have issues framed on the ground that the counterclaim involves a long account, the motion should be granted as of course, unless resisted by a counter application showing the necessity of a reference.

Counterclaim Presenting Issue for Damages. — The provisions of the Code Civ. Pro., § 974, are applicable where a counterclaim is set up as a defense in the answer which presents an issue for which a separate action might be maintained to recover damages against the plaintiff. If the allegations of the answer are not sufficiently distinct to make up a cause of action *per se*, the defendant will not be entitled to have the issue framed thereon for a trial by jury. *Cock v. Jenkins*, 79 N. Y. 575.

Under the Code Civ. Pro., § 970, as amended by the Act of 1891, where, in an action to foreclose a mechanic's lien, the defendants set up a counterclaim in which they asked for judgment against the plaintiff, not only for the money which they claimed they had to expend to complete certain work left undone by the plaintiff, but also for damages caused by his delay, the plaintiff was held entitled to have the question of damages for delay submitted to a jury unless the defendants, before the settlement of an order in the case, which must be done on three days' notice, stipulated to abandon their claim for damages by reason of delay; in which event the motion

should be altogether denied. *Riggs v. Shannon*, 27 Abb. N. Cas. (N. Y. C. Pl.) 456.

1. See *Keller v. De Franklin*, 5 Cal. 433; *Pond v. Pond*, 10 Cal. 495; *Leach v. Pierce*, 93 Cal. 614.

On Appeal from Decree of Probate Judge. — Under the laws of *New Hampshire*, on appeal from the decree of a judge of probate, allowing a guardian's account, the appellate court may in its discretion send any questions of fact to a jury that it may deem proper, but neither party can claim as a matter of right that any such question of fact shall be submitted to a jury. *Patrick v. Cowles*, 45 N. H. 553.

2. In *Alabama* the judges of probate have authority to cause jurors to be impaneled and sworn in any matter of fact pending before them in which the right to a jury trial is given by law. This, however, cannot be done *ex mero motu*, and if no requisition for a jury be made, there is no error in trying the cause without a jury. *Blankenship v. Nimmo*, 50 Ala. 508.

3. In *Indiana*. — Under Rev. Stat. (1843), §§ 15, 16, either party could demand a trial by jury of issues of fact involved in the chancery proceedings in the Probate Court, and the court was bound by the verdict, unless it was set aside. The language of the statute though in form merely permissive, was held to be in fact peremptory. *Clem v. Durham*, 14 Ind. 263.

4. In *Missouri*. — The statutes have made no provision for a trial by jury in the Probate Courts, and Rev. Stat. (1889), § 2131, providing for the trial of certain issues of fact by jury, has no application to proceedings in the Probate Court. *Bradley v. Woerner*, 46 Mo. App. 371.

Orphans' Courts. — The awarding of issues in matters arising in Orphans' Courts is likewise for the most part governed by statutes.¹

Surrogates' Courts. — Issues from these courts are in general gov-

For General Treatment of issues in probate and administration cases, see article PROBATE AND ADMINISTRATION.

For Particular Questions as to issues from Probate Courts pertaining to the various divisions of this article, see those divisions.

1. Pennsylvania. — *Under Act of March 15, 1832* (Purdon 1256, pl. 22), it is provided that whenever a dispute upon a matter of fact arises before any Register's Court, now superseded by the Orphans' Court, the said court "shall, at the request of either party, direct a precept for an issue to the Court of Common Pleas of the county, for the trial thereof." The demand for such an issue is a matter of right, and not dependent on the discretion of the court, as are other issues of fact under Act of March 29, 1832, Purdon 1108, pl. 45. But the issue demanded must be relevant, material, and sustained by competent proof, else it will be refused. *In re Boyer*, 13 Phila. (Pa.) 255.

Under Act of March 29, 1832, § 55 (Purdon 768, pl. 44), it is declared that the "Orphans' Court shall have power to send an issue to the Court of Common Pleas of the same county, for the trial of facts by a jury, whenever they shall deem it expedient to do so." The allowance of it is entirely within the discretion of the court. *Baker's Appeal*, 59 Pa. St. 317; *Kates's Estate*, 9 Pa. Co. Ct. Rep. 569; *Cobb v. Burns*, 61 Pa. St. 281; *Thompson's Appeal*, 103 Pa. St. 606.

Under Act of April 20, 1846 (P. L. 411), which treats of returns made by a sheriff, executor, administrator, or other person who has made a sale of real estate whereby it appears that the purchaser is a lien creditor and has given his receipt to the officer for the amount of his lien, an issue is a matter of right on a proper and sufficient affidavit. The discretion to be exercised is in determining the sufficiency of this affidavit. If it be sufficient it is error to refuse it; *aliter* if it be insufficient. *Gordon's Estate*, 9 Phila. (Pa.) 350, *referring to Lippincott v. Lippincott*, 1 Phila. (Pa.) 396; *Baker's Appeal*, 59 Pa. St. 313; *Russel v. Reed*, 27 Pa. St. 166; *Cobb v. Burns*, 61 Pa. St. 278;

Christophers v. Selden, 28 Pa. St. 165. This act applies only to the distribution of money arising from sales under execution and Orphans' Court sales. *Baker's Appeal*, 59 Pa. St. 317.

Demand Supported by Evidence. — A demand for an issue from the Orphans' Court under the foregoing provisions must be supported by competent and sufficient evidence, usually such as would sustain a verdict in favor of the party. See *infra*, VIII. 2. *a. Bill and Answer Unsupported by Evidence*, notes.

Mixed Questions of Law and Fact. — The Orphans' Court can send issues only on contested questions of fact, not on mixed questions of law and fact. *Cobb v. Burns*, 61 Pa. St. 281, *referring to Robinson v. Zollinger*, 9 Watts (Pa.) 169; *Shertzer v. Herr*, 19 Pa. St. 34; *Russel v. Reed*, 27 Pa. St. 166; *Christophers v. Selden*, 28 Pa. St. 165; *Robinson's Appeal*, 36 Pa. St. 81. See *infra*, VIII. 3. *Questions of Law*.

Materiality and Relevancy of Issues. — The issues demanded must be material and relevant to prevent their refusal. *In re Boyer*, 13 Phila. (Pa.) 255.

Maryland. — The Code of Maryland, art. 93, § 250, requires the Orphans' Court, in all cases of controversy therein, if either party require it, to direct an issue or issues to be made up and sent to any court of law convenient for trying the same. *Sumwalt v. Sumwalt*, 52 Md. 338. Where different parties, by separate petitions in the Orphans' Court, are resisting a claim upon the same grounds, and ask for issues to try its validity, it is proper for the court to order the parties and proceedings to be joined on the trial of the issues sent. *Yingling v. Hesson*, 16 Md. 112.

For Particular Questions on issues from Orphans' Courts, pertaining to the various divisions of this article, see those divisions.

Of issues on questions arising before auditors, on questions of distribution, on facts arising on execution, Orphans' Court and sheriffs' sales, and on claims in general and issues on rights of property, see the following articles: PROBATE AND ADMINISTRATION; REFERENCES; RIGHT OF PROPERTY — TRIAL OF.

erned by principles and statutes similar to those relating to the courts above dealt with.¹

VIII. GENERAL PRINCIPLES GOVERNING GRANTING OR DENYING

— 1. **Where Matters Are Not Alleged in Pleadings.** — In the exercise of the discretion with which a court of equity is endowed, to determine upon matters itself or to submit them to a jury, certain rules and principles will be more or less closely adhered to. For the most part no issue will be directed on matters not properly alleged in the pleadings.²

2. Questions Relating to Doubt, Evidence, Disputed Facts, etc. —

a. **BILL AND ANSWER UNSUPPORTED BY EVIDENCE.** — According to the practice prevailing in some cases, if the allegations of the bill are directly denied by the answer, though there be no evidence introduced, an issue to a jury may be awarded to try the question of fact thus raised.³ But the general and most approved doctrine is that where the allegations of the bill or answer are unsupported by any evidence or proof, no issue should be directed.⁴

1. For the most part the issues from these courts arise on probate and administration proceedings, and will be treated in the article PROBATE AND ADMINISTRATION.

2. See *St. Paul's v. Kettle*, 2 Ves. & B. 2; *Morgan v. Fuller*, L. R. 2 Eq. 296; *Price v. Berrington*, 3 Macn. & G. 486; *Bennett v. Neale*, Wightw. 324; *Savage v. Carroll*, 1 B. & B. 548; *Borret v. Goodere*, 4 Bro. P. C. 679. See *infra*, X. 8. *From What Sources Issues Are Made Up.*

3. **Issue upon Inspection of Pleadings.** — As illustrating this doctrine, it was said in a case in *Pennsylvania* that it is probable that since the adoption of the amended equity rules, issues will be awarded much more frequently whenever, upon an inspection of the pleadings, it becomes manifest that important and difficult questions of fact are asserted on one side and denied on the other. *Flory v. Bangor Water Co.*, 4 Pa. Dist. Rep. 643.

Validity of Assignment. — So in another case in *Pennsylvania*, where a bill in equity alleged the assignment of certain shares of stock belonging to a decedent, which the executor denied, a feigned issue was granted to determine the validity of the assignment. *Philadelphia Nat. Bank v. Henry*, 13 W. N. C. (Pa.) 128.

Forgery or Alteration of Deed. — Likewise in *Tennessee* it was held that if a bill is filed for the cancellation of a deed because of forgery, or because a par-

ticular clause was inserted in it, after its execution, by the defendant, without the complainant's knowledge or consent, and the answer directly denies the charge, this makes an issue which the court of equity will submit to a jury. *Maise v. Garner*, Mart. & Y. (Tenn.) 383.

4. **Claim or Title Unsupported by Evidence.** — An issue out of chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but suggested in the answer without proof; neither is this rule to be varied by the circumstance that infants are interested. *Paynes v. Coles*, 1 Munf. (Va.) 373.

Plaintiff's Suggestion of Mistake Without Evidence. — On a bill in equity to reform a policy of insurance by inserting a clause which it is alleged the parties agreed to insert, the plaintiff cannot have issues framed for a jury as a matter of right; and the court will not, in its discretion, frame such issues without evidence that the plaintiff's suggestion of mistake in the contract has some foundation, or circumstances indicating that the matter can be more satisfactorily tried by a jury than by the court. *Ross v. New England Mut. Ins. Co.*, 120 Mass. 113.

Case Relied On by Answer but Omitted in Proof. — A defendant is not entitled to an issue or inquiry to establish a case relied on by his answer but omitted in proof. *Savage v. Carroll*, 1 B. & B. 548.

b. DOUBT PRODUCED BY NATURE OF PROOF OR CONFLICTING EVIDENCE. — Generally speaking, a court of equity will direct an issue to be tried at law only in cases where doubt is produced in the mind of the court, either by the nature of the proof itself or by reason of conflicting evidence.¹ When, however, important rights are depending upon disputed or controverted facts, and the court is in doubt as to the proof thereof, it is proper and usual to send such issues of fact to a jury for determination.²

No Evidence Against Denial in Answer.

— Where the case of the plaintiff is denied by the defendant, and there is no evidence against the answer, the court will not direct an issue to be tried and defendant to be examined, though the transaction be of such kind as to be exclusively within the knowledge of the defendant. *Pritchard v. Gee*, 3 L. J. Ch. 222.

Evidence on Demand of Issues from Orphans' Court. — In order to support a demand for an issue from the Orphans' Court of *Pennsylvania*, there must be competent and sufficient evidence produced, usually such as would sustain a verdict in favor of the party. *Gray's Estate*, 7 W. N. C. (Pa.) 542; *Kates's Estate*, 9 Pa. Co. Ct. Rep. 569; *Hansell's Estate*, 2 W. N. C. (Pa.) 128; *Restine's Estate*, 3 W. N. C. (Pa.) 27; *In re Boyer*, 13 Phila. (Pa.) 255; *Beeher's Estate*, 3 Phila. (Pa.) 254.

1. *Gray v. Haig*, 20 Beav. 219; *Harrod v. Harrod*, 18 Jur. 853; *Short v. Lee*, 2 Jac. & W. 464; *Atwood v. Smith*, 11 Ala. 894; *Miller v. Wack*, 1 N. J. Eq. 215; *Hurley v. Oakley Land, etc., Co.*, (Va. 1896) 24 S. E. Rep. 237.

In Case of a Rector or Heir at Law, an issue at law could be directed though there was no contradictory evidence, and nothing to prevent or embarrass the court's decision upon the evidence. 2 *Daniell Ch. Pr.* (1st Am. ed.) 728.

2. *Ringold v. Patterson*, 15 Ark. 209; *Milk v. Moore*, 39 Ill. 588; *Munson v. Reed*, *Clarke Ch.* (N. Y.) 580; *Black v. Shreve*, 13 N. J. Eq. 455; *Fisler v. Porch*, 10 N. J. Eq. 243; *Miller v. Wack*, 1 N. J. Eq. 215; *Porter v. Child*, 10 Lanc. Bar (Pa.) 45; *Huston v. Huston*, 13 Phila. (Pa.) 183, 36 Leg. Int. (Pa.) 202; *Garsed v. Beall*, 92 U. S. 684; *Field v. Holland*, 6 Cranch (U. S.) 8; *Bott v. Smith*, 21 Beav. 511; *Plunkett v. Kingsland*, 1 Bro. P. C. 322; *Burkett v. Randall*, 3 Meriv. 466.

Evidence Unsatisfactory or Insufficient.

— When feigned issues are directed by

the court sitting in equity, it is generally done upon the ground that the evidence in the record is not of a character or not sufficient to afford the means of a satisfactory conclusion; but the verdict of the jury is only advisory, and may be set aside or even overruled. *Goodyear v. Providence Rubber Co.*, 2 Cliff. (U. S.) 351.

Facts Doubtful from Bill, Answer, or Evidence. — Where an allegation of a bill in equity is denied by the answer, and the evidence leaves the fact doubtful, the court will direct an issue. *Bullock v. Gordon*, 4 Munf. (Va.) 450; *Galt v. Carter*, 6 Munf. (Va.) 245; *Janney v. Imperial Oil Co.*, 6 Phila. (Pa.) 261; *Huston v. Huston*, 13 Phila. (Pa.) 183.

Submission for Additional Facts and Satisfactory Conclusion. — It rests in the sound discretion of the chancellor to award a feigned issue or not, and it is done to enable him to obtain additional facts, and to arrive at a satisfactory conclusion on the facts of the case. *U. S. v. Samperyac*, *Hempst.* (U. S.) 118.

To Determine Nature of Assignment. — The question whether an assignment was intended as an absolute one or as a mere authority to enable the defendant to collect being doubtful from the evidence, the court directed an issue out of chancery. *Fisler v. Porch*, 10 N. J. Eq. 243.

Whether Elder Grant Embraced Land Covered by Junior Patent. — Where the evidence fails to show that an elder grant, under which the plaintiff claims, covered the land embraced by a junior patent sought to be set aside, but yet makes it probable that such was the case the court should direct an issue to be tried by a jury to ascertain that fact. *Randolph v. Adams*, 2 W. Va. 519.

Submission on Written as Well as Oral Evidence. — The practice of referring doubtful questions in chancery cases to juries is not confined to those cases

c. WHERE THERE IS CONFLICTING EVIDENCE, OR CREDIBILITY OF WITNESSES IS INVOLVED. — Where the evidence in the case is conflicting,¹ or the accuracy and credibility of witnesses is involved,² and the chancellor feels the necessity of a trial by

where witnesses ought to be introduced; but where the chancellor is perplexed with doubtful questions of fact, he may invoke the aid of a jury as well where the decision must be upon written evidence in the record as where oral testimony is to be introduced. *Lee v. Beatty*, 8 Dana (Ky.) 212.

On written depositions it has always appeared proper, and therefore has been the practice, to direct issues on important questions of fact, *Hilleary v. Crow*, 1 Har. & J. (Md.) 542; even though the whole of the evidence be written and the question depends upon the construction of that evidence, *Collins v. Sawrey*, 4 Bro. P. C. 692.

In *West Virginia* it was said that where, in a given case, a decree rendered is sustained with reasonable certainty by the facts and circumstances disclosed by the record, there would be no error in omitting or refusing to direct an issue to try any material matters of fact put in issue by the pleadings; but if the correctness of the decree is made to depend on the existence or nonexistence of such material facts, and the evidence and circumstances of the case are so equally balanced as to make their existence or nonexistence doubtful, then it would be error to fail or refuse to direct an issue to be tried by a jury. *Powell v. Batson*, 4 W. Va. 610.

1. *Kennedy v. Kennedy*, 2 Ala. 571; *Guild v. Hull*, 127 Ill. 523; *Bassett v. Johnson*, 3 N. J. Eq. 417; *Wendell v. Highstone*, 52 Mich. 552; *Asbill v. Asbill*, 24 S. Car. 359; *Hooe v. Marquess*, 4 Call (Va.) 416; *Knibb v. Dixon*, 1 Rand. (Va.) 249; *Almond v. Wilson*, 75 Va. 626; *Steptoe v. Pollard*, 30 Gratt. (Va.) 689; *Stokes v. Edmeades*, 1 McClel. & Y. 436; *Savage v. Carroll*, 2 B. & B. 451.

New York. — Under the code, when an equity case is called for trial, the court may order questions to be tried by a jury if it is apparent that their determination will depend on conflicting evidence. *Zimmerman v. Schoenfeldt*, 3 Hun (N. Y.) 692, 6 Thomp. & C. (N. Y.) 142.

In *Oregon* the code, providing for the submission of issues to a jury in an

equity case, does not provide when or in what cases it becomes necessary or proper to inquire of a fact by the verdict of the jury, and in order to determine this question it is necessary to look to the general equity practice. Under such practice, if the evidence is contradictory and conflicting, and so nearly equally balanced that it is doubtful which scale preponderates, it is a proper case to be submitted to a jury. *Swegle v. Wells*, 7 Oregon 223.

Doubt as to Preponderance of Evidence. — A court of chancery usually will, in its discretion, when the evidence in regard to any material fact properly in issue in the cause is conflicting and the weight of testimony is so nearly balanced that it is unable to determine on which side it preponderates, direct an issue as to such facts, to be tried by a jury. *O'Brien v. Bowes*, 4 Bosw. (N. Y.) 657; *Munson v. Reed*, Clarke Ch. (N. Y.) 580; *Mahnke v. Neale*, 23 W. Va. 57; *Anderson v. Cranmer*, 11 W. Va. 582; *Jarrett v. Jarrett*, 11 W. Va. 585; *McFarland v. Douglass*, 11 W. Va. 637; *Setzer v. Beale*, 19 W. Va. 289; *Vangilder v. Hoffman*, 22 W. Va. 1; *Crabb v. Larkin*, 9 Bush (Ky.) 163; *Stokes v. Edmeades*, 1 McClel. & Y. 436.

Test of Doubtful Preponderance by Action of Appellate Court. — The conflict of the evidence must be regarded as justifying the direction of an issue whenever on appeal the appellate court is so divided in opinion as to the weight of the evidence that some of the judges think that the issue ought not to have been directed, because the evidence established clearly one state of facts, while others of the judges think that the evidence establishes an opposite state of facts. This marked diversity of opinion as to the weight of evidence is itself sufficient to establish that it is doubtful on which side is the preponderance, and therefore, in such case, the order directing such issue ought not to be reversed. *Vangilder v. Hoffman*, 22 W. Va. 1.

2. *Ex p. Chambers*, 1 Deacon 197, 38 E. C. L. 439; *Chapman v. Chapman*, 4 Call (Va.) 430; *Isler v. Grove*, 8 Gratt. (Va.) 257; *Munson v. Reed*, Clarke Ch. (N. Y.) 580.

jury to satisfy his conscience upon a question of fact before him for determination, it is proper to award an issue to a jury.¹ But even though the evidence is contradictory and conflicting, if the chancellor is satisfied that the weight of evidence is on one side, he is not bound to direct an issue. The expense and delay which it involves are only to be incurred when the court, in the exercise of a sound discretion, may think it necessary, except in certain particular cases in which, by statute or practice, it is made a matter of right.² In some of the states the doctrine has been carried so far as to preclude the direction of an issue until the plaintiff has thrown the burden of proof upon the defendant, so that where there is a direct conflict between two witnesses, one affirming and the other denying a fact to be proven, there should be no issue to a jury.³

Conflict in Depositions Showing Perjury.

— In *Witherspoon v. Dula*, 2 Dev. & B. Eq. (N. Car.) 279, it was held that when the depositions of the witnesses in an equity suit, transmitted to the Supreme Court for hearing, are in such direct conflict with each other that perjury has evidently been committed, but the court cannot tell on which side the guilt lies, it will direct feigned issues to be made up and tried, so that the witnesses may be personally examined in open court.

1. *McCully v. McCully*, 78 Va. 159; *Keagy v. Trout*, 85 Va. 390; *Williams v. Blakey*, 76 Va. 259; *Russell v. Paine*, 45 Ill. 350.

Pennsylvania. — In the trial of an equitable ejectment where the defendant relies upon an alleged parol contract and possession and improvements thereunder, where the facts alleged are sufficient, if satisfactorily established, but the evidence in relation to them is conflicting or the credibility of a witness is involved, and the conflicting testimony is of such a character that the chancellor can conscientiously sustain a verdict either way, according as the jury may find, the case should go to a jury with careful instructions, so that it may turn upon their finding on the disputed fact. On the other hand, if the evidence in support of the witness or fact necessary to sustain the parol contract is 'suspicious or unreliable in character, so that the chancellor could not conscientiously sustain a verdict resting upon it, he should not submit it to the jury. Their finding is in aid of his conscience, and when, upon all the evidence, he could not in good conscience accept their verdict as a fair and just

disposition of the question, whatever the verdict might be, he may dispose of the case without their aid. *Hess v. Calender*, 120 Pa. St. 138.

2. *Alabama.* — *Alexander v. Alexander*, 5 Ala. 517.

New York. — *Cantoni v. Forster*, 12 Misc. Rep. (N. Y. Super. Ct.) 343.

Virginia. — *Nice v. Purcell*, 1 Hen. & M. (Va.) 372; *Rowton v. Rowton*, 1 Hen. & M. (Va.) 93; *Crebs v. Jones*, 79 Va. 385; *Keagy v. Trout*, 85 Va. 390; *Hord v. Colbert*, 28 Gratt. (Va.) 49; *Williams v. Blakey*, 76 Va. 259; *Robinson v. Allen*, 85 Va. 721; *Samuel v. Marshall*, 3 Leigh (Va.) 567.

England. — *Robinson v. Anderson*, 7 De G. M. & G. 239. See *Mason v. Mason*, 1 Meriv. 308; *Collins v. Sawrey*, 4 Bro. P. C. 692.

Extent of Conflict Necessary. — In *West Virginia* no issue is to be directed until there is such a conflict as renders it difficult to see on which side the preponderance lies; not for mere conflict short of this. *Vangilder v. Hoffman*, 22 W. Va. 1. See also *Setzer v. Beale*, 19 W. Va. 289.

3. *Vangilder v. Hoffman*, 22 W. Va. 1; *Sands v. Beardsley*, 32 W. Va. 594.

Plaintiff Failing to Overthrow Answer Denying Bill. — According to this doctrine, where the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and strongly corroborating circumstances, in support of the bill, it is error in the chancellor to direct an issue. No issue should be ordered until the plaintiff has shown enough to throw the burden of proof on the defendant, or until the onus is shifted and the case rendered doubtful

d. WHERE THERE IS NO CONFLICTING OR CONTRADICTORY EVIDENCE. — Where there is no conflict or contradiction produced by the evidence, or it is not so nearly balanced as to render an open and rigid cross-examination of witnesses before a jury necessary, no issue should in general be awarded.¹ But though this is the general rule, yet the court is not in all cases precluded from granting an issue because there is no conflicting evidence.²

e. WHERE THERE IS FAILURE OF PROOF. — If there is no conflict between the different portions of the evidence, no ambiguity or uncertainty in it, but simply a failure to prove material facts, no issue will ordinarily be directed.³

f. WHERE EVIDENCE IS SATISFACTORY OR DECISIVE. — Where the evidence is satisfactory or decisive, the court should decide the facts itself and not submit them to a jury for determination.⁴

g. WHERE EVIDENCE IS ALL ON ONE SIDE, OR PREPONDERANCE IS CLEAR. — If all the evidence⁵ or a clear preponderance

by the conflicting evidence of the opposing parties. *Smith v. Betty*, 11 Gratt. (Va.) 752; *Pryor v. Adams*, 1 Call (Va.) 382; *Carter v. Carter*, 82 Va. 624. See also *Jones v. Christian*, 86 Va. 1031; *Gamble v. Johnson*, 9 Mo. 605.

1. *Carradine v. Carradine*, 58 Miss. 286; *Townsend v. Graves*, 3 Paige (N. Y.) 453; *Genet v. Delaware, etc.*, Canal Co., 6 Luz. Leg. Reg. (Pa.) 73; *Kraker v. Shields*, 20 Gratt. (Va.) 377.

2. **Evidence All on One Side but Unsatisfactory.** — Thus, where the evidence was all on one side and there was no conflicting evidence or claim, yet if the evidence was not satisfactory to the court, the practice was to direct an issue. *Moons v. De Bernales*, 1 Russ. 301; *Burkett v. Randall*, 3 Meriv. 466. See *infra*, VIII. 2. *g.* *Where Evidence Is All on One Side, or Preponderance Is Clear.*

3. *Reed v. Cline*, 9 Gratt. (Va.) 136; *Beverly v. Rhodes*, 86 Va. 419.

Thus, where in a bill for specific performance the plaintiff failed to prove the terms of the agreement relied on, the court would not direct an issue to ascertain them. *Savage v. Carroll*, 2 B. & B. 451.

But in *Moons v. De Bernales*, 1 Russ. 301, where the title of plaintiffs to certain goods in controversy was not made out strictly or conclusively, an issue at law was directed to try that fact, though no adverse claim was set up and strong uncontradicted evidence was produced on the plaintiff's part.

See *supra*, VIII. 2. *d.* *Where There Is No Conflicting or Contradictory Evidence.*

4. *Missouri.* — *Luce v. Barnum*, 19 Mo. App. 359; *Morris v. Morris*, 28 Mo. 114.

New Jersey. — *Garwood v. Eldridge*, 2 N. J. Eq. 290; *Stafford v. Stafford*, 1 N. J. Eq. 525; *Miller v. Wack*, 1 N. J. Eq. 215; *Shields v. Arndt*, 4 N. J. Eq. 234.

New York. — *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436.

Pennsylvania. — *Genet v. Delaware, etc.*, Canal Co., 13 Phila. (Pa.) 534.

Virginia. — *Loftus v. Maloney*, 89 Va. 605; *Hurley v. Oakley Land, etc.*, Co., (Va. 1896) 24 S. E. Rep. 237; *Robinson v. Allen*, 85 Va. 721.

United States. — *U. S. v. Samperyac*, Hempst. (U. S.) 118; *Van Hook v. Pendleton*, 1 Blatchf. (U. S.) 187; *Goodyear v. Day*, 2 Wall. Jr. (C. C.) 283.

England. — *Harrod v. Harrod*, 18 Jur. 853.

5. "It is generally in those cases only where there is contradictory evidence that the court will be induced to grant an issue to try a controverted fact; a mere suggestion upon the record, unsupported by evidence in opposition to evidence on the other side, will not be sufficient." 2 Dan. Ch. Pr. (1st Am. ed.) 733; *Nichol v. Vaughan*, 2 Dow. & Cl. 420; *Winchilsea v. Garety*, 1 Myl. & K. 253; *Harrod v. Harrod*, 1 Kay & J. 4; *Hoitt v. Burleigh*, 18 N. H. 390.

thereof is on one side, no issue should usually be awarded.¹ But even though all the evidence be on one side, if the court is doubtful or not satisfied it may direct an issue.²

h. WHERE THERE ARE NO DISPUTED OR CONTROVERTED FACTS. — An issue should not be awarded where there are no disputed or controverted facts and no evidence to make an issue necessary.³

3. Questions of Law. — An issue to a jury ought to be granted only to try definite and clearly defined questions of fact, and never to try questions of law.⁴ And where intricate questions

1. *Mahnke v. Neale*, 23 W. Va. 57; *De Vaughn v. Hustead*, 27 W. Va. 773; *Loftus v. Maloney*, 89 Va. 605.

In *Iler v. Roth*, 3 How. (Miss.) 276, it was held that a chancellor may, whenever his mind is in doubt or uncertainty as to the preponderance of evidence, send an issue to the country, but he has the right, with certain exceptions, to take upon himself the decision of every fact in a cause; and that if the chancellor directs an issue to the country where the preponderance of evidence is clearly on one side, error will not lie, inasmuch as it is entirely a matter of discretion with him.

2. *Moons v. De Bernales*, 1 Russ. 301; *Burkett v. Randall*, 3 Meriv. 466. See *supra*, VIII. 2. *d. Where There Is No Conflicting or Contradictory Evidence.*

3. *Rochester v. Atty.-Gen.*, 4 Bro. P. C. 643; *Pym v. Bowreman*, 3 Swanst. 241.

Controverted Facts. — In *Massachusetts*, whether or not a party to a suit in chancery has a constitutional right to a trial by jury, issues can be framed only in regard to controverted questions of fact material to the case. *Shaw v. Norfolk County R. Co.*, 16 Gray (Mass.) 407; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344.

Facts in Dispute. — In proceedings to quiet title under *Pennsylvania* Act of July 10, 1893, where it appears that there are no facts in dispute, the court will not frame an issue for the jury. *President, etc., of Delaware & H. Canal Co. v. Genet*, (Pa. Com. Pl.) 3 Lack. Jur. 281.

In *St. Clair v. Piatt*, *Wright* (Ohio) 537, it was said that a chancellor is not required to send contests about facts to a master or to a jury, of course. He may either send to a jury, refer to a master, or ascertain facts himself, at his option. In that case a reference was deemed unnecessary, because the

case on paper showed the amounts, and there was little or no dispute, even among counsel, as to sums or dates.

As to Public Officer's Compensation. — In a suit for the determination of a public officer's right to compensation, an issue should not be awarded if the facts are undisputed. *Scranton School Dist. v. Simpson*, 133 Pa. St. 202, 25 W. N. C. (Pa.) 517.

4. *Blaney v. Mahon*, 4 Bro. P. C. 81; *Noel v. Rochford*, 5 Bligh N. S. 667; *Thompson's Appeal*, 36 Pa. St. 418; *Crosier v. McLaughlin*, 1 Nev. 348.

The Legal Effect of uncontroverted facts should not be the subject of issues to a jury. *Sparks v. Farmers' Bank*, 3 Del. Ch. 225.

Mixed Questions of Law and Fact are not to be tried by a jury on issues. *Landis v. Lyon*, 71 Pa. St. 475; *Cleandaniel's Estate*, 11 Phila. (Pa.) 50; *Cobb v. Burns*, 61 Pa. St. 281, referring to *Robinson v. Zollinger*, 9 Watts' (Pa.) 169; *Shertz v. Herr*, 19 Pa. St. 34; *Russel v. Reed*, 27 Pa. St. 166; *Christophers v. Selden*, 28 Pa. St. 165; *Robinson's Appeal*, 36 Pa. St. 81.

Construction of Issue. — In an action brought by the plaintiff to recover a tract of land described by metes and bounds and alleged to have been purchased by the defendant from a party, the defendant asserted title to the land described by the same metes and bounds as in the complaint. It was held that an issue in the words, "Is plaintiff entitled to the possession of the following described land?" did not refer questions of law to the jury, but only an issue of fact to be determined by them under instructions from the court upon the law of the case. *Robertson v. Sharpton*, 17 S. Car. 592.

Issue on Opening Judgment. — Judgment was entered by a school district against a city treasurer, who was *ex officio* school treasurer, on his official

of law will arise on the trial of an equity case, the discretion of the judge is best exercised by not allowing issues of fact to a jury.¹

4. Materiality of Issues.—An issue should not be directed on a question the decision of which is immaterial or unessential to the determination of the suit.² Unless the court can see that the result of the issue, in any event, must be material, no issue will be put to the jury.³

5. Issues Numerous, Minute, or Liable to Confuse.—Where the issues are very numerous or very minute, or so grouped that confusion and mistake by a jury may be expected, the court should decide them itself and not send them to a jury.⁴

bond, under a warrant of attorney contained therein. On opening the judgment the court framed an issue to determine his right to retain a certain sum for compensation as school treasurer. This was held error. There were no disputed facts, and nothing but a question of law to be decided, and to refer this to a jury was clearly wrong. *Scranton School Dist. v. Simpson*, 133 Pa. St. 202.

1. *Blunt v. Hibbard*, (C. Pl.) 3 N. Y. Supp. 121, citing *Acker v. Leland*, 109 N. Y. 5.

2. *Price v. Griffin*, 1 Moll. 401; *Rochester v. Atty.-Gen.*, 4 Bro. P. C. 643; *Ellensohn v. Keyes*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 353; *In re Boyer*, 13 Phila. (Pa.) 255.

Materiality of Facts Where Issues Are of Right.—Thus, it is held in *Massachusetts* that even if a party has a statutory right to trial by jury in an equity case, it is only in regard to those controverted facts which are essential to the trial of the whole case. And whether the facts are so essential or material is to be determined by the court. *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344.

So in *Delaware* it was held that the act which directs issues of fact in a chancery cause to be tried at the bar of the Superior Court must be understood as referring only to issues of fact which involve the merits of the case and are material to the decision of the cause, and the chancellor is not bound to order issues to be tried by a jury unless they are thus material. *Waters v. Comly*, 3 Harr. (Del.) 117, affirming *Comly v. Waters*, 2 Del. Ch. 72.

In *Tennessee*, likewise, where the parties to an equity case have a right to a jury trial, it is not reversible error for the court to refuse to submit an imma-

terial issue, all the material issues having been submitted. *Pearce v. Suggs*, 85 Tenn. 724.

Issues on Conditions of Chattels Which Were Considerations of Mortgage.—The current English and American authority on the subject of sales of chattels is firmly established that on such sales, in the absence of an express warranty of quality or condition, no implied warranty can be raised; therefore, in an action to foreclose a mortgage, an order for a feigned issue to ascertain whether the mortgage, which were the consideration of the mortgage, were reasonably sound and fit for the uses and purposes contemplated in the contract is improper where no express warranty of fraud was shown. *Williams v. Slaughter*, 3 Wis. 347.

Issue on Duration of Desertion in Divorce—Pennsylvania.—Under the Pennsylvania Act of April 26, 1850, P. L. 591, a petition or libel can be filed six months after the alleged desertion has taken place, but an issue will not thereupon be awarded to try the question whether there had been a desertion for six months, as it would be an immaterial fact and would not obviate the necessity of trying the real issue of a desertion of two years. *Winpenny v. Winpenny*, 16 Phila. (Pa.) 24.

3. *Price v. Berrington*, 7 Hare 403; *Bury v. Phillpot*, 2 Myl. & K. 349.

Where the Party Would Not Be Entitled to Relief, even if the issue were found in his favor, none will be directed. See *Berney v. Harvey*, 17 Ves. Jr. 119; *Blackburn v. Jepson*, 3 Swanst. 132.

Where the Finding Could Be But One Way there is no ground for an issue. See *Ross v. Aglionby*, 4 Russ. 489; *Goodenough v. Powell*, 2 Russ. 219.

4. *Rutty v. Person*, 49 N. Y. Super

IX. IN PARTICULAR PROCEEDINGS OR FOR DETERMINATION OF PARTICULAR FACTS — 1. Ejectment. — In an action of ejectment it is often proper for the court to direct an issue of fact to be tried by a jury.¹

2. Attachment and Garnishment. — The court is not always bound to grant an issue in attachment cases.² In garnishment

Ct. 55; Brooklyn, etc., *R. Co. v. Reid*, 21 Hun (N. Y.) 274; *Ellensohn v. Keyes*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 353. See *Elliott v. Balcom*, 11 Gray (Mass.) 286. See *infra*, IX. 18. *Accounts and Accounting*.

In an Action by a Taxpayer to Enjoin a City from purchasing property, for the reason that it would be a waste of public funds, a court of equity will not submit issues of fact arising on the pleading to a jury if such issues are a very large number and apt to confuse the jury. The court must decide such facts itself. *Ziegler v. Chapin*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 317.

In an Action Brought to Set Aside a Composition Deed and release on the ground of fraud, and to vacate an order discharging an assignee on the ground of fraud, and to obtain a decree requiring all of the defendants to pay the plaintiff his claim against the debtors, and that a receiver be appointed, etc., the issues presented for trial by jury were thirty-three in number. The court held that this fact alone would be sufficient reason for not sending them to a jury, since there were so many that the jury would necessarily be confused. *Blunt v. Hibbard*, (C. Pl.) 3 N. Y. Supp. 121.

Where the Amount in Controversy Is Small, and the facts can be satisfactorily ascertained by the court, an issue will not be awarded. *Gawood v. Eldridge*, 2 N. J. Eq. 290; *Stafford v. Stafford*, 1 N. J. Eq. 525.

1. Issue on Doubtful Fact. — In an action of ejectment, where the defendant alleges that the lessor of the plaintiff has taken possession of more land than was recovered by the verdict, the court will order restitution, but where the fact is doubtful the proper course is to award a feigned issue to try the question. *Jackson v. Hasbrouck*, 5 Johns. (N. Y.) 366.

Ejectment on Equitable Title to Land. — In *Pennsylvania* an action of ejectment on an equitable title to land is in fact a bill for specific performance, and therefore governed by the general principles of equity applying to an

issue of fact. *Reno v. Moss*, 120 Pa. St. 49; *Hess v. Calender*, 120 Pa. St. 138. See *infra*, IX. 4. *Specific Performance, etc.*

For General Matters Relating to Ejectment, see article EJECTMENT, vol. 7, p. 260.

For Equitable Issues on Cross-complaint and Counterclaim in action of ejectment, see *supra*, VI. *Cross-complaint and Counterclaim*.

2. Question of Residence — Issue to Enable Appellate Review. — In an attachment case against an alleged non-resident debtor, it was asked that if the court should be of opinion that the defendant was a resident of the state at the date of issuing the writ, a feigned issue should be granted to determine that point, as otherwise the plaintiff would lose his remedy without being able to review the judgment in the Supreme Court. It was held that there was no reason why the court should not determine the case as other cases were determined, by the evidence submitted; and that it was not bound to grant a feigned issue merely for the sake of getting the case in form to carry it to the Supreme Court. *Scott v. Hilgert*, 14 W. N. C. (Pa.) 305.

Issue to Try Right to Money under Attachment Execution. — A feigned issue was framed between *Lewis A. Landis*, plaintiff, and *Jeremiah Lyons* and *Henry Cross*, assignees of *Kurtz* and *Cross*, defendants, to try the right of the said plaintiff, under the \$300 law, of the money in the hands of *Samuel Leonard*, administrator of *Joseph Kurtz*, deceased, attached by the said defendants under an attachment execution. This issue was held not to have been properly made up. Feigned issues are for the trial of disputed facts, and not for mixed questions of law and fact; an issue to try the right of a party to anything is too general. *Landis v. Lyon*, 71 Pa. St. 475. See *infra*, IX. 19. *Right and Title to Property*, and *supra*, VIII. 3. *Questions of Law*.

For General Matters Pertaining to Attachment, see article ATTACHMENT, vol. 3, p. 1.

cases issues are at times properly directed.¹

3. Habeas Corpus. — In some cases it has been held that on habeas corpus the court has no power to order a jury to determine the questions of fact that may arise.² But in other cases it has been held competent and proper for the court to have issues tried by a jury.³

4. Specific Performance, Rescission, and Cancellation — Specific Performance. — An action for specific performance, being an equitable one, is triable by the court, subject to the power, in its discretion, of submitting proper issues of fact to a jury.⁴

Rescission and Cancellation. — An action brought to obtain the rescission or cancellation of an instrument is an equitable one in which the trial is by the court, unless in its discretion it takes the opinion of a jury upon some specific question of fact involved therein by an issue made up for that purpose. This issue will be granted or denied according to the rules governing the grant or refusal of equitable issues generally.⁵

1. Issues to Try Rights of Contesting Claimants. — Where money is paid into court by a garnishee, and there are contesting claimants, the court will award a feigned issue to try the right. *Hiller v. Good*, 2 Lanc. Bar (Pa.) 129.

For General Matters Pertaining to Garnishment, see article GARNISHMENT, vol. 9, p. 805.

2. *State v. Farlee*, 1 N. J. L. 49; *State v. Beaver*, 1 N. J. L. 94.

3. *Respublica v. Gaoler*, 2 Yeates (Pa.) 258; *Graham v. Graham*, 1 S. & R. (Pa.) 330. See article HABEAS CORPUS, vol. 9, p. 1049.

4. *McCullough v. McCullough*, 31 Mo. 226; *Bronson v. Wanzer*, 86 Mo. 408.

Equitable Ejectment. — In *Pennsylvania* an action of ejectment on an equitable title to land is in effect a bill for specific performance, and therefore governed by the general principles of equity applying to issues of fact. *Reno v. Moss*, 120 Pa. St. 49.

5. *Conran v. Sellaw*, 28 Mo. 320; *Hornbrook v. Powell*, 146 Ind. 39; *Goldsborough v. Turner*, 67 N. Car. 403; *Blunt v. Hibbard*, (C. Pl.) 3 N. Y. Supp. 121. See *Atty.-Gen. v. Cashel*, 2 Con. & L. 1, 3 Dr. & War. 294.

Cancellation and Delivery on Ground of Mistake. — Where a cause of action is founded upon the cancellation and delivering up of a note by mistake, and it is prayed that the defendant be decreed to pay the amount, it may properly be tried as a bill in equity, but issues may, in the discretion of the court, be

framed and submitted to a jury. *Weil v. Kume*, 49 Mo. 158.

On Ground of Deceit, Falsity, or Fraud. — On a bill in equity to rescind a contract procured by fraud and misrepresentations, an issue will not be directed when the court can properly determine the facts from the evidence. *Hurley v. Oakley Land, etc., Co.*, (Va. 1896) 24 S. E. Rep. 237.

Answer Denying Fraud and Deceit, etc. — Upon a bill filed to set aside a written contract for the purchase of land, or to obtain an abatement of purchase money on account of deceit and false and fraudulent representations by the vendor, when the answer positively denied the allegations of fraud and deceit and the testimony greatly preponderated in favor of the defendant, it was held to be error to direct an issue out of chancery to a jury to determine whether or not there were such deceit and fraudulent representations. *DeVaughn v. Husted*, 27 W. Va. 773. See *infra*, IX. 13. *Fraud or Undue Influence.*

Cancellation of Forged or Altered Deed. — If a bill is filed for the cancellation of a deed because it was forged or because a particular clause was inserted in it after its execution by the defendant, without the complainant's knowledge or consent, and the answer directly denies the charge, this makes an issue which the court of equity will submit to a jury. *Maise v. Garner*, Mart. & Y. (Tenn.) 383. See *infra*, IX. 14. *Forgery.*

5. Quieting Title, and Partition — Quieting Title. — In a suit in equity to quiet title, according to the general practice, the decree emanates from the judge, who may try the case without a jury or submit special issues to a jury.¹

Partition. — In actions for partition, it is sometimes optional with the court whether or not it will submit the issues of fact to a jury.² In other cases, however, by statutory or code provisions, the issues of fact in such actions, though they are of an equitable nature, are to be tried by a jury, if either party so desires.³

Issue on General Question Whether Sale Should Be Rescinded. — Upon the trial of a suit in equity to rescind the sale of land, where specific questions of fact were submitted to a jury, it is improper practice for the court also to submit, over objection of counsel, the question whether or not the sale should be rescinded, this being a question for the court to decide upon the other facts found by the jury. *Bell v. Hutchings*, 86 Ga. 571.

For Issues on Cross-complaint in an action to rescind sale of land, see *Ross v. Hobson*, 131 Ind. 166, and generally *supra*, VI. *Cross-complaint and Counterclaim*.

1. *Mantle v. Noyes*, 5 Mont. 274.

In Indiana the statutory action to quiet title to land was not an action of exclusive equitable jurisdiction prior to June 18, 1852, and therefore, by the practice in that state, in such case the issues are properly triable by jury. *Puterbaugh v. Puterbaugh*, 131 Ind. 288. See also *Trittip v. Morgan*, 99 Ind. 269; *Spencer v. Robbins*, 106 Ind. 581; *Kitts v. Willson*, 106 Ind. 147; *Johnson v. Taylor*, 106 Ind. 89; *Martin v. Martin*, 118 Ind. 227. See further, as to issues to the jury in Indiana, *supra*, p. 610.

For Issues on Cross-complaint in action to quiet title, see *supra*, VI. *Cross-complaint and Counterclaim*.

2. In California, for instance, this option exists. *Lorenz v. Jacobs*, 59 Cal. 262.

3. New York — *Under Code of Procedure — Partition of Decedent's Lands.* — In an action brought by plaintiff as heir at law of a decedent, to obtain partition under Laws of 1853, c. 338, the special term refused to settle issues for a jury trial. On appeal to the general term it was held that the provisions of the Revised Statutes on the subject of partition, to which section 448 of the Code of Procedure applied,

clearly contemplated, if they did not require, a trial by jury where the legal title was in dispute, and that in this case the special term erred in refusing to settle the issues for a jury trial. *Hewlett v. Wood*, 1 Hun (N. Y.) 478, 3 *Thomp. & C.* (N. Y.) 453, *affirmed* in 3 Hun (N. Y.) 736, appeal dismissed by Court of Appeals in 62 N. Y. 75.

Under Code of Civil Procedure. — The Code of Civ. Pro., § 1544, provides that an issue of fact joined in an action for partition is triable by a jury. See *Cuthbert v. Ives*, (Supreme Ct.) 20 N. Y. Supp. 469; *Mellen v. Mellen*, 27 *Abb. N. Cas.* (N. Y. Supreme Ct.) 99, 21 *Civ. Pro. Rep.* (N. Y.) 301; *Tucker v. Tucker*, (Supreme Ct.) 45 N. Y. St. Rep. 458.

Reference. — Under the provision last above mentioned the issues in an action for partition should not be made the subject of a reference, either party having the right of a jury trial if he so desires. *Larder v. Granger*, (Supreme Ct.) 51 N. Y. St. Rep. 185. The issues cannot be tried by reference if one of the parties objects. *Cassedy v. Wallace*, 61 *How. Pr.* (N. Y. Supreme Ct.) 240.

The issues of fact to which this code provision relates are only such as involve the maintenance of the action. It has no application unless some defense is interposed which, if successful, would prevent any partition at all; for example, a denial of the plaintiff's title, or a denial that the parties were joint tenants or tenants in common would be such a defense. But where there is no dispute as to their proportionate interests, and the only matters in controversy relate, directly or indirectly, to the amounts with which the respective shares are chargeable, neither party is entitled to a trial by jury as matter of right; and if the trial will require the examination of a long account,

6. Interpleader and Intervention. — Interpleader and intervention proceedings being equitable in their nature, the general rule applies, and the court may or may not, in its discretion, submit the issues to a jury.¹

7. Divorce. — In some of the states the submission of issues to a jury in divorce cases is governed by the practice and principles relating to equitable suits in general, while in others there are statutory provisions limiting the trial to the court, or giving a jury trial as a matter of right.² In at least one state, the right

on either side, the action may properly be referred. *Brown v. Brown*, 52 Hun (N. Y.) 533.

1. Interpleader.—See generally article INTERPLEADER, *ante*, pp. 473, 474.

In *New York*, where in an action at law a third party, claiming to own the cause of action, has been brought in and substituted as defendant, and the original defendant has been discharged on payment into court of the amount of the demand, in pursuance of the provision of Code Civ. Pro., § 820, the action thereafter becomes an equitable one, triable by the court, and neither party has a right to a trial by jury. Where the trial judge impaneled a jury and submitted to them a single question of fact, but disregarded their finding and found the fact contrary thereto, his decision was pronounced correct on appeal. *Clark v. Mosher*, 107 N. Y. 118, 13 Civ. Pro. Rep. (N. Y.) 215, *reversing* (Supreme Ct.) 5 N. Y. St. Rep. 84.

Intervention. — Upon an intervention in railway foreclosure proceedings to recover damages against the receiver for personal injuries to an employee, the court has authority to send to a jury the single issue as to the amount of damages in case there is any liability. *Kohn v. McNulta*, 147 U. S. 238. See generally article INTERVENTION, *ante*, p. 494.

2. See article DIVORCE, vol. 7, pp. 118, 119.

In California, in an action for divorce, it is optional with the judge to submit issues to a jury or not; and his refusal to submit them cannot be reviewed in the Supreme Court on appeal. *Clegghorn v. Clegghorn*, 66 Cal. 309.

In Washington an action for divorce was brought, asking alimony and praying that a conveyance fraudulently made by the husband be set aside, since otherwise the plaintiff could obtain no alimony. It was held that under Washington Code Pro., § 776, dispensing with jury trials in divorce

cases, the defendant was not entitled to have the issue of conspiracy tried by a jury. *Prouty v. Prouty*, 4 Wash. 174.

In Montana divorce cases are governed by the practice and rules of procedure obtaining in other chancery causes, except that by law, if the defendant appears and denies the charges alleged in the complainant's bill, the issues must be tried by a jury. But the jury tries only the issue framed by the defendant's denial or charge, upon which the complainant asks for a divorce. Rev. Stat. Mont., p. 514, § 511. So far as alimony and the custody of children is concerned, the judge sitting as chancellor is alone responsible for the decree. He may refer special issues to a jury to make findings as to these matters, but he is not bound by them, and he may set them aside and make other findings, and decree accordingly. *Black v. Black*, 5 Mont. 15. See *Beck v. Beck*, 6 Mont. 318.

In Iowa, under the old chancery practice, the chancellor might, to inform his conscience, submit any issue of fact to a jury, but under the provisions of the code, an issue of fact in an action for divorce cannot be submitted to a jury for determination, and the subsequent adoption by the court of the finding of the jury will not cure the error of submission. *Hobart v. Hobart*, 51 Iowa 512, *reviewing and disapproving* *Sherwood v. Sherwood*, 44 Iowa 192.

In Pennsylvania, in a suit for divorce, where a trial by jury is demanded it will usually be granted, but if there is a rule of court providing that if an answer to a libel shall be filed it shall state whether the respondent demands an issue, otherwise a jury trial shall be taken to be waived; and if the respondent files an answer without any demand for an issue, the refusal of a jury trial is proper. *Johnson v. Johnson*, 4 Pa. Dist. Rep. 460.

Under the Act of April 20, 1850, P. L. 591, a petition or libel can be filed

to a jury trial of certain issues in a divorce case is a statutory and constitutional one, which has been aided and further secured by various code provisions.¹

six months after the alleged desertion has taken place, but an issue will not thereupon be awarded to try the question whether there has been a desertion for six months, as it would be an immaterial fact and would not obviate the necessity of trying the real issue of a desertion for two years. *Winpenny v. Winpenny*, 16 Phila. (Pa.) 24.

In Wisconsin, by Rev. Stat., § 2843, the issue of adultery in an action for divorce must be tried by a jury, unless a jury trial thereof be waived. *Poertner v. Poertner*, 66 Wis. 644.

1. **New York** — *Statutory and Constitutional Provisions*. — The trial by jury of the question of adultery, when put in issue in an action for divorce, has been used in New York ever since the power was given courts in that state to grant relief in such cases. By statutory enactments the trial of such an issue was an existing right prior to and at the time of the adoption of the Constitution of 1846, and when that instrument was adopted such right became a constitutional one by virtue of the provision therein, viz.: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law." Art. 1, § 2. *Conderman v. Conderman*, 44 Hun (N. Y.) 181; *Batzel v. Batzel*, 42 N. Y. Super. Ct. 561; *Ferguson v. Ferguson*, 3 Sandf. (N. Y.) 307; *Galusha v. Galusha*, 43 Hun (N. Y.) 181; *Whitney v. Whitney*, 76 Hun (N. Y.) 585. And the right of trial by jury upon issues relative to the legality of a marriage, in an action for divorce, was a statutory right prior to the constitution, and by that instrument was made a constitutional one, unless waived in the manner to be prescribed by law. *Morrell v. Morrell*, 17 Hun (N. Y.) 324.

Under the Code of Procedure, § 253, an issue of fact in an action for divorce was to be tried by a jury, unless waived under section 266, or unless a reference was ordered under section 270. *Batzel v. Batzel*, 42 N. Y. Super. Ct. 561; *Dietz v. Dietz*, 2 Hun (N. Y.) 339; *Leslie v. Leslie*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 311, distinguished in *Compton v. Compton*, 46 N. Y. Super. Ct. 579.

The Code of Civil Procedure adopted September, 1877, did not, in terms, give the right to a jury trial in such an action, and repealed section 253 of the Code of Procedure above referred to. Yet this did not affect the right to a jury trial, for by section 970 of the Code Civ. Pro. it is expressly provided that where a party is entitled by the constitution, or by express provision of law, to a trial by jury of one or more issues of fact in an action not specified in section 968, he may apply, upon notice to the court, for an order directing all the questions arising upon those issues to be distinctly and plainly stated. The right to a jury trial of an issue of adultery being a statutory and constitutional right prior to the adoption of the Code of Procedure, that right remains and is included in section 970 of the Code of Civil Procedure. *Batzel v. Batzel*, 42 N. Y. Super. Ct. 561. By section 1757 of the Code Civ. Pro. as now in force, it is provided: "If the answer puts in issue the allegation of adultery, the court must, upon application of either party, or it may of its own motion, make an order directing the trial by a jury of that issue, for which purpose the questions to be tried must be prepared and settled as prescribed in section 970 of this act." See *Conderman v. Conderman*, 44 Hun (N. Y.) 181; *Lowenthal v. Lowenthal*, 92 Hun (N. Y.) 385; *Carpenter v. Carpenter*, (Supreme Ct.) 9 N. Y. Supp. 583.

Waiver. — Under section 266 of the Code of Procedure, the jury trial of an issue might be waived. *Dietz v. Dietz*, 2 Hun (N. Y.) 339; *Leslie v. Leslie*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 311. Under the Code Civ. Pro., the method of waiver was prescribed by section 1009. *Morrell v. Morrell*, 17 Hun (N. Y.) 324.

Reference. — The party might defeat his right to a jury trial by consenting to have a reference, but unless that right is properly waived, or a reference consented to, a jury trial cannot be denied the party. A compulsory reference cannot be ordered. *Leslie v. Leslie*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 311; *Dietz v. Dietz*, 2 Hun (N. Y.) 339; *Batzel v. Batzel*, 42 N. Y. Super. Ct. 561; *Morrell v. Morrell*, 17 Hun (N. Y.) 324. See

8. Patents. — In suits in equity for the infringement of patents issues may or may not be granted, according to the determination of the court as to the necessity of a jury trial of the issues.¹

further, on the question of reference, article REFERENCES.

Limitation of Right by Rule of Court. — The party having an absolute right, by statutory, constitutional, and code provisions, to a jury trial of the issue of adultery, such right cannot be impaired by the rules of practice limiting the time for making application to frame issues; and rule 31, limiting the time for making application, is applicable to cases in equity where, by section 971 of the Code Civ. Pro., the granting of issues to a jury is discretionary; but in cases where a jury trial is a matter of right, the rule cannot convert the positive requirement of the statute into a matter of discretion, if the application be not made within ten days. *Conderman v. Conderman*, 44 Hun (N. Y.) 181; *Sigel v. Sigel*, 28 Abb. N. Cas. (N. Y. Super. Ct.) 308.

Absence of Application or Denial of Part Only of Charges. — The right of trial by jury in a divorce case for adultery is, as we have seen, a right preserved by the constitution, which cannot be defeated unless waived as provided by Code Civ. Pro., § 1009, or otherwise tried by consent. By Code Civ. Pro., § 1757, if the answer puts in issue the allegation of adultery, the court must, upon application of either party, or it may, upon its own motion, direct the trial of that issue by jury, and thereupon the questions to be tried must be prepared and settled. Under these provisions, where no application is made, and the defendant denies some only of the charges of adultery alleged in the complaint, the court does not err in proceeding to try without a jury the charges not denied nor put in issue by the answer. *Galusha v. Galusha*, 43 Hun (N. Y.) 181.

Method of Stating Questions. — The method before the Code of Civil Procedure was to send a feigned issue to the jury for trial, for which the present statute has provided as a substitute (Code Civ. Pro., § 970) that in such cases the party may, upon notice, apply to the court for an order directing the questions of fact arising upon those issues to be distinctly and plainly stated for trial by jury, and upon the hearing of the application the court must cause

the issues to be distinctly and plainly stated. This is not a matter of discretion with the court, but the provisions of the statute are imperative that the court, by order, direct the trial by jury and cause issues to be framed for that purpose. *Conderman v. Conderman*, 44 Hun (N. Y.) 181; *Gross v. Gross*, 2 N. Y. Month. L. Bul. 86. Where, however, the issues are stated and settled in pursuance of a stipulation of the attorneys for the parties, it is held that they thereby waive the right to have, preliminarily to the trial, any questions more specifically stated and settled; and that in such case the trial is properly permitted to proceed, subject to the power of the court to state and submit to the jury any further questions of fact which properly or necessarily were for them to determine. *Whitney v. Whitney*, 76 Hun (N. Y.) 585.

Alimony. — The amount of alimony which ought to be allowed annually to a wife if a decree of divorce be granted is a question to be determined by the court, and not submitted to a jury. In this respect the code has not changed the former practice; but if the court submits the question of alimony to a jury, their finding upon that question furnishes no ground for setting aside the verdict upon the guilt or innocence of the parties of the offense charged, and if their finding be disregarded by the court, it is superfluous and harmless. *Forrest v. Forrest*, 6 Duer (N. Y.) 103.

1. Identity of Two Machines. — On a question of infringement of a patent raised in a suit in equity, a feigned issue is not to be granted unless the opinion of the jury on the question is found to be needed, or unless the court has doubts as to the identity of the two machines. *Van Hook v. Pendleton*, 1 Blatchf. (U. S.) 187.

Directing Issues Prior to Granting Injunction. — Where a court of equity, having heard a case, with full proofs, is well satisfied with the originality of an invention, the regularity of the patent, and of the fact of infringement, it will not send the issues to a jury for its verdict prior to granting a perpetual injunction, especially if the questions in the case, though questions of fact,

9. Mortgages and Liens — Mortgages. — An action or suit for the foreclosure or redemption of a mortgage is an equitable proceeding, and in the absence of statutory provisions the issues are not triable by jury.¹ Under the general practice in equity, the court may refer questions of fact to a jury, in such a case.²

are of that kind which the court can decide on the testimony of men of science as well as or better than a jury, and where a jury trial would be long, costly, or troublesome. *Goodyear v. Day*, 2 Wall. Jr. (C. C.) 283.

Issue on Newly Discovered Evidence as to Invention. — An action at law for the infringement of a patent was tried, and a verdict found for the plaintiff; and a motion for a new trial, on the grounds of errors in law at the trial, and of surprise in the exclusion of evidence, and of newly discovered evidence, was made and denied. After the verdict the plaintiff filed a bill against the defendants for a perpetual injunction, founded on the verdict. An answer was put in, setting up in defense the matters urged as grounds for a new trial. After the refusal of a new trial in the action at law, and after replication in the suit in equity, the defendants moved in the latter suit for a feigned issue, on the ground that they had just discovered new evidence which went to show a want of novelty in the plaintiff's invention, and was of a different character from any before presented. This was held a proper case for a feigned issue. *Foote v. Silsby*, 1 Blatchf. (U. S.) 545.

Action on Patent Right Involving Accounting. — In an action growing out of a contract for the use of a patent right involving an accounting, the defendant is not entitled as a matter of right to a trial of the issues by a jury. *Creighton v. Haggerty*, 50 N. Y. Super. Ct. 9.

Practice of Federal District Courts in Massachusetts. — It has not been the practice in the federal district courts in Massachusetts to send questions to a jury in patent cases, or in any cases. The court said: "The practice in England exists to a considerable extent, but it should be remembered that there are two classes of courts — the courts of common law and the courts of equity, both very distinct from each other; and when the chancellor sends a case for trial by a jury he sends it to another court, for trial before another bench, because he has no jury in his court; and one reason is, that it is supposed that

the judges in the courts of common law determine questions of law in patent cases, and the chancellor can have the aid of the opinions of the judges in the other courts on questions of law, as well as the finding of the jury on the facts. But that is not our practice." *Ely v. Monson*, etc., Mfg. Co., 4 Fisher Pat. Cas. 64.

1. For trial of issues in suits to foreclose mortgages, see article FORECLOSURE OF MORTGAGES, vol. 9, p. 396.

In *Indiana* a suit to foreclose, cancel, or set aside a mortgage was a suit of exclusive equitable jurisdiction prior to June 18, 1852, and under Rev. Stat. Ind. 1881, § 409, the issues are triable by the court, and there is no error in refusing to have them tried by a jury. *Lane v. Schlemmer*, 114 Ind. 296; *Voss v. Eller*, 109 Ind. 260; *Brown v. Russell*, 105 Ind. 46; *Stix v. Sadler*, 109 Ind. 254; *Rogers v. Union Cent. L. Ins. Co.*, 111 Ind. 343; *Carmichael v. Adams*, 91 Ind. 526; *Brighton v. White*, 128 Ind. 320.

2. *Johnson v. Powers*, 65 Cal. 179; *Munson v. Reed*, Clarke Ch. (N. Y.) 580; *Gleason v. Hamilton*, 64 Hun (N. Y.) 96; *Carroll v. Deimel*, 95 N. Y. 255; *Ex p. Rutledge*, Harp. Eq. (S. Car.) 67; *Farrin v. Cox*, 47 Ill. App. 273; *Rariden v. Rariden*, 129 Ind. 288; *Moors v. Sanford*, 2 Kan. App. 243; *Dowse v. Rue*, 9 Mod. 38. See *Pym v. Bowreman*, 3 Swanst. 241.

Issue on Character of Evidence and Witnesses. — Where the evidence in a suit to foreclose a mortgage is contradictory, depends upon slight circumstances, or the veracity of witnesses is involved, and where the manner, intelligence, and relation of witnesses to a case must have their proper weight, it is highly desirable that the disputed issues should be tried by a jury. In this case, no issues having been submitted, the appellate court reversed the decree and remanded the cause, with directions to the court below to have the proper issues of fact formed and submitted to a jury for trial. *Russell v. Paine*, 45 Ill. 350.

Question of Payment on Application to Discharge Decree of Foreclosure. — On an

But whether it will do so or not is a matter within its discretion.¹

Liens. — An action to foreclose a mechanic's lien is an equitable action, triable by the court, in which generally the parties have

application to discharge a decree of foreclosure, etc., on the ground that the amount due upon the decree has been fully paid, the court may properly direct the question of payment to be tried by jury. *Williams v. Troop*, 17 Wis. 465.

Question of Title on Bill to Redeem. — A bill to redeem alleged that the defendant was a mortgagee in possession; that the complainant was owner of the equity of redemption, and was ready to pay the mortgage debt. The answer alleged that the defendant had become the owner of the absolute title by purchasing the complainant's equity of redemption under a justice's court judgment against the complainant, docketed in the common pleas. The complainant filed a general replication. It was held that the question whether the title, under the docketed judgment, was valid or void on its face, was properly put in issue. On such an issue the proper practice in chancery is to send an issue on the legal title to be tried at law, or to retain the bill until an action can be brought at law to try the legal title, or until an action pending at law for that purpose can be determined; and the court of equity can so control the action at law that the legal question may be decided. If the parties waive a trial at law, the court of equity is at liberty to decide the question for itself. *Freichnecht v. Meyer*, 39 N. J. Eq. 551. See *infra*, IX. 19. *Right and Title to Property*.

1. *La Société Française, etc., v. Selheimer*, 57 Cal. 623; *Miller v. Wack*, 1 N. J. Eq. 215; *Knickerbocker L. Ins. Co. v. Nelson*, 8 Hun (N. Y.) 21; *Hayes v. Bainbridge*, (Supreme Ct.) 61 N. Y. St. Rep. 853, 30 N. Y. Supp. 148.

To Ascertain the Value of Mortgage Property on a bill to redeem, it is not necessary for the chancellor to direct an issue unless he has doubts on the subject. *Reed v. Lansdale*, Hard. (Ky.) 8. See *infra*, IX. 20. *Value of Property*.

Counterclaim in Answer. — In *New York*, in an action to foreclose a mortgage, where the answer sets up a counterclaim, the defendant, by noticing the cause for trial at a court of

which a jury forms no part, waives any right he may have to a jury and consents to a trial by the court; therefore, the granting or refusing of a request to frame issues is a matter of discretion, and is not reviewable on appeal. *MacKellar v. Rogers*, 109 N. Y. 468. See *supra*, VI. *Cross-complaint and Counterclaim*, and *infra*, XVI. *Appellate Review*.

Issue on Quality or Condition of Consideration of Mortgage. — The current English and American authority on the subject of sales of chattels is firmly established that on such sales, in the absence of an express warranty of quality or condition, no implied warranty can be raised. Hence, in an action to foreclose a mortgage, an order for a feigned issue to ascertain whether sheep, which were the consideration of the mortgage, were reasonably sound and fair for the uses and purposes contemplated in the contract, was held improper where no express warranty or fraud was shown. *Williams v. Slaughter*, 3 Wis. 347.

Jury Trial under Statutes of Wisconsin. — Wisconsin Laws 1864, c. 169, required every issue of fact joined in an action to foreclose a mortgage executed to a corporation, to be submitted to a jury on demand of either party. This made it imperative on the court to submit the issues to a jury only when demanded by either party. The act also made the verdict final and conclusive. The court, in the case cited below, did not pass upon the constitutionality of the statute, but said that to avoid all misapprehension it did not suppose it incumbent upon the Circuit Court to submit the issues of fact to a jury, unless it thought proper so to do. *Truman v. McCollum*, 20 Wis. 360.

Wisconsin Laws 1867, c. 79, prohibited courts from trying an action to foreclose a mortgage in which there were issues of fact, without the intervention of a jury, except upon the written stipulation of the parties, and gave to the verdict the same force and effect as in actions at common law. It was held that the power to decide questions of fact in equity cases belonged by the constitution to the chancellor, just as much as the power to decide questions

no right to a trial by jury; but issues may be submitted to a jury in the discretion of the court.¹

10. Injunctions. — If in an injunction case there is a difficulty as to the law involved, the court may retain the case and send the parties to a court of law to determine the legal controversy; or if the facts are complicated or difficult, an issue may be awarded to try them.² The suit for an injunction being an equitable one,

of law; that it was an inherent part and one of the constituent elements of equitable jurisdiction thereby conferred; and that this act attempting to confer on juries the final decision as to matters of fact in an equity case, and to make their verdict conclusive, was unconstitutional. *Callanan v. Judd*, 23 Wis. 343.

1. Albrecht v. C. C. Foster Lumber Co., 126 Ind. 318; *Simonton v. Kelly*, 1 Mont. 483; *Pairo v. Bethell*, 75 Va. 825; *Kenney v. Apgar*, 93 N. Y. 539; *Riggs v. Shannon*, 27 Abb. N. Cas. (N. Y. C. Pl.) 456.

In New York actions to foreclose mechanics' liens in courts of record are not triable by jury as a matter of right under Laws 1885, c. 342; but by section 8 of that act the form of prosecuting such actions is the same as in the foreclosure of mortgages on real property. Sections 11 and 12, providing that issues in such actions must be tried the same as other issues in the respective courts in which the action is brought, are applicable only to courts not of record. *Riggs v. Shannon*, 27 Abb. N. Cas. (N. Y. C. Pl.) 456, *disapproving* *Schillinger Fire-Proof Cement, etc., Co. v. Arnott*, (Supreme Ct.) 14 N. Y. Supp. 326.

Counterclaim for Damages — *New York*.

— In an action to foreclose a mechanic's lien, the defendants set up a counterclaim in which they asked for judgment against the plaintiff, not only for the money which they claimed they had to expend to complete certain work left undone by the plaintiff, but also for damages caused by his delay. Under N. Y. Code Civ. Pro., § 970, as amended by the Act of 1891, the plaintiff was held entitled to have the question of damages for delay submitted to a jury, unless the defendants, before the settlement of an order in the case, which must be done on three days' notice, stipulated to abandon their claim for damages by reason of the delay, in which event the motion should be altogether denied. *Riggs v. Shannon*, 27 Abb. N. Cas. (N. Y. C. Pl.) 456.

Washington. — In a suit to foreclose a mechanic's lien, the fact that defendant has set up a claim for damages for breach of contract does not entitle him to a trial by jury, although the statutes of Washington give him the right to interpose such legal defense. The foreclosure suit was properly cognizable in a court of equity, and the court of equity, having once obtained jurisdiction of the cause, will retain it until final determination, and the interposition of a legal defense does not carry with it all rights incident to such legal defense, so as to make it triable by jury as of right. *Installment Bldg., etc., Co. v. Wentworth*, 1 Wash. 467. See *infra*, IX. 12. *Damages*; *supra*, VI. *Cross-complaint and Counterclaim*; and *supra*, V. *Legal and Equitable Issues in the Same Action or Suit*.

In Wisconsin, by Rev. Stat. (Sanb. & B. Annot. Stat. 1889), § 3323, either party to an action to foreclose a mechanic's lien has the right to demand a jury. But this does not prevent the court on its own motion ordering a jury to try any issue of fact. *Huse v. Washburn*, 59 Wis. 414.

2. Ryder v. Bentham, 1 Ves. 543; *Agar v. Regents' Canal Co.*, Cooper 77; *Thompson v. Paterson*, 9 N. J. Eq. 624. See also article INJUNCTIONS, vol. 10, p. 887 *et seq.*

Defendant Denying Plaintiff's Right or Setting Up Title in Himself. — Where the complainant seeks protection in the enjoyment of a natural watercourse upon his land, the right will ordinarily be regarded as clear. The mere fact that the defendant denies the right by his answer, or sets up title in himself by adverse user, will not entitle him to an issue before the allowance of an injunction. *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Denton v. Leddell*, 23 N. J. Eq. 64; *Shields v. Arndt*, 4 N. J. Eq. 234.

If the Title of the Complainant Is Not Disputed, and the Injury Is Clear, it is not necessary that the fact of a nuisance

there is in general no right to a trial by jury. The court may submit questions of fact to a jury, but whether it will grant or refuse an issue is a matter resting within its sound discretion.¹ In the exercise of this discretion the court, acting on the general principles of chancery practice, will direct an issue if this be the proper course,² or will decline to do so and will determine the

should be first established by a verdict at law. *Duncan v. Hayes*, 22 N. J. Eq. 25. See generally article NUISANCES.

Existence or Absence of Doubt. — The court will exercise its discretion whether to order a trial at law or not before granting an injunction to restrain a private nuisance; always inclining, if there be reasonable doubt, to put the case to a jury. Where, however, the court has no doubt as to the weight of evidence or the facts of the case, it will not send the case down for trial at law, but will grant or refuse the injunction as it deems proper. *Shields v. Arndt*, 4 N. J. Eq. 234; *Colman v. Dixon*, 50 N. Y. 572. As to the establishment of a right or title at law generally, see article INJUNCTIONS, vol. 10, p. 887 *et seq.*

1. *Emporia v. Soden*, 25 Kan. 588; *Hixon v. George*, 18 Kan. 256; *Carlin v. Donegan*, 15 Kan. 495; *Newark Plank Road, etc., Co. v. Elmer*, 9 N. J. Eq. 786; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Scheetz's Appeal*, 35 Pa. St. 88; *Wise v. Lamb*, 9 Gratt. (Va.) 294; *Ely v. Monson, etc., Mfg. Co.*, 4 Fisher Pat. Cas. 64; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30. But see *Hutchins v. Smith*, 63 Barb. (N. Y.) 251, in which case it is said that where the issues have been voluntarily brought to a hearing before the court, the finding of the court ought to stand in the place of a verdict of the jury, and the defendant is to be regarded as having waived a trial by jury.

Indiana. — Formerly in Indiana a suit for a perpetual injunction was triable before a jury unless a jury trial was waived. *Edwards v. Applegate*, 70 Ind. 325; *Pence v. Garrison*, 93 Ind. 345. By the Code Civ. Pro. of 1881 the trial of such a cause is by the court, but the court may in its discretion, for its information, cause any questions of fact involved in the trial to go to a jury. The statute gives no particular directions concerning the trial by jury in such case, and the provision contemplated is that used in trial by jury of questions of fact sent out of the Court of Chancery before the adoption of the

Code of 1852, instead of modified by the provisions of the Code Civ. Pro. of 1881. *Pence v. Garrison*, 93 Ind. 345.

Damages Claimed in Injunction Suit. — In *Nebraska*, although damages are claimed for wrongs previously committed, the defendant is not entitled to a trial by jury. *Disher v. Disher*, 45 Neb. 100.

In *California* an action to restrain the continuance or repetition of a trespass of a character to produce irreparable injury, and to recover for damages already suffered, is an equitable action, in which the issues of fact raised by the pleadings may be tried by the court, or submitted by the court, in its discretion, to a jury. *McLaughlin v. Delre*, 64 Cal. 472.

In *New York*, however, it was held that where an action is brought for the double object of removing a nuisance and recovering the damages occasioned by it, it is always tried by a jury. *Hudson v. Caryl*, 44 N. Y. 553.

Injunction Ancillary to Legal Issues. — In *Nevada*, where an injunction is sought as ancillary to legal issues, parties have a right to claim a jury to determine the legal issues. *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534.

Prohibition of Acts by Action at Law or Suit in Equity. — In *Iowa* there are statutory provisions conferring power upon the courts of law in certain cases to prohibit the continuance or repetition of certain acts, and in such a proceeding there is a right to a trial by jury. In order, however, to secure this right, the defendant must pursue the course pointed out by law. If he fails to object at the proper time to the prosecution of an injunction suit in the court of equity, his right to a jury trial will be waived; he has no such right in the equitable injunction proceeding. *Richmond v. Dubuque, etc., R. Co.*, 33 Iowa 422.

2. **Case Proper for Jury.** — If the court thinks there are matters of fact that would render it proper to send the case to a jury, it may do so. *Ely v. Monson, etc., Mfg. Co.*, 4 Fisher Pat. Cas. 64. In *Hammond v. Fuller*, 1

fact itself if the contrary be the case.¹

11. Nuisances. — An equitable action to abate a nuisance or to restrain the continuance thereof, or an action for a nuisance in which equitable relief is also demanded, is one in which the parties are not usually entitled to a jury trial, though in its discretion the court may refer issues of fact to a jury.²

Paige (N. Y.) 197, it was impossible for the court to determine whether or not a dam raised the water of a stream above its natural level in such a manner as to injure materially the mill privileges of the plaintiff, and an issue was therefore awarded to determine the question, and all other proceedings, questions, and directions were reserved until after the trial of that issue.

Facts Doubtful and Evidence Conflicting. — Where there is a question of fact involved in the injunction suit upon which the court is doubtful or upon which the evidence is conflicting, an issue should be directed to ascertain it. *Nelson v. Armstrong*, 5 Gratt. (Va.) 354; *Billups v. Sears*, 5 Gratt. (Va.) 31; *Wise v. Lamb*, 9 Gratt. (Va.) 294; *Galt v. Carter*, 6 Munf. (Va.) 245; *Carlisle v. Cooper*, 21 N. J. Eq. 576.

Issue to Ascertain Bona Fides of Claim of Creditors. — In *Virginia*, where a debtor remained in possession of slaves for five years under a parol loan, they were liable to satisfy his creditors, though the possession were resumed by the lender before executions levied upon them. Under these circumstances, where an injunction against the judgment creditors was applied for, it was held that an issue should be directed for the parties to ascertain whether the claim of the creditors for which they sought to subject the slaves was fair and *bona fide*, or fictitious and fraudulent. *Beale v. Digges*, 6 Gratt. (Va.) 582.

1. Where a Case Is Not a Doubtful One, there is no necessity for a trial by jury. *Newark Plank Road, etc., Co. v. Elmer*, 9 N. J. Eq. 786.

Where the Facts Can Be Satisfactorily Ascertained by the Court without the aid of a jury, it is its duty to decide as to the facts and not to subject the parties to the expense and delay of a jury trial. *Carlisle v. Cooper*, 21 N. J. Eq. 576.

If the Issues Are Numerous and Apt to Confuse a Jury, the court will not submit them to a jury. So held in an action by a taxpayer to enjoin the city from

purchasing property for the reason that it would be a waste of public funds. *Ziegler v. Chapin*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 317. See further, for issues on injunctions in nuisance cases, *infra*, IX. 11. *Nuisances*.

2. Cogswell v. New York, etc., R. Co., 105 N. Y. 319, *reversing* 54 N. Y. Super. Ct. 92, and holding that it is not an action for a nuisance within the meaning of the provisions of the *New York Code Civ. Pro.*, § 968, which declares that such an action must be tried by a jury.

In *New York*, before as well as since the writ of nuisance was abolished by the code, the right existed to maintain an action for the removal of a nuisance which, when brought, was exclusively of equitable cognizance, properly triable at special term and not by a jury, unless the court in its discretion should otherwise order. An action at common law might also have been maintained for the recovery of the damages occasioned by the nuisance which was exclusively of common-law jurisdiction and triable at circuit, and always by a jury, unless the parties should otherwise agree. Where, however, the action was brought for the double objects of removal of the nuisance and recovery of damages occasioned by it, it was always tried by a jury. *Hudson v. Caryl*, 44 N. Y. 553.

Facts Doubtful or Plain. — In an equity case, where the question whether a structure will be a nuisance is doubtful, the chancellor will usually refer it to a jury to determine; but if the question is too plain to admit of reasonable doubt, there is no necessity for a jury trial and the chancellor will be right in deciding the fact for himself. *Newark Plank Road, etc., Co. v. Elmer*, 9 N. J. Eq. 790, where the alleged nuisance was a bridge over a navigable stream, and the chancellor decided the issue.

Proper Case for an Issue. — On a bill in equity by a riparian proprietor of land on a natural stream, to restrain another proprietor from so conducting his busi-

12. Damages. — In some cases where a court of equity has jurisdiction of a suit involving a claim for damages, it may ascertain and assess the damages.¹ In other cases the damages may be assessed by a jury impaneled for the purpose, or on issues submitted,² and this seems to be the common course.³ In at least

ness as to pollute the waters of the stream, and to cause disagreeable odors at the plaintiff's land, the answer denied that the stream was polluted or disagreeable odors produced at the plaintiff's land, or that the plaintiff intended to use his land as a residence, and alleged that the defendant had a prescriptive right to carry on his business in the manner in which he was carrying it on. Defendant filed a motion for issues to a jury, which motion was overruled. It was held that without passing upon the question whether the defendant had a constitutional right to trial by jury, it was erroneous to refuse him the right to have issues framed which should submit to a jury the important facts which were in controversy between himself and the plaintiff. *Harris v. Mackintosh*, 133 Mass. 228.

Necessity of Applying for Issue Where Parties Have Adequate Remedy at Law. — A bill in equity was filed asking the abatement as a nuisance of a building which was being erected within the line of the street, and obstructed and delayed public travel. The answer denied that the building was erected within the line of the street. It was held that an issue at law could be directed to try the disputed facts and the bill retained, but that since the parties had an adequate remedy at law, and the case was one not requiring the extraordinary powers of the court of equity to be exercised, the bill must be dismissed unless an issue of fact were applied for. *Atty.-Gen. v. Heishon*, 18 N. J. Eq. 410. See generally article NUISANCES. As to issues in nuisance cases where injunction is sought, see further, *supra*, IX. 10. *Injunctions*.

1. *McDowell v. Wilmington Bank*, 1 Harr. (Del.) 369.

Uncertain Demands Where Right and Remedy Are Equitable. — Whatever may be the proper mode of ascertaining uncertain and unliquidated demands in cases where a court of chancery may be compelled to decide legal rights or questions on account of defect of a remedy at law, it is a well-established principle that where both the right and

the remedy are equitable, the chancellor may ascertain and fix, without resorting either to a jury or commissioners, all uncertain sums to be adjusted between the parties. *Head v. Head*, 3 A. K. Marsh. (Ky.) 112; *Baltzell v. Hall*, 1 Litt. (Ky.) 97.

2. *McDowell v. Wilmington Bank*, 1 Harr. (Del.) 369; *Hilleary v. Crow*, 1 Har. & J. (Md.) 542; *Watson v. Stucker*, 5 Dana (Ky.) 581.

Issue on Damages After Disapproval of Commissioner's Award. — In a case where relief was sought in the premises by injunction, commissioners were appointed to assess the damages sustained by complainant arising from an obstruction of a lane on his land by an embankment erected by a railroad company. The court was unable to determine, from the award of the commissioners, what would be proper compensation. The award, therefore, was not approved, and instead thereof an issue was directed to be framed on the defendant's paying into court the amount of the award to insure the complainants' damages, and undertaking to try the issue at the next circuit, the *ad interim* injunction being dissolved. *Carpenter v. Easton, etc.*, R. Co., 24 N. J. Eq. 408.

3. *Braxton v. Willing*, 4 Call (Va.) 288; *Isler v. Grove*, 8 Gratt. (Va.) 257, where the subject-matter in controversy was in the nature of estimated and unliquidated damages, and the accuracy and credit of witnesses were impeached, the appellate court, considering the issue proper, reversed the decree of the chancery court rendered on report of a commissioner, and remanded the cause, with instructions to direct an issue to a jury to try the questions of fact involved.

In Kentucky, in a suit in chancery to enforce a lien upon a note pledged to secure a reasonable compensation for services performed, the appellate court, in reversing the decree, suggested the propriety, upon return of the cause, of submitting an inquiry to a jury to ascertain and fix the amount upon an issue to be directed, with a view to that object. The court stated that upon the

one instance, by statutory provisions, either party has been given the right to jury trial on the question of damages.¹

13. Fraud or Undue Influence. — Where there is a question of

trial of such an issue more satisfactory evidence might possibly be adduced, but if it should not be, the assessment of unliquidated damages for services rendered falls more properly within their province, as more consistent with the genius of our institutions and more likely to be satisfactory to the parties. *Moore v. Martin*, 1 B. Mon. (Ky.) 97.

In *Tennessee*, where a widow filed her bill charging her deceased husband with selling and conveying his land with intent to defraud her of her dower, and praying dower and damages for the detention thereof, the chancellor submitted both the validity of the deed and the quantum of damages to the jury. It was held that the submission of the matter of damages to the jury was not in accordance with chancery practice. The validity of the deed being settled by the verdict of the jury, it was said that the court should have given relief by assigning dower and taking all proper accounts between the parties. *London v. London*, 1 Humph. (Tenn.) 1.

1. In *New York*, by Code Civ. Pro., § 970, as amended by Laws of 1891, c. 208, it is provided that where one or more questions arise on the pleadings, as to the value of the property or as to the damages which a party may be entitled to recover, either party may apply, upon notice at any time, to the court for an order directing all such issues or questions to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application the court must cause such issues or questions to be distinctly and plainly stated. See note, 27 Abb. N. Cas. (N. Y.) 101.

Under the foregoing provision, in an action to foreclose a mechanic's lien, questions as to the amount of the lien do not affect the value of the property or damages which one party may be entitled to recover; and the plaintiff, therefore, cannot demand as matter of right that issues as to such questions be framed and sent to a jury. *Riggs v. Shannon*, 27 Abb. N. Cas. (N. Y. C. Pl.) 456, holding, however, that in such an action, where a counterclaim asks judgment not only for money expended by the defendant to complete the work left undone by the plaintiff, but also

for damages caused by the plaintiff's delay in completing the work, the plaintiff is entitled to have questions of damages or delays submitted to a jury, unless the defendant waives his claim thereto.

See generally articles DAMAGES, vol. 5, p. 700; INQUESTS AND INQUIRIES, vol. 10, p. 1134.

Section 253 of the *New York Code of Procedure* provided that actions for the recovery of money only, or for specific real or personal property, or for divorce on the ground of adultery, must be tried by a jury, unless waived, as provided by section 266, or a reference be ordered. Section 254 provided that every other issue was triable by the court, which, however, might order the whole issue or any specific question of fact involved therein to be tried by a jury, or refer it, etc. Under this provision an order of the court that all issues be tried by a jury in an action brought to recover damages for alleged wrongful acts and to restrain the continuance thereof was held valid, irrespective of the question whether issues might have been tried by the court or not. *Parker v. Laney*, 58 N. Y. 469. See *Colman v. Dixon*, 50 N. Y. 572.

Under the Code Civ. Pro., an equitable action for the recovery of damages is triable by the court, with the assistance of a jury upon such issues of fact as the court may refer to them. *Brinckerhoff v. Bostwick*, 105 N. Y. 567, *reviewing and distinguishing* *Hun v. Cary*, 82 N. Y. 65; *Bradley v. Aldrich*, 40 N. Y. 504; *Davison v. Associates*, etc., 71 N. Y. 333; and *reversing* *Brinckerhoff v. Bostwick*, 43 Hun (N. Y.) 458.

So, in an equitable action to recover damages for alleged illegal acts of defendants, the special term, on motion or of its own volition, may direct questions of fact to be tried at circuit. If any special right of the parties is violated in the final disposition of the issues tried, whether as to the mode of the trial or otherwise, such question may be raised on the trial and exception taken. *Kellum v. Durfoo*, 78 N. Y. 484, dismissing appeal from *Kellum v. Knecht*, 17 Hun (N. Y.) 583.

fraud or undue influence involved in a suit in equity, the court can determine the question without the aid of a jury.¹ But it is often deemed desirable to have an issue directed to determine that fact.² Where a bill in equity alleges fraud in fact, which is denied by the answer and not established to the satisfaction of the court, an issue should be awarded.³ If, however, the chancellor

1. *White v. Hussey*, Pre. Ch. 14; *Fullagar v. Clark*, 18 Ves. Jr. 481; *Nichol v. Vaughan*, 2 Dow. & Cl. 420; *Israel v. Jackson*, 93 Ind. 543; *Goldsborough v. Turner*, 67 N. Car. 403.

Undue Influence Implied by Law.—When undue influence is to be inferred from the nature of the transaction, or where the transaction itself is contrary to the policy of the law, it is the province of the court of equity to determine the point, and the question should not be sent to a jury on issues. *Casborne v. Barsham*, 2 Beav. 76.

2. *Osborn v. Lea*, 9 Mod. 97; *Rhodes v. De Beauvoir*, 6 Cl. & F. 532; *Gee v. Gurney*, 2 Colly. 486, 10 Jur. 367; *Goldsborough v. Turner*, 67 N. Car. 403.

Whether Certain Promises and Assurances Were Fraudulently Made, to the plaintiff's injury and the defendant's gain, are issues which should be submitted to a jury. *Rutherford v. Williams*, 42 Mo. 18.

Deed Impeached as Fraudulent.—On a hearing in equity, the deed under which the defendant claimed to hold the premises was impeached as fraudulent, and the court ordered a jury to try the question of fraud. *Pomeroy v. Winship*, 12 Mass. 514; *Anonymous*, 1 Desaus. (S. Car.) 124.

Bond to Defraud Creditors.—Where there is reason to believe that a bond has been given to defraud creditors, the court will direct an issue to try the validity of the bond and the *quantum* of the debt. *M'Neal v. Smith*, 1 Yeates (Pa.) 552.

Fraud and Mismanagement of Directors of Corporation.—In *Hedges v. Paquett*, 3 Oregon 78, stockholders of a corporation sued the directors and the corporation, charging fraud and mismanagement; a jury was impaneled to pass upon the question whether there had been gross mismanagement on the part of the directors and on the question whether the directors had been guilty of actual fraud.

In *New York* it is held that an action against directors of a bank, by stockholders, to call them to account for

losses and damages sustained by reason of their fraud and misconduct, is an equitable action, in which defendants are not of right entitled to a jury trial of the whole issue. But it is proper in such an action to frame issues to be submitted to and tried by a jury. *Brinckerhoff v. Bostwick*, 105 N. Y. 567 [reviewing and distinguishing *Hun v. Cary*, 82 N. Y. 65; *Bradley v. Aldrich*, 40 N. Y. 504; *Davison v. Associates*, etc., 71 N. Y. 333; and reversing *Brinckerhoff v. Bostwick*, 43 Hun (N. Y.) 458].

3. *Janney v. Imperial Oil Co.*, 6 Phila. (Pa.) 261; *Hooe v. Marquess*, 4 Call (Va.) 416; *Bullock v. Gordon*, 4 Munf. (Va.) 450.

Where the agent of a landlord had procured from a tenant a conveyance of his farm under suspicious circumstances, the court, not being satisfied with the evidence in the cause, after the lapse of five years directed an issue to inquire whether the deed had been obtained by fraud, duress, imposition, or undue influence. *Smith v. Ward*, *Hayes & J.* 705.

Reversal for Failure to Order an Issue.—If the appellate court is satisfied, from the conflicting and unsatisfactory testimony, that the chancery court should have directed an issue to determine the fraud, it will reverse the decree of the chancellor, and remand the cause back, and direct an issue to be submitted to a jury. *Hooe v. Marquess*, 4 Call (Va.) 416; *Bullock v. Gordon*, 4 Munf. (Va.) 450.

Suit to Subject Property Fraudulently Conveyed.—In a suit in equity, under *Massachusetts* Stat. 1875, c. 235, for the collection of a debt for goods sold and delivered, out of property alleged to have been fraudulently conveyed by the defendant to a third person, the existence of the debt was denied and a trial by jury demanded in the answer. The Supreme Court was of opinion that the defendant had a constitutional right to have issues framed covering the material facts in dispute, but it was not deemed necessary to determine that

can satisfactorily decide, from the evidence, on the question of fraud, no issue should be submitted.¹

14. Forgery. — If the question of forgery is in issue in an equitable case, it may be submitted to a jury for determination.²

15. Usury. — The question of usury arising in an equitable case may be determined by the court, or made the subject of an issue.³

point, since the case was to be remanded. It was held, however, that exercising the discretion existing in equity and given by Mass. Stat., c. 151, § 27, issues should be framed covering all the material facts relating to the alleged fraudulent conveyance. *Powers v. Raymond*, 137 Mass. 483.

Issue Confined to Pleadings. — Where the pleadings present the question of one particular fraud only, an issue whether there was any fraud is not warranted. *Brink v. Morton*, 2 Iowa 411.

1. *Nichol v. Vaughan*, 2 Dow. & Cl. 420; *Carter v. Carter*, 82 Va. 624; *Keagy v. Trout*, 85 Va. 390; *Hurley v. Oakley Land, etc., Co.*, (Va. 1896) 24 S. E. Rep. 237; *De Vaughn v. Husted*, 27 W. Va. 773; *Knickerbocker L. Ins. Co. v. Nelson*, 8 Hun (N. Y.) 21.

An action to set aside a release as fraudulent and procured by duress and for malicious prosecution is such an equitable action as is triable by the court, and the plaintiff has no right to the trial by jury of the question of fraud in the release. *Stono v. Weiller*, (Supreme Ct.) 32 N. Y. St. Rep. 936, affirmed in 3 Silv. Ct. App. (N. Y.) 556, 128 N. Y. 655. For issues in cases involving a rescission or cancellation of instruments on the ground of fraud, see *supra*, IX. 4. *Specific Performance, Rescission, and Cancellation*.

2. *Wilson v. Thornbury*, 30 L. T. N. S. 667; *Maise v. Garner*, Mart. & Y. (Tenn.) 383.

In *Stafford v. Stafford*, 1 N. J. Eq. 533, after the delivery of the opinion application was made to the court upon the part of the complainant for an issue at law. The chancellor refused the application, but stated that if the evidence had led to the conclusion that the deed in question was a forgery, he would not have pronounced a decree involving a party in a criminal charge without the intervention of a jury, and would have awarded an issue at law. Cited in *Garwood v. Eldridge*, 2 N. J. Eq. 291, note.

Without Sending the Fact of Forgery to a Jury, the court has jurisdiction to

declare an instrument forged, and to order it to be delivered up. *Peake v. Highfield*, 1 Russ. 559. For issues in cases involving the rescission or cancellation of instruments because of forgery, see *supra*, IX. 4. *Specific Performance, Rescission, and Cancellation*.

3. The Refusal of the Court to Frame Issues on the question of usury in such a case is not error. *Knickerbocker L. Ins. Co. v. Nelson*, 8 Hun (N. Y.) 21.

Where No Doubt Exists as to usury charged, it is proper that no issue thereon should be submitted to a jury. *Keagy v. Trout*, 85 Va. 390.

Where Doubt Exists whether the sale of property is really intended as a shift to evade the statute against usury, the court of chancery ought to direct an issue to be tried upon *viva voce* testimony if it can be had. This not having been done, the decree was reversed on appeal, and the cause remanded to the court of chancery with directions to have the specified issues made up and tried. *Douglass v. McChesney*, 2 Rand. (Va.) 109.

Where No Reason Appears why the court should exercise its discretion by sending the issue of usury to a jury, such a motion will be denied. *Hayes v. Bainbridge*, (Supreme Ct.) 61 N. Y. St. Rep. 853, 30 N. Y. Supp. 148.

In *Virginia* the Code of 1860, c. 141, § 10, provided that "upon a bill requiring no discovery of the defendant, but praying an injunction to prevent the sale of property conveyed to secure the repayment of a sum of money or other thing borrowed at usurious interest, the court shall cause an issue to be made and tried at its bar by a jury, whether or no the transaction be usurious," etc. It was held that such an issue was not a mere incident to the suit, as ordinary issues out of chancery, but the sole object of the suit; that it was not to inform the conscience of the court, but the court was bound to decree according to the verdict, unless for good cause a new trial were granted; and that it was to be tried in the same manner, and the verdict was to have the same effect, as if the suit

16. Insanity. — Where the question of insanity is involved in a suit in equity, the court may inform its conscience by directing an issue to determine the matter.¹ But this question is within the sound discretion of the judge, who may decide the question of insanity himself, without any submission to a jury.²

17. Partnership. — Authorities which declare that the question whether or not a partnership exists is generally to be decided by a jury have reference to actions at law, and not necessarily to suits in equity; and the fact that a question of partnership arises in the case does not affect the general rule in relation to an issue in chancery causes.³ Where there is a serious doubt upon a

were an action at law to recover a debt alleged to be usurious. *Brockenbrough v. Spindle*, 17 Gratt. (Va.) 21. The provision above quoted was incorporated in the Code of 1873, c. 137, § 12, and has no application to a bill requiring a discovery. *Keagy v. Trout*, 85 Va. 390.

In *West Virginia* the special issue of usury required to be submitted to a jury by the court, under the Code, c. 96, § 6, is intended to apply to jury trials alone, and not to cases wherein a jury is waived and the court, by agreement of the parties, is substituted to try the issue. In such a case neither party can afterwards complain that such special issue was not directed. *Ravenswood Bank v. Hamilton*, (W. Va. 1897) 27 S. E. Rep. 296.

1. *Atwood v. Smith*, 11 Ala. 894; *Myatt v. Walker*, 44 Ill. 485; *Pankey v. Raum*, 51 Ill. 88; *Howard v. Howard*, 87 Ky. 616; *Doe v. Roe*, 1 Edm. Sel. Cas. (N. Y. Cir. Ct.) 344; *Wallace v. Bevard*, *Wright* (Ohio) 114; *Yourie v. Nelson*, 1 Tenn. Ch. 275; *Fishburne v. Ferguson*, 84 Va. 87; *Hall v. Warren*, 9 Ves. Jr. 605; *Frank v. Mainwaring*, 2 Beav. 115; *Snook v. Watts*, 12 Jur. 444; *Lewis v. Thomas*, 3 Hare 26.

2. *Alexander v. Alexander*, 5 Ala. 517; *Brown v. Miner*, 128 Ill. 148; *Smith v. Carll*, 5 Johns. Ch. (N. Y.) 118; *Harding v. Handy*, 11 Wheat. (U. S.) 103; *Evans v. Blood*, 3 Bro. P. C. 632; *Steed v. Calley*, 1 Keen 620; *Price v. Berrington*, 3 Macn. & G. 486, 15 Jur. 999.

Submission of Issue upon Unsworn Allegation. — A motion, in a suit to foreclose a mortgage, to submit to a jury a question of fact as to the insanity of the mortgagor upon the allegation of insanity in an unsworn answer, without any affidavit of the fact, is properly refused. While an issue of insanity

might be a proper one for a jury in a case of that character, yet there is no rule of chancery practice which would require a chancellor to submit a question of fact to a jury upon the bare assertion of counsel that the fact existed, unsupported by any evidence whatever. *Hahn v. Huber*, 83 Ill. 246, *approving* *Sea Ins. Co. v. Day*, 9 Paige (N. Y.) 369.

For Further Treatment of the question when issues of insanity will be submitted to a jury, see article *INSANE PERSONS*, vol. 10, p. 1169.

For Submission of Issues in a Will Case where the question of sanity is involved, see article *PROBATE AND ADMINISTRATION*.

3. *Robinson v. Allen*, 85 Va. 721, where the court in its discretion refused an issue to a jury to determine whether or not there was a partnership.

New York. — An action brought by a plaintiff alleged a partnership with the defendant, and prayed for a dissolution and account, a receiver, a sale and distribution of the property, and payment to the plaintiff of whatever was found due. The answer denied every material fact alleged, and the issues thus raised were brought to trial. It was held that such action was not one for the recovery of money, or for any of the relief specified in the Code of Procedure, § 253, declaring what actions must be tried by jury, but sought other relief and fell within the provisions of section 254, which declared that "every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury," and was also within the provisions of the Code of Procedure, § 72, which provided that "feigned issues are abolished; and instead thereof, in cases where the power

matter of fact in a partnership case, the court may, and usually will, award an issue to determine the fact.¹

18. Accounts and Accounting. — Where a case involves an accounting on the examination of a long account, the matter will usually be decided by the court or made the subject of a reference, and not of issues to a jury.²

19. Right and Title to Property. — Issues may be and frequently are directed to decide on questions affecting the right of property.³ And where a court of equity has jurisdiction of the subject-matter, as in cases of dower, partition, etc., and title to property is

now exists to order a feigned issue, * * * an order for the trial may be made, stating distinctly and plainly the question of fact to be tried, and such order shall be the only authority necessary for a trial." Hence there was no lack of power in the court to order any question of fact arising upon the issues between the parties to be tried by a jury, and to settle and determine what questions should be so tried. *O'Brien v. Bowes*, 10 Abb. Pr. (N. Y. Super. Ct.) 106.

Various Controverted Questions in Action to Settle Partnership. — Where, in an action between partners to settle copartnership matters, it becomes evident to the court, on examination of the issues, that the several interests of the parties will, on the trial, involve much contradiction, perhaps questions of veracity, of mistake or fraud in the drawing of the papers, etc., and is manifestly an inquiry which business men, accustomed to examine facts, should decide, the court will direct the issue to be tried by a jury. *Clark v. Brooks*, 26 How. Pr. (N. Y. C. Pl.) 285.

1. The Existence of a Copartnership being doubtful upon bill and answer, the court will award an issue to determine it. *Huston v. Huston*, 13 Phila. (Pa.) 183, 36 Leg. Int. (Pa.) 292; *Drope v. Miller*, Hempst. (U. S.) 49. See *Hinds v. Daley*, 3 Pa. Dist. Rep. 52, in previous note. Also *M'Gregor v. Bainbrigge*, 7 Hare 164, note.

Withdrawing from Master and Submitting to Jury. — While the court is disposed to withdraw sharply contested questions of fact from masters, in order that they may be settled with less expense, more expedition, and perhaps more satisfaction, by a jury, nevertheless, this practice ought not to be encouraged where the finding of the jury might not put an end to the case by placing the facts in such a condition

on the record as to make it possible for the court to enter a final decree without further reference to a master. This is particularly true in matters of account, of which partnership cases form one of the most numerous classes. *Hinds v. Daley*, 3 Pa. Dist. Rep. 51.

2. Complicated Accounts. — Thus where the matter involved arose upon complicated accounts, the court refused an issue, holding such matters to be more satisfactorily triable by the court than by a jury. *Sparks v. Farmers' Bank*, 3 Del. Ch. 225.

Accounting in Partnership Cases. — See *supra*, IX. 17. *Partnership*.

An Action on a Contract Relating to the Use of a Patent Right, and involving an accounting, is one in which the defendant is not of right entitled to a trial of the issues by a jury. *Creighton v. Haggerty*, 50 N. Y. Super. Ct. 9. See *supra*, IX. 8. *Patents*.

Issues upon Counterclaims involving account, see *supra*, VI. *Cross-complaint and Counterclaim*.

3. Issue to Try Right in Attachment. — An issue in an attachment case to try the right of a party to anything is too general. If the right depends upon disputed facts, these facts may be ascertained by a feigned issue; as, for instance, if the fact in question was whether the defendant had demanded the exemption at the time of the service of the attachment, this fact could be so ascertained. But the right of a party may depend upon law and fact. When this is the case the court should send the contested facts to trial by a jury, and retain the questions of law for its own decision. *Landis v. Lyon*, 71 Pa. St. 475. See *supra*, IX. 2. *Attachment and Garnishment*, and VIII. 3. *Questions of Law*.

For General Treatment of trial of right of property, see article RIGHT OF PROPERTY, TRIAL OF.

involved, it is believed to be the general practice of the court not to determine on the title, but to leave that matter to a jury, by directing an action at law or ordering an issue.¹

20. Value of Property. — The ascertainment of the value of property involved in a suit in equity may be determined by the court or on issues to a jury, according to the general practice in equity.²

1. *Stone v. Anglesea*, 1 Bro. P. C. 218; *Burkett v. Randall*, 3 Meriv. 466; *Mott v. Blackwall R. Co.*, 2 Phil. 632; *Pym v. Bowreman*, 3 Swanst. 241; *Fox v. Ford*, 5 Rich. Eq. (S. Car.) 349; *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266.

In *McDougald v. Dougherty*, 11 Ga. 570, it was held that when titles to property are in dispute before a court of chancery, a jury alone is competent to determine the real truth of the fact, and that neither the chancellor himself nor the master will undertake to decide upon antagonistic claims to property.

In *Reams v. Spann*, 28 S. Car. 530, the action was to recover real estate, and incidentally thereto obtain a partition of it, the plaintiffs claiming title on one ground as heirs at law. It had been determined on a former appeal that such claim was invalid and a new trial had been ordered. When the case went back to the circuit, the judge, upon motion of the plaintiff's attorney, framed issues to be submitted to the jury, "whether the plaintiffs are the owners in fee simple, or are entitled to the land in dispute." It was held that the issues framed were so general in their character as practically to supersede the decision already made and to authorize the plaintiffs to bring a new action of ejectment, when one of that character, certainly as to the question of titles, was already then and there pending; and it was said that upon the question of title it was not a case for issues from chancery.

Cross-References. — As to issues on value of property, see *infra*, IX. 20. *Value of Property*.

In actions to quiet title, see *supra*, IX. 5. *Quieting Title and Partition*.

In actions on mortgages, see *supra*, IX. 9. *Mortgages and Liens*.

On claims by and against administrators, executors, etc., see article PROBATE AND ADMINISTRATION.

On claims before auditors, or on distribution of proceeds of sheriff's or other judicial sales, see generally the articles REFERENCES; SHERIFF'S SALES.

2. Value and Profits of Land. — Where it is necessary to ascertain the value and profits of land in a suit in equity, an issue should be directed to a jury, and the matter should not be referred to commissioners. *Eustace v. Gaskins*, 1 Wash. (Va.) 188.

Value of Land Condemned. — In a controversy in an equity case between the owner of certain lots of land, and a corporation which had condemned them for a raceway, an issue was ordered to ascertain their value. *Trenton Banking Co. v. McKelway*, 8 N. J. Eq. 84.

Value of Mortgaged Property. — On a bill to redeem mortgaged property, it is not necessary for the chancellor to direct an issue to ascertain the value unless he has doubts upon the subject. *Reed v. Lansdale*, Hard. (Ky.) 8. See *supra*, IX. 9. *Mortgages and Liens*.

Value of Deficiency of Land Conveyed. — If a tract of land, with the growing crops, and a few articles of personal property, be all sold together for a given sum, and the land proves deficient in quantity, the court of chancery may deduct a ratable proportion of the purchase-money without directing an issue to ascertain it. *Anthony v. Oldacre*, 4 Call (Va.) 489.

Where the Value of an Interest in Slaves was involved in a suit in chancery, it was deemed best to ascertain it by a jury impaneled for the purpose. *Smiley v. Smiley*, 1 Dana (Ky.) 94.

The Value of Property Wrongfully Attached and Converted, where the whole controversy is in equity, may be determined by the court without the intervention of a jury. *Greer v. Powell*, 1 Bush (Ky.) 499, decided under section 343 of the *Kentucky Civil Code*, providing that issues of fact in equitable proceedings shall be tried by the court, "subject to its power to order any issue or issues to be tried by a jury."

21. Agreements, Deeds, and Covenants Generally. — Questions of fact relating to agreements, deeds, and covenants generally, when involved in a suit in equity, may be, and often are, submitted to a jury for their determination under the ordinary principles applicable.¹

22. Lost Papers. — Where a bill is filed to recover the amount of a lost note, the chancellor may direct an issue to be tried by a jury to ascertain the fact of loss.² And though it has been held that the consideration of a written paper is a matter for the judge to determine, yet it is proper for him to submit an issue as to what the terms of the lost paper were.³

23. Leases and Rents. — Where, in a suit concerning leases and rents, questions of fact arise, they may be determined by a jury.⁴

It was held that as it did not appear that the court was asked to exercise the power thus conferred to order a jury, its failure to do so of its own volition was not an abuse of its discretionary power.

In New York it is provided by Code Civ. Pro., § 970, as amended by Laws of 1881, c. 208, that where one or more questions arise on the pleadings as to the value of property, either party may apply to the court, upon notice at any time, for an order directing the issues or questions to be distinctly and plainly stated for trial, and upon the hearing of the application the court must cause such issues or questions to be distinctly and plainly stated. See note, 27 Abb. N. Cas. (N. Y.) 101; *Riggs v. Shannon*, 27 Abb. N. Cas. (N. Y. C. Pl.) 456.

1. See *Stone v. Anglesea*, 1 Bro. P. C. 218; *Plunket v. Kingsland*, 1 Bro. P. C. 322; *Burkett v. Randall*, 3 Meriv. 466; *Savage v. Carroll*, 1 B. & B. 283; *Money v. Macleod*, 2 Sim. & S. 301; *Penny v. Watts*, 2 De G. & Sm. 501; *Mott v. Blackwall R. Co.*, 2 Phil. 632; *M'Gregor v. Bainbridge*, 7 Hare 164, note; *Blaney v. Mahon*, 4 Bro. P. C. 81; *Vanhoven v. Giesque*, 4 Bro. P. C. 622. See further the particular subsections in this division, such as *supra*, IX. 9. *Mortgages and Liens*; *infra*, IX. 23. *Leases and Rents*, etc.

Covenants Broken. — Whether a party has broken any of his covenants or not is a matter properly triable at law, as the damages, supposing a breach, cannot be settled without such trial. *Stafford v. London*, 4 Bro. P. C. 635.

Illegal Agreements. — An issue may be directed to try whether an agreement to carry on an illegal game and a contribution for that purpose had been made. *Nash v. Ash*, 1 Eden 378.

2. *Truly v. Lane*, 7 Smed. & M. (Miss.) 325.

3. *Asbill v. Asbill*, 24 S. Car. 359.

A lease made before the enactment of the statute of frauds and afterwards lost, being proved to contain an agreement as to the amount of a fine to be paid "upon the renewing of any life or lives," and having been seven times since renewed, an issue was directed to try whether at or before the making of the lease there was an agreement for a lease of lives renewable forever; and a second issue to try whether such lease contained any clause or covenant relating to the renewal, and independent of the stipulation as to the amount of fines. *Nangle v. Smith*, 1 Ir. Eq. Rep. 119. See generally article LOST PAPERS.

4. See *Dowell v. Dew*, 1 Y. & Coll. Ch. 345, 7 Jur. 117; *Bowser v. Coleby*, 1 Hare 109, 5 Jur. 1106; *Surtees v. Hopkinson*, 12 Jur. 240; *Nangle v. Smith*, 1 Ir. Eq. Rep. 119; *Gardner v. Rowe*, 5 Russ. 258, *affirming* 2 Sim. & S. 346; *Douglas v. M'Causland*, *Hayes* 254; *Walker v. Jeffreys*, 1 Hare 341, 6 Jur. 336; *Plunket v. Kingsland*, 1 Bro. P. C. 322; *Atty.-Gen. v. Cashel*, 2 Con. & L. 1, 3 Dr. & War. 294; *Dublin v. Trimleston*, 12 Ir. Eq. Rep. 251; *Kealey v. Dawes*, 5 Bro. P. C. 460; *Whitfield v. Fausset*, 1 Ves. 387.

Determination of Rent, Commencement and Duration of Lease, etc. — Where, in an agreement for a lease, the particular rent, and the commencement and duration of the lease are uncertain, or dependent upon the approbation of a third person, a court of equity will direct proper issues to ascertain these several facts before any specific performance of the contract will be decreed. *Plunket v. Kingsland*, 1 Bro. P. C. 322.

24. Custom. — An issue to determine a custom may or may not be granted, according to the court's discretion, exercised on general principles of chancery practice.¹

25. Heirship, Legitimacy, and Marriage — Heirship. — The question of heirship, according to the English practice, was sometimes made the subject of an issue to a jury and sometimes decided by the court.²

Legitimacy and Marriage. — Issues to try the question of legitimacy or marriage raised in a suit have been granted in some cases and refused in others.³

26. Boundaries. — Matters in dispute concerning boundaries of property may be, and often are, according to the English practice, determined by a jury on issues directed for that purpose.⁴

27. Bankruptcy and Insolvency. — In bankruptcy matters, issues to a jury are often directed to ascertain certain facts.⁵

28. Miscellaneous Instances. — Other cases than those already specifically treated, in which it has been considered proper to

1. See *Chamberlayn v. Symonds*, Barnard 98; *Atty.-Gen. v. Wall*, 4 Bro. P. C. 665; *Leathes v. Newitt*, 4 Price 370; *London v. Combe*, 6 Jur. 75; *Arthington v. Fawkes*, 2 Vern. 356; *Grafton v. Horton*, 2 Bro. P. C. 284; *Locke v. Colman*, 1 Myl. & C. 423, 2 Myl. & C. 42.

2. See *Newton v. Newton*, Dick. 443; *Lancashire v. Lancashire*, 9 Beav. 259; *Lloyd v. Wait*, 1 Phil. 61, 6 Jur. 45; *Monkton v. Atty.-Gen.*, 2 Russ. & M. 147; *Locke v. Colman*, 1 Myl. & C. 423, 2 Myl. & C. 42; *Malone v. Malone*, 8 Cl. & F. 179, 2 Dr. & Wal. 491, 3 Ir. Eq. Rep. 536.

3. See *Devereux v. Devereux*, Rep. temp. Finch. 324; *Bury v. Phillpot*, 2 Myl. & K. 349; *Graham v. Whitmarsh*, 2 L. J. Ch. 42; *Piers v. Tuite*, 1 Dr. & War. 279; *Malone v. Malone*, 8 Cl. & F. 179, 2 Dr. & Wal. 491, 3 Ir. Eq. Rep. 536; *Gordon v. Gordon*, 3 Swanst. 468; *Revel v. Fox*, 2 Ves. 269.

Issues upon Legality of Marriage. — How. Annot. Mich. Stat., § 6622, provides that "all issues upon the legality of a marriage (except where a marriage is sought to be annulled on the ground of the physical incapacity of one of the parties), shall be tried by a jury of the country." Under this statute the court has authority to frame an issue and submit it to the jury on its own motion, but the statute is not mandatory and may be waived. *Maier v. Lillibridge*, (Mich. 1897) 70 N. W. Rep. 1032. See *supra*, IX. 7. *Divorce*.

4. *Lethieullier v. Castlemaine*, Dick.

46; *Rous v. Barker*, 4 Bro. P. C. 660; *Atty.-Gen. v. Chamberlaine*, 4 Kay & J. 292.

Information to Establish Title to Alluvium. — An information for the purpose of having the title of the crown to alluvium gained from the sea declared and established is analogous to a bill to ascertain boundaries, and requires in support of it admissions or evidence showing a title in the crown to some lands in the possession of the defendant. But where the witness in support of the information deposed that the alluvium had been added to the main land, not gradually and imperceptibly, but rapidly, it was held that a sufficient case had been made for directing issues. *Atty.-Gen. v. Chambers*, 4 De G. & J. 55, 5 Jur. N. S. 745.

5. *Ex p. Scott*, Buck. 275; *Gawthorne v. Meymott*, 2 Ken. Ch. 20; *Re Perse*, 2 Moll. 441; *Parrott v. Congreve*, 16 Sim. 579; *Grugeon v. Gerrard*, 4 Y. & Coll. 119; *Ex p. Chambers*, 1 Deacon 197, 38 E. C. L. 439; *Re Ledwith*, 2 Moll. 450.

The chancellor of *Maryland*, by the Act of 1801, c. 18, had power to direct issues in a summary way and inquire whether a debtor who applied to him for relief under the insolvent law was liable to be made a bankrupt under the law of the United States. *Clarke v. Ray*, 1 Har. & J. (Md.) 318. For general matters of practice pertaining to bankruptcy and insolvency, see article INSOLVENCY, *ante*, p. 1.

submit issues, will be found in the notes. In general, it may be said that for the determination of any question of fact, in all equity cases and proceedings, issues to the jury may be directed subject to the general principles governing the discretion of the court.¹

X. PRINCIPLES AND PROCEEDINGS RELATIVE TO SUBMISSION, FRAMING, REQUISITES, CORRECTION, ETC. — 1. By Whom Granted — In General, as has been seen, issues to the jury may be granted by courts of various natures, such as courts of equity, courts of law, and those of a probate nature.²

Jurisdiction. — It is obvious that the court granting the issues should possess the requisite jurisdiction.³

Court of Proper County. — It is equally evident that the granting and framing of issues should be by the court of the proper county.⁴

Single Judge. — In some cases the application in a cause pending before a court in banc may be made to and issue granted by a single judge.⁵ In other cases it appears that

1. Issue on Donatio Mortis Causa. — An issue has been directed to try whether there was a *donatio mortis causa*, as it did not appear to have been in the last illness. *Blount v. Burrow*, 1 Ves. Jr. 546.

Issue Ordered to Discover Witness's Interest. — *Stokes v. M'Kerral*, 3 Bro. C. C. 228.

An Issue to Try a Solicitor's Authority to use a relator's name was directed under the circumstances, although such relator afterwards acknowledged the authority. *Atty.-Gen. v. Skinners' Co.*, *Cooper's Pr. Cas.* 1.

The Practice of Making the Agents of a Party Defendants when nothing but costs is prayed against them, as it deprives him of their evidence, is improper, and should be made by directing an issue. *Attwood v. Small*, 6 Cl. & F. 232, *reversing Small v. Attwood*, *Young* 407.

The Question as to an Agent's Authority, denied by the answer and by his deposition stating his declaration to the contrary at the time of execution, was held proper to be determined by issue. *Howard v. Braithwaite*, 1 Ves. & B. 202.

A Suit in Equity Involving the Professional Conduct of an Attorney is appropriately tried by a judge without a jury, and if there is no suggestion, nor any reason why a trial by a jury is necessary, the appellate court will reverse the order directing the issues. *Ellensohn v. Keyes*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 353.

Currency with Reference to Which Contract Was Made. — Questions in an equity case as to whether a contract was made with reference to Confederate money as a standard of value or whether the notes were to be paid in the currency of the time when they fell due, are more properly subjects of reference to a commission than of issues to a jury, and the court makes no error in refusing an issue in such a case, and especially where there is no conflict of testimony. *Kraker v. Shields*, 20 Gratt. (Va.) 377.

2. See *supra*, I., II., IV., VII.

3. Judgment on Issue in Wrong Court No Bar. — The award of an issue by a court without jurisdiction and affirmance of the judgment on exceptions to the ruling upon the trial, in which the question of jurisdiction was not mooted, is no bar to the granting of another issue by the proper court. *Gordon's Appeal*, 93 Pa. St. 361.

4. Issue to Test Validity of Judgment. — In *Pennsylvania* the court of the county in which the transcript of the record of a judgment from another county was entered cannot frame an issue to test the validity of the judgment. Only the court of the county in which it was originally entered has this power. *Gordon's Estate*, 9 Phila. (Pa.) 350.

5. Massachusetts Stat. 1826, c. 109, provided that in suits in equity pending in the supreme judicial court, any justice thereof might make all interlocutory orders and decrees necessary

it should be so made.¹

2. On What Proceedings Granted — *a.* ON APPLICATION OR EX MERO MOTU. — The submission of issues is done either upon the application of a party or upon the court's own motion.² The failure to make a demand or application may constitute a waiver of the right to an issue,³ and it is apprehended that the court, subject to the rules governing its discretion, is never obliged to submit issues without a request therefor.⁴ But in general the court has power *ex mero motu* to direct an issue in an equitable case whenever such issue is proper,⁵ and it may do this in a case in which a party would have an absolute right

to the full hearing and final determination of such suits. It was held that an order directing the trial of a material fact by jury was an interlocutory order, and consequently that where the only material question in the suit in equity was of the sanity of the plaintiff, it was competent for the court, when holden by a single judge, to direct an issue to be framed and tried by a jury, for the purpose of determining this question, before the general hearing. *Eames v. Eames*, 16 Pick. (Mass.) 141. See *infra*, X. 4. *Time of Application and Order for Issue.*

1. In Tennessee, under the Act of Assembly in force in 1804, to regulate the proceedings of the court of equity and for the amendment of the law, it was held that an application to the court to make up issues of fact should be made to a single judge out of court. *Duncan v. King*, 1 Overt. (Tenn.) 79.

2. Ringgold v. Patterson, 15 Ark. 209; *Carroll v. Deimel*, 95 N. Y. 255; *Brinkley v. Brinkley*, 56 N. Y. 192; *Ellensohn v. Keyes*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 353; *Black v. Shreve*, 13 N. J. Eq. 455. As to whom application is made, see *supra*, X. 1. *By Whom Granted.*

3. Thus, in an action for partition in which there is a counterclaim, if there is no request made for a trial by jury, the right, if any such exists, must be regarded as waived. *Sheets v. Bray*, 125 Ind. 33.

In the Probate Courts of Alabama there must be a requisition by one of the parties for issues to the jury; the court cannot *ex mero motu* submit them. *Blankenship v. Nimmo*, 50 Ala. 506. See also *supra*, V., VI., and VII.

4. See *Greer v. Powell*, 1 Bush (Ky.) 499; *Robinson v. Allen*, 85 Va. 721.

5. Ringgold v. Patterson, 15 Ark. 209; *Smith v. Rowe*, 4 Cal. 6; *Hall v. Linn*, 8 Colo. 264; *Peck v. Farnham*, (Colo. 1897) 49 Pac. Rep. 364; *Cobb v. Cole*, 44 Minn. 278; *Tappan v. Evans*, 11 N. H. 311; *Hoitt v. Burleigh*, 18 N. H. 390; *Black v. Shreve*, 13 N. J. Eq. 455; *Brinkley v. Brinkley*, 56 N. Y. 192; *Church v. Freeman*, 16 How. Pr. (N. Y. Supreme Ct.) 298; *Meek v. Spracher*, 87 Va. 162.

Foreclosure of Mortgage. — In *New York*, under the former chancery practice where, on bill to foreclose a mortgage, a cause came on to be heard upon pleadings and proof, and the testimony as to a leading and decisive fact in the cause was so nearly balanced as to leave the court in doubt, a feigned issue might have been awarded by the court itself without any motion from either party to have such fact tried by a jury. *Munson v. Reed*, *Clarke Ch. (N. Y.)* 580. And under the Code Civ. Pro., §§ 823, 791, 1003, in an action for the foreclosure of mortgages the trial is by the court, but the court is authorized to direct any matter of fact in issue to be tried by a jury; and such a direction is a substitute for the former practice of awarding feigned issues in an action in equity, and the direction may be given on the application of either party or by the court on its own motion. *Carroll v. Deimel*, 95 N. Y. 255.

Issue on Legality of Marriage. — In *Michigan*, under How. Anno. Stat., § 6622, providing for trial by jury, of issues upon the legality of a marriage, the court has authority to frame an issue and submit it to a jury on its own motion, and the failure to base the order on a special motion will be no ground for vacating the order by mandamus. *Maier v. Lillibridge*, (Mich. 1897) 70 N. W. Rep. 1032.

to a jury trial of the issues, if application therefor had been properly made.¹

b. REQUISITES AND ACCOMPANIMENTS OF APPLICATION OR DEMAND—(1) *Demand in Pleading or by Independent Application*.—In some cases the demand for an issue is to be made by the party in his first pleading in the cause,² but it is believed that this practice is peculiar, dependent upon statutes or rules of court, and that generally the application is an independent one made at the proper time.³

(2) *Application for Proper and Material Issue*.—The application or demand must be made for a proper and material issue.⁴

(3) *Affidavit and Evidence*.—And it must in many cases be accompanied by affidavits, or supported by competent and sufficient evidence.⁵

(4) *Time of Application or Demand*.—See *infra*, this article, X. 4. *Time of Application and Order for*.

(5) *Notice of Motion*.—In several of the states provisions exist requiring notice to be given within a certain time of the motion

1. Hoitt v. Burleigh, 18 N. H. 390.

In Tennessee the Code gives either party to an equitable action the right to have the issues tried by a jury, on proper application therefor, but if this application be not made, the court, *ex mero motu*, may submit proper issues to a jury. London v. London, 1 Humph. (Tenn.) 1; Orgain v. Ramsey, 3 Humph. (Tenn.) 580; Timmons v. Garrison, 4 Humph. (Tenn.) 148; Lowe v. Traynor, 6 Coldw. (Tenn.) 633.

In Wisconsin Rev. Stat., § 3323, gives either party to an action to foreclose a mechanic's lien the right to demand a jury. But this is held not to prevent the court, on its own motion, from ordering a jury to try any issue of fact. Huse v. Washburn, 59 Wis. 414.

2. In Pennsylvania rules of court have been made providing that if an answer to a libel in a divorce case be filed, it shall state whether the respondent demands an issue, otherwise a jury trial shall be taken to be waived. Johnson v. Johnson, 4 Pa. Dist. Rep. 460. Rules making such provisions will be strictly enforced. Reinbold v. Reinbold, 15 Pa. Co. Ct. Rep. 335.

In Tennessee, however, it has been expressly decided that the Act of 1875, relating to the demand for a jury in a party's first pleading tendering an issue triable by jury, does not apply to chancery causes. Allen v. Saulpaw, 6 Lea (Tenn.) 481; Cooper v. Stockard, 16 Lea (Tenn.) 140; Cheatham v. Pearce, 89 Tenn. 668.

3. See *infra*, X. 4. *Time of Application and Order for Issue*.

4. See *supra*, VIII. 3. *Questions of Law*; VIII. 4. *Materiality of Issues*; and *infra*, X. 9. *The Preparation of the Issues*.

5. *Issue of Usury in Foreclosure Suit*.—Where the defendants in a foreclosure suit, who had set up the defense of usury in their answer, which was put in without oath, applied for an issue to try the question of usury by a jury, it was held that an issue ought not to be granted without an affidavit showing some probable ground for believing that the defense of usury could be sustained by proof, and that the issue was not asked for by the defendant for the purpose of delay merely. Sea Ins. Co. v. Day, 9 Paige (N. Y.) 369.

Insanity.—The rule above stated is applicable likewise where insanity is alleged in an unsworn answer. Hahn v. Huber, 83 Ill. 246.

In Pennsylvania, evidence to support demand for issue from Orphans' Court is necessary, and ordinarily it must be of such a character as to sustain a verdict in favor of the party. Gray's Estate, 7 W. N. C. (Pa.) 542; Hantell's Estate, 2 W. N. C. (Pa.) 128; Restine's Estate, 3 W. N. C. (Pa.) 27; Kates's Estate, 9 Pa. Co. Ct. Rep. 569; Beehler's Estate, 3 Phila. (Pa.) 254; *In re Boyer*, 13 Phila. (Pa.) 255.

See *supra*, VII.; and *supra*, VIII. 2, a. *Bill and Answer Unsupported by Evidence*.

to be made for a jury trial of the issues of fact, and regulating the practice connected with such notice.¹

3. Order for Trial of Issue — a. NECESSITY FOR. — The doctrine is believed to be, that if the issue is to be tried before a different court from the one directing it, there must be an order from the latter court furnishing to the trial court its authority for proceeding.² But if the judge by whom the issues are directed be the one before whom the trial is to take place, even though the jurisdictions in equity and law are separate, previous formal order for the trial of the issue may be dispensed with.³

b. REQUISITES AND CONTENTS. — Besides ordering the trial and stating the issues to be determined, the order oftentimes contains various directions and suggestions to the trial court. These, for the most part, relate to the place and time of trial, the form which the proceeding is to take, the parties thereto, the general nature of and proceedings at the trial, whether by general or special jury, the admissions to be made, the evidence to be used, etc.⁴ It has been hereinbefore shown that in many of the states

1. See *infra*, X. 4. a. (2) *At or Within a Definite Time.*

In South Carolina it was objected in an equity case that the court could not submit issues on motion of the plaintiff, without previous notice of such intended motion. Without expressly deciding the point, the court said it was true that in cases where the trial of issues of fact was not provided for in the code, if either party desires a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings. "But at the same time," continued the court, "in cases triable by the judge he may, for his own enlightenment, order an issue as to the whole, or as to any specific questions of fact, to be tried by a jury. Now, although the issues here were ordered on motion of the plaintiff, yet it does not appear but that the circuit judge granted the motion for his own satisfaction and enlightenment, under the power with which he was invested, independent of the motion of the plaintiff." *Rynerson v. Allison*, 28 S. Car. 81.

Sufficiency of Notice. — In *Bailey v. Ryder*, 1 Barb. (N. Y.) 74, it was objected by the counsel for defendants that the notice was for a motion for a settlement, and not for the award of issues required by the New York Act of 1839, §§ 2 and 3, that the notice presupposed an award of issues under the

second and third sections of the Act, and that the application was under the fourth section; and they insisted that the court could not award issues upon a notice in this form. The court said: "The notice of motion is sufficient under the statute and the 59th rule, although the settlement is in fact merely incidental to the award of issues. The intention of the rule was that the whole matter should be disposed of on the motion for settlement of the issues. The award of issues being necessarily precedent to their settlement, no party can be misled by such a notice as this, under the rule; and as copies of the pleadings are to be presented to the court by the party making the application, no harm can arise from the form of the notice, although the practice under the rule may be somewhat artificial."

2. See *Wilson v. Riddle*, 123 U. S. 608; *Williams v. Bishop*, 15 Ill. 554. See *supra*, II. 2. a. *Feigned Issues.*

3. *Wilson v. Riddle*, 123 U. S. 608; *Williams v. Bishop*, 15 Ill. 554.

4. For matters in the order, concerning the trial generally, see *infra*, XI. *The Trial.* As to the form of the proceeding, see *infra*, X. 10. *General Form of Issues.* As to the parties, see *infra*, X. 12. *Parties.* As to the statement of the issues, see *infra*, X. 5, 6, 7, 8, 9, 10, and 11.

For Forms of Orders generally, see *Miller v. Wilson*, 1 Barb. (N. Y.) 222;

a simple direct order for the trial by jury of such facts as are so desired to be determined is all that is necessary.¹

4. Time of Application and Order for Issue — *a. BEFORE HEARING* — (1) *In General*. — In general, the application for the issue should be made at the hearing of the cause. If made before the hearing it will frequently be refused as being premature, since, until a hearing, it cannot be determined whether or not, according to the evidence, an issue is necessary.² On the other hand, in many cases an issue may be directed on an interlocutory application, before the cause is brought to a hearing.³ Thus, where,

Bosher v. Harris, 1 How. Pr. (N. Y. Supreme Ct.) 206; *Bassett v. Johnson*, 3 N. J. Eq. 421.

Determining Whether Order Is for Issue or Action. — Whether an order is for an action at law or an issue out of chancery does not depend upon the form in which the issue is framed, but the order itself must be inspected to determine whether an issue or an action is directed. *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266.

Sufficiency of Order. — Where, in a suit pending in equity, the only issue made by the pleadings was as to the liability of the defendant to the plaintiff for the demand asserted by the latter, and the extent of such liability if it existed, which issue was transferred to the common-law docket to be tried by a jury, the order on the subject, to the effect that the issue raised by the pleadings was to be tried by a jury, was held sufficiently explicit. *Savings Bank v. Benton*, 2 Metc. (Ky.) 240.

In *Cobb v. Burns*, 61 Pa. St. 281, it was held that an order of the Orphans' Court which merely "directs an issue in the matter of specific performance of contract" in a case before the court, and specifies it in these words only, is simply void; that it ascertains no fact in dispute and certifies nothing to be tried; that if it means to send to the Common Pleas a question of specific performance, it is improper as an unauthorized delegation of jurisdiction; and that if it means to send any issue the parties may themselves choose to raise in the Common Pleas, it is equally irregular.

1. See *supra*, II. 2. *b. Abolition of Feigned and Substitution of Direct Issues.*

2. 2 Dan. Ch. Pr. (1st Am. ed.) 735; *Eames v. Eames*, 16 Pick. (Mass.) 141; *Waterman v. Dutton*, 5 Wis. 413; *Bradley v. Bevington*, 4 Drew. 511; *George v. Whitmore*, 26 Beav. 557; *Morrison*

v. Barrow, 1 De G. F. & J. 633; *Davenport v. Goldberg*, 2 Hem. & M. 286; *Hamp v. Hamp*, 35 Beav. 189; *Jenkins v. Bushby*, 16 W. R. 189; *Fullagar v. Clark*, 18 Ves. Jr. 481; *Ridgway v. Roberts*, 4 Hare 106; *Garling v. Royds*, 25 W. R. 123; *Roskell v. Whitworth*, L. R. 5 Ch. 459.

3. *Bacon v. Jones*, 4 Myl. & C. 433; *De Tastet v. Bordenave*, Jac. 516; *Lewis v. Thomas*, 3 Hare 26; *Townley v. Deare*, 3 Beav. 213; *Lancashire v. Lancashire*, 9 Beav. 259; *Gardiner v. Rowe*, 4 Madd. 236; *Middleton v. Sherburne*, 4 Y. & Coll. 358; *Ansdell v. Ansdell*, 4 Myl. & C. 449; *Kent v. Burgess*, 11 Sim. 361, 5 Jur. 166; *Waterman v. Dutton*, 5 Wis. 413.

In *New York* the Court of Chancery was authorized by statute to award an issue previous to the hearing or taking of testimony in cases proper to be tried by the jury, if, in the opinion of the chancellor, such trial would be conducive to the ends of justice. *New-Orleans Gas Light, etc., Co. v. Dudley*, 8 Paige (N. Y.) 452.

The question, however, being addressed to the discretion of the court, it has been held that on a motion, before hearing, to frame issues for a jury, it was not a proper exercise of the discretion of the court in ordinary cases to instruct the court before which the case is to be tried beforehand, what question it shall submit to a jury and what it shall not. The court thought it better as a general rule to leave the court, which is to be charged with the conduct of the trial, to determine for itself the manner in which the questions of fact in the case shall be decided. *Church v. Freeman*, 16 How. Pr. (N. Y. Supreme Ct.) 294.

In *Massachusetts* the proper time to present a request for a jury trial of issues is before the hearing. *Charles River Bridge v. Warren Bridge*, 7

upon inspection of the pleadings in the cause, it appears that important facts are asserted and denied, and it is clear to the court that such questions should be submitted to a jury, the order for the jury trial is properly made before the hearing.¹

(2) *At or Within a Definite Time.* — In some of the states the motion is to be made at or within a definite time.² Such rules,

Pick. (Mass.) 345; *Eames v. Eames*, 16 Pick. (Mass.) 141; *Dole v. Wooldredge*, 142 Mass. 161; *Stratton v. Hernon*, 154 Mass. 310.

A hearing was had and decree entered in 1886, but on appeal the decree was reversed in 1887. The cause was again set down for hearing, and on the day appointed for the hearing the defendant for the first time applied for a jury to try the issues. The presiding judge of the court below certified that the juries at that time had been dismissed for the term, and that there had been ample time, while the juries were still in court, to make the request for a trial by jury. The appellate court held that the proper time to make such request was before the hearing in 1886; that by going into that hearing without requesting a jury trial, the defendant had waived his right to a jury, if he had any such right; and that it was a proper exercise of the discretionary power of the court to refuse the request because of laches in making the application. *Blanchard v. Cooke*, 147 Mass. 215.

Term at Which Issues Moved for. — In *Coffin v. Easton*, 12 Cush. (Mass.) 107, it was held that the proper term to make a motion to have issues in an equity case submitted to a jury was at the equity term, and not at a law term. The motion at a law term was denied, and the cause was fixed for hearing before one judge at the next *nisi prius* term.

In *Pennsylvania* it has been held that an issue out of chancery should not be awarded before the hearing. The court said: "How could the chancellor know whether it was within his exclusive province or not to decide upon all the issues involved in the cause, whether of law or of fact, until a full hearing had been had? How could he determine that there was such a conflict in the testimony as made it desirable to have his conscience informed by sending an issue to the jury, until that testimony had been elicited before an examiner? True, a case might arise where, after bill, answer, and replica-

tion, a chancellor would be warranted in sending an issue to a jury before hearing, as, for instance, where questions of fact were in dispute well known to the chancellor at the outset to be supported on the one side and denied on the other by equally respectable testimony; but this is not that case." *Genet v. Delaware, etc., Canal Co.*, 13 Phila. (Pa.) 534. In a later case, however, it was said that the proposition that an issue may be awarded before the hearing upon a mere inspection of the pleading is a corollary of the theory on which the whole practice of awarding such issues rests; and that the provision in the amended equity rule, "after a cause in equity is at issue upon questions of fact" either party may move for an issue, is but declaratory of the practice theretofore in vogue. *Flory v. Bangor Water Co.*, 4 Pa. Dist. Rep. 643.

1. *Waterman v. Dutton*, 5 Wis. 413; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 354.

Usury, Forgery, Lunacy. — In cases of usury, forgery, lunacy, in case of a will, or where some fact of that kind is asserted or denied in the bill and answer, it would usually be necessary to take the opinion of a jury thereon, and to save time and expedite the cause the court may and usually will order an issue before the hearing. *Waterman v. Dutton*, 5 Wis. 413; *Eames v. Eames*, 16 Pick. (Mass.) 141.

2. When the rules of the court require issues to be framed and presented to the court two days before the trial, the court may properly refuse to submit the issues in a case where the rule is disregarded. *Gay v. Ihm*, 3 Mo. App. 588, *affirmed* 69 Mo. 584.

In *Massachusetts*, where the case had been marked for hearing six weeks, and the juries had been excused before a motion for a jury trial was made, it was held that the motion was properly overruled. *Bourke v. Callanan*, 160 Mass. 197.

In *Tennessee*, — **Construing the Provisions of the Code**, it was held that the Act of 1875, providing "that hereafter

however, operate neither as an enlargement nor restriction, so far as the power of the court itself to direct an issue is concerned.¹ Nor do they apply to cases in which the parties have a right to the submission of issues to a jury.²

when any civil suit in any of the courts of record in this state, whether such suit comes to this court by summons, appeal, certiorari, or otherwise, and which is now triable by jury, either party desiring a jury shall, in case of original suits, demand a jury in his first pleading, tendering an issue triable by jury; and in the cases of all other suits shall demand a jury within the first three days of the trial term," is not applicable to suits in chancery. The demand for the jury, therefore, does not have to be made in the first pleading in the cause, and may be made at any time before the case is actually heard by the chancellor. *Allen v. Saulpaw*, 6 Lea (Tenn.) 481; *Cooper v. Stockard*, 16 Lea (Tenn.) 145; *Cheatham v. Pearce*, 89 Tenn. 668. It is competent for the Chancery Court, however, to make all reasonable rules upon the subject. The rules in force in 1884 declared that for the purpose of saving costs and time, and to have all jury cases tried about the same time, and for the convenience of the court, no jury would thereafter be allowed in that court, unless demand therefor be made on or before the second day of the term, by motion on the motion docket, or at the bar of the court. This was held on appeal to be a reasonable regulation, preventing surprise to the adverse party, and affording opportunity to obtain a jury. *Stadler v. Hertz*, 13 Lea (Tenn.) 315, where the motion for a jury was made more than a week after the beginning of the term, and on the same day on which the case was heard and the decree entered, and it was held that the chancellor committed no error in refusing to order a jury. By the rules of 1889, it is required that applications for a jury must be made within the first three days of the trial term. This, also, was held to be a reasonable rule, which the Chancery Court had the right to make and enforce. *Cheatham v. Pearce*, 89 Tenn. 668.

In New York it has been provided by several successive rules of court that "in cases where the trial of issues of fact is not provided for by the Code, if either party shall desire trial by jury,

such party shall, within ten days after issue joined, give notice of the special motion to be made upon the pleading, that the whole issue or any specific question of fact involved therein be tried by jury." *O'Brien v. Bowes*, 10 Abb. Pr. (N. Y. Super. Ct.) 106; *Paul v. Parshall*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 138; *Clark v. Brooks*, 26 How. Pr. (N. Y. C. Pl.) 285; *Apel v. O'Connor*, 39 Hun (N. Y.) 482; *New York L. Ins., etc., Co. v. Cuthbert*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 377.

If the Motion is Not Made Within Ten Days after issue joined, as provided by the rule, it will be too late to make it afterwards. *Blunt v. Hibbard*, (C. Pl.) 3 N. Y. Supp. 121.

Under the rule, by going to trial before a judge without a jury, the parties lose all right to move for such a trial on the hearing or to make such motion at any time afterwards. *O'Brien v. Bowes*, 10 Abb. Pr. (N. Y. Super. Ct.) 106, reviewed in *Brinkley v. Brinkley*, 2 Thomp. & C. (N. Y.) 501.

1. **New York.** — The rule does not apply to the power of the court to direct an issue, and the court deviates from it whenever in its judgment a proper case is presented. Therefore, if special reasons exist, it is within the power of the court, notwithstanding that the application is not made within ten days after issue joined as required by a rule, to make an order for the framing of issues and the trial of those issues by a jury. *O'Brien v. Bowes*, 10 Abb. Pr. (N. Y. Super. Ct.) 106; *Clark v. Brooks*, 26 How. Pr. (N. Y. C. Pl.) 285; *Apel v. O'Connor*, 39 Hun (N. Y.) 482; *MacKellar v. Rogers*, 9 Civ. Pro. Rep. (N. Y. Super. Ct.) 6; *New York L. Ins., etc., Co. v. Cuthbert*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 377; *Paul v. Parshall*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 138.

The court undoubtedly has power to open a default, and allow the application to be made; but facts must be shown to excuse the neglect to apply within the time prescribed by the rule. *Ellensohn v. Keyes*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 353.

2. **New York.** — *In an Action for Divorce for Adultery* the right of either

b. ON HEARING AND DURING TRIAL. — As before stated, the application is generally to be made and the issue directed at the hearing,¹ and it is believed that as a rule an issue may be submitted at any time during the trial up to the final determination of the cause.²

c. BEFORE OR AFTER PLEADINGS CLOSED. — As a rule, the application should not be made, nor the issue be directed, before the pleadings in the case are closed, so as to enable the court to see what facts are controverted, and give the party entitled the benefit of the discovery which the defendant may make in his answer.³

party to have the question of adultery tried by a jury is a constitutional and statutory one, which is not impaired or modified by this rule of practice so as to make it a matter of discretion with the court if the application be not made within ten days after issue. *Conderman v. Conderman*, 44 Hun (N. Y.) 181; *Sigel v. Sigel*, 28 Abb. N. Cas. (N. Y. Super. Ct.) 308.

Issue as to Value of Property or Damages. — The rule of court is likewise not applicable to a motion for the trial of issues as to the value of property or damages; and if it were, it would be superseded by legislative enactment. *Eggers v. Manhattan R. Co.*, 27 Abb. N. Cas. (N. Y. Super. Ct.) 463.

In *South Carolina* the provision was the same as that in New York, set forth in next to the last note. *Ryerson v. Allison*, 28 S. Car. 81.

1. In *New York* the statute which empowered the chancellor to award an issue before the hearing did not deprive him of the right to award an issue at the hearing. *New Orleans Gas Light, etc., Co. v. Dudley*, 8 Paige (N. Y.) 452.

In *Tennessee*, either on a motion for a jury in open court by one of the parties, or on the chancellor's own motion, a jury trial of the issues in an equity case has been ordered in several cases, even after the hearing has commenced. *Duncan v. King*, 1 Overt. (Tenn.) 79; *London v. London*, 1 Humph. (Tenn.) 4; *Lowe v. Traynor*, 6 Coldw. (Tenn.) 635; *Morris v. Swaney*, 7 Heisk. (Tenn.) 591; *Pearce v. Suggs*, 85 Tenn. 728. See *supra*, p. 658, note 2.

2. See *Zimmerman v. Schoenfeldt*, 3 Hun (N. Y.) 692; *Paul v. Parshall*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 138; *Wear's Assignment*, 1 Kulp (Pa.) 104; *Russell v. Paine*, 45 Ill. 350.

In *O'Brien v. Bowes*, 10 Abb. Pr. (N.

Y. Super. Ct.) 106, 4 Bosw. (N. Y.) 657, it was held that, under the *New York* Code of Procedure, where no application is made for a jury trial in a case in which the court has a power to order one, and the court at the trial makes no order submitting the issue, but the trial is proceeded with before the judge, all the testimony in the case given, and the cause submitted for determination, the judge had no alternative but to give his decision, and could not, at such a stage, invoke the aid of a jury for the conflict of evidence. This case was questioned and limited in *Brinkley v. Brinkley*, 2 Thomp. & C. (N. Y.) 501, where it was held that after an equity case has been tried and finally submitted for decision, the court at special term has the power of its own motion to direct certain issues therein to be passed upon by a jury, if the case be one in which, under similar circumstances, the late court of chancery was authorized to direct a feigned issue; and that the former practice had not been changed except so far as to substitute a 'simple interrogatory' for the wager.

3. *Tibbetts v. Perkins*, 20 N. H. 275; *Hoitt v. Burleigh*, 18 N. H. 389; *Johnston v. Hainesworth*, 6 Ala. 443.

In *Horner v. Harris*, 10 Bush (Ky.) 360, it was said: "We are aware of no state of case in which the chancellor can compel a petitioner to establish his cause of action or any fact essential thereto to the satisfaction of a jury, until he has first required the defendant to answer, and has thereby ascertained whether or not the existence of the fact is denied."

After Replication. — In *Hoitt v. Burleigh*, 18 N. H. 389, it was held that if a party exercises his constitutional right given him in *New Hampshire* to require a trial by jury, it should be after the

d. BEFORE OR AFTER TESTIMONY TAKEN. — The general rule of practice is that an order for the issues will not be directed until the testimony is taken. The reason is that until the testimony is taken it cannot be known whether any conflict will arise, so as to make it necessary to refer the decision to a jury.¹ This rule is not universal, and there are many cases in which it is held that the order for the jury trial may, and should, be made before the testimony has been taken.²

e. AFTER REFERENCE TO MASTER. — Ordinarily the motion for a jury trial of the issues of fact in an equity case should be made before the case is referred to a master, and the motion will not usually be granted after the master has made a finding and returned his report,³ or after he has proceeded with the case to any considerable degree.⁴

replication and before the taking of the testimony.

A Supplemental Bill opens a case to a further answer, and to further evidence, and in such case a motion for an issue to be tried by a jury is in order after the coming in of the answer to the supplemental bill. *Hoitt v. Burleigh*, 18 N. H. 389.

1. *Hamp v. Hamp*, 35 Beav. 189; *Roberts v. Kerslake*, 23 L. J. Ch. 632; *Johnston v. Hainesworth*, 6 Ala. 443; *Rice v. Tobias*, 83 Ala. 348; *Porter v. Child*, 10 Lanc. Bar (Pa.) 45; *Goodyear v. Providence Rubber Co.*, 2 Cliff. (U. S.) 351. But see *Flory v. Bangor Water Co.*, 4 Pa. Dist. Rep. 643.

It Is Premature to Apply for an issue immediately after filing a replication to an answer, when no testimony has been taken, and the testimony is to be mostly in writing. *Herdsmen v. Lewis*, 20 Blatchf. (U. S.) 266; *Genet v. Delaware, etc., Canal Co.*, 13 Phila. (Pa.) 533.

2. Right to Decree Depending on Question of Usury. — The question of usury arising out of disputed facts, upon the determination of which the right of the complainant to a decree against the defendant solely depends, is a proper case for the granting of an issue before the testimony in the cause is taken, if the costs will not be enhanced, nor the proceedings unreasonably delayed, by the awarding of such issue. *New-Orleans Gas Light, etc., Co. v. Dudley*, 8 Paige (N. Y.) 452.

Issues of Right. — It has been held that if a party exercises the constitutional right given him in *New Hampshire* to require a trial by a jury, it should be after replication, and before

the taking of the testimony. *Hoitt v. Burleigh*, 18 N. H. 389, holding, however, that the court, for sufficient reasons, may cause issues to be framed after the evidence has been taken.

3. *Lower's Appeal*, 1 Walk. (Pa.) 404; *Shaw v. Norfolk County R. Co.*, 16 Gray (Mass.) 407.

A motion for the issue will not be granted after the coming in of the master's report if the case on the issues made by the pleadings has been referred to the master without objection, and heard before him at great length, and the evidence before him is not reported, and there is nothing to show that the master's conclusion is unsatisfactory, or that the case can be better tried by a jury. *Atlanta Mills v. Mason*, 120 Mass. 244; *Nichols v. Ela*, 124 Mass. 333.

4. Waiver by Reference to and Hearing before Master. — Where an application to frame issues for a jury would have been granted if seasonably made, the plaintiff waives his right by allowing a reference to a master and a hearing before him before asking for a jury trial. *Parker v. Nickerson*, 137 Mass. 487; *Freeland v. Wright*, 154 Mass. 493, holding that it would be unreasonable to permit a party to go to trial before a master and take his chances of a favorable report, and then, if he is dissatisfied with the result, have another trial before a jury, and thereby put the other party to unnecessary expense and trouble.

Testimony Taken and Case Virtually Closed. — An issue in an equity case will not be awarded where the defendant has made no application, and has stood by after a master has been ap-

5. General Methods of Submitting. — There are several methods adopted in the framing and submitting of issues to a jury. One is by directing the parties to plead to issue, and submitting to the jury the issue joined on their pleadings.¹ Another is by reciting in the order what one party alleges and the other denies, and directing the issue made by such allegation and denial to be tried by a jury.² Still another mode is by directing an issue framed in the form of a simple question, and recited in the order, to be tried by a jury.³

6. Necessity of Framing Special and Distinct Issues. — Where questions of fact in an equity case are to be tried by a jury, the general and most approved practice requires that proper issues presenting these questions should be settled, made up, or framed.⁴

pointed, and after the plaintiff has virtually closed his case, involving the taking of voluminous testimony. *Flory v. Bangor Water Co.*, 4 Pa. Dist. Rep. 643; *Phillips v. Edsall*, 127 Ill. 548.

Withdrawing from Master to Submit to Jury. — In *Pennsylvania* it was held that though the court is disposed to withdraw sharply contested questions of fact from masters, in order that they may be settled with less expense, more expedition, and perhaps more satisfaction, by a jury, nevertheless this practice ought not to be encouraged where the finding of the jury might not put an end to the case by placing the facts in such a condition on the record as to make it possible for the court to enter a final decree without further reference to a master. Particularly is this so in partnership cases where there are matters of account, and if the verdict established the alleged partnership, there would have to be a further reference to a master. *Hinds v. Daley*, 3 Pa. Dist. Rep. 51.

Case before Examiner. — In *Pennsylvania* an issue may be granted after an examiner has entered upon his duties upon payment of costs. *Fougeray v. Fougeray*, 6 W. N. C. (Pa.) 38. But usually it will not be granted after the examiner has examined some of the witnesses. *Lathrop v. Lathrop*, 2 Northam L. Rep. (Pa.) 9. Nor after the testimony has been returned by the examiner. *Uhrich v. Uhrich*, 3 Del. Co. Rep. (Pa.) 281; *Schaeffer v. Schaeffer*, 3 Kulp (Pa.) 14. So a demand for an issue is too late after the report of the examiner has been filed; especially where the respondent has entered a rule to take testimony. *Lynch v. Lynch*, 7 Luz. Leg. Reg. (Pa.) 69; *Uhrich v.*

Uhrich, 1 Northam L. Rep. (Pa.) 58; *Schneider v. Schneider*, 9 W. N. C. (Pa.) 253.

1. *Dorr v. Tremont Nat. Bank*, 128 Mass. 357 [citing *Frank v. Frank*, 2 M. & Rob. 314; *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131; *Phelps v. Hartwell*, 1 Mass. 71; *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524; *Hodges v. Pingree*, 108 Mass. 585].

2. *Dorr v. Tremont Nat. Bank*, 128 Mass. 357, giving, as the usual form, the following: "Whereas the plaintiff alleges, and the defendant denies (stating the question in dispute), now, therefore, it is ordered that a jury be impaneled to try said issues."

3. *Dorr v. Tremont Nat. Bank*, 128 Mass. 357, stating that this mode of framing issues is one of long use in *Massachusetts* [and citing *Eames v. Eames*, 16 Pick. (Mass.) 141; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Barker v. Comins*, 110 Mass. 477].

4. *Warring v. Freear*, 64 Cal. 54. See *Smith v. Rowe*, 4 Cal. 6; *Reed v. Bott*, 100 Mo. 62; *Bedloe v. Bedloe*, 40 Leg. Int. (Pa.) 46; *Hall v. Layton*, 10 Tex. 55; *Soenksen v. Weyhausen*, 32 Wis. 521.

Time of Framing Special Issues. — In *Smith v. Rowe*, 4 Cal. 6, the court said: "The matter of time we deem immaterial, except that for greater certainty and convenience it would best serve the ends of justice that the particular issues upon which a verdict is to be rendered should be framed and settled before the trial rather than after, thus enabling the jury to pursue their investigations intelligently upon the points they would be called upon by the court to decide." See *supra*, X. 2. b. (4) *Time of Application or Demand.*

The issues submitted should be special and specific,¹ and should be separately, plainly, and distinctly stated, so that each question will relate to only one fact.² But though this is the practice most in vogue, and is believed to be the best, yet, according to some authorities, the whole issue may be submitted generally, without the framing of any special issues for the determination of the jury.³

1. *Hulley v. Chedic*, 22 Nev. 127; *Hall v. Doran*, 6 Iowa 433.

In *Brewster v. Bours*, 8 Cal. 502, the court said that it would be next to impossible to find a jury capable of passing understandingly upon various and complicated questions of fact without the aid of special issues, and that the statute of *California* contemplates that in all such cases special issues should be framed under the direction of the court, according to the long-established rules of chancery practice. See *infra*, X. 7. *Number of Questions or Issues Submitted — Part or Whole Thereof.*

Divorce Cases. — The issues in divorce cases should in general be distinctly and definitely stated. See *infra*, X. 11. *b. Application to Particular Cases.*

In *New York*, under the N. Y. Code of Procedure, it was held, in one case, that in an action for divorce on the ground of adultery in which the issues were raised by the pleadings themselves, it was not necessary to frame issues for a jury trial; that the issues joined by the pleadings might be tried. *Parker v. Parker*, 3 Abb. Pr. (N. Y. Supreme Ct.) 478. But it was afterwards held that in such an action in which a jury trial was given of right by section 253 of the Code of Procedure, the issue of adultery must be settled before notice of trial could be given, or the cause placed on the calendar. *Leslie v. Leslie*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 311, *distinguishes* in *Compton v. Compton*, 46 N. Y. Super. Ct. 579.

According to the provisions of the Code Civ. Pro., § 970, if a party desires a trial by jury he may apply, upon notice to the court, for an order directing questions of fact arising upon the issues to be distinctly and plainly stated for trial by jury, and upon the hearing of the application the court must cause the issues to be distinctly and plainly stated. *Conderman v. Conderman*, 44 Hun (N. Y.) 181; *Whitney v. Whitney*, 76 Hun (N. Y.) 585. Where, however, the issues are stated and settled in an action for divorce in pursuance of a

stipulation of the attorneys for the parties, they respectively waive the right to have, preliminarily to the trial, any question more specifically stated and settled. In such a case the trial is properly permitted to proceed, subject to the power of the court to state and submit to the jury any further questions which are proper or necessary for them to determine. *Whitney v. Whitney*, 76 Hun (N. Y.) 585.

2. *Phoenix Water Co. v. Fletcher*, 23 Cal. 482; *Milk v. Moore*, 39 Ill. 588.

The chancellor, in submitting issues, should confine the inquiry to a single point, and if more than one point arises the different points ought to be specially and particularly stated. *Ayers v. Scott*, *Sneed* (Ky.) 164. See *Cobb v. Burns*, 61 Pa. St. 281.

When issues are framed in a court of equity, they are so condensed as to present some proposition the affirmative or negative of which cannot be affirmed or denied without finding all the other facts necessary to a conclusion. *Barth v. Rosenfeld*, 36 Md. 605.

3. See the following section, and *supra*, X. 5. *General Methods of Submitting.*

Estoppel to Object. — Where the failure to present issues was the result of the plaintiff's own motion, he preferring a general verdict, he cannot be allowed to take advantage of the failure to present special issues. *Brewster v. Bours*, 8 Cal. 502.

Waiver of Special Issues. — Where an equitable case was, on plaintiff's motion, submitted to the court for trial, and the court of its own motion, "and for its information as to the facts in the case, called a jury and caused them to be sworn to well and truly try the issues in said cause," etc., the jury, having heard the evidence, arguments of counsel, and instructions of the court, returned a general verdict for the defendant, upon which the court rendered judgment. On appeal it was contended that the court erred in that, after calling a jury for its own information as to the

7. Number of Questions or Issues Submitted — Part or Whole Thereof. — The court may submit to the jury one or more issues of fact, according to the number of questions of fact in the case upon which it desires to be informed.¹ It may refer one or more questions of fact, without embracing in the reference all the questions of fact in the cause.² And for the most part, the practice

facts, it failed to frame and submit proper questions for the jury to answer, but permitted them to consider the whole case and return a general verdict. The court held that while the course pursued was not to be commended, yet, in the absence of a motion or request to the court to submit special questions, it was not such error as should reverse the case. "The court having advised the parties that the jury was only called for its information as to the facts, the parties having, without objection, permitted the jury to retire without requesting the court to submit special questions, and having moved the court to make a finding after the jury had advised the court as to the facts by a general verdict, it must be held that the irregularity of the court in failing to frame special questions of its own motion was waived." *Ikerd v. Beavers*, 106 Ind. 483, *distinguishing* *Lake Erie*, etc., *R. Co. v. Griffin*, 92 Ind. 487.

When All Equitable Features Have Been Eliminated from a case, reducing it simply to an action for the recovery of real property, it is properly triable by jury, and there is no necessity for framing the issues to be submitted. *Robertson v. Sharpton*, 17 S. Car. 592.

Action for Partition. — The *New York* Code Civ. Pro., § 1544, provides that an issue of fact joined in an action for partition is triable by a jury, and that unless the court directs the issues to be stated as prescribed in section 970 of the code, the issues may be tried upon the pleadings. In *Tucker v. Tucker*, (Supreme Ct.) 45 N. Y. St. Rep. 458, the special term directed that the cause be placed on the calendar of the Circuit Court for trial, "and that upon the trial the issues proper to be submitted to a jury be so submitted under the direction of the court as to form and substance." But, by reason of the duties and functions of the Supreme and Circuit Courts of the state of New York, it is considered the proper practice in an equitable action for partition to have the issues framed at the special term, and not place that labor upon the judge

holding the Circuit Court. *Cuthbert v. Ives*, (Supreme Ct.) 20 N. Y. Supp. 469, holding, however, that under the Code Civ. Pro., § 1544, above cited, this practice is not a jurisdictional requisite, and that the court has the power to direct the trial of the issues raised by the pleadings.

1. 2 Daniell Ch. Pr. (1st Am. ed.) 736; *Bailey v. Sewell*, 1 Russ. 239; *Hippesley v. Homer*, T. & R. 48, note g; *Seton on Decrees*, 984; *Pence v. Garrison*, 93 Ind. 345.

As Many or As Few, All or Any Part, of the questions of fact involved, may be submitted, as the court may deem expedient. *Pence v. Garrison*, 93 Ind. 345; *Zimmerman v. Schoenfeldt*, 3 Hun (N. Y.) 692, 6 Thomp. & C. (N. Y.) 142; *Church v. Freeman*, 16 How. Pr. (N. Y. Supreme Ct.) 298.

The rule applies to issues from the Probate Court in *Pennsylvania*. If more than one fact be in dispute, all may be certified at the same time, but each one constitutes the subject of a separate issue. *Cobb v. Burns*, 61 Pa. St. 281.

Several Questions Incorporated in Order. — Where several questions are to be determined by an issue framed to determine the validity of a judgment, it is the better practice to incorporate the several questions in the order of the court, and to require them to be separately answered. *Martin v. Kline*, 157 Pa. St. 473.

Unnecessary Multiplication of Issues. — In submitting issues from the Orphans' Court of *Maryland*, under section 250, art. 93 of the code, there is an obvious impropriety in multiplying issues unnecessarily, especially by presenting the same substantial question in two separate and distinct issues. *Sumwalt v. Sumwalt*, 52 Md. 338.

2. *Pankey v. Raum*, 51 Ill. 88; *Evansville*, etc., *R. Co. v. Miller*, 30 Ind. 209; *Chamberlain v. Juppiers*, 11 Iowa 513. See *Phoenix Water Co. v. Fletcher*, 23 Cal. 482.

Some of the issues may be immaterial and irrelevant, and to refer all the issues would often tend only to delay and embarrass the cause, increase the

is against submitting the whole issue or case to a jury.¹ But oftentimes the court is authorized to submit either the whole issue made by the pleadings, or any specific question of fact involved therein, in its discretion.²

8. From What Sources Issues Are Made Up — *a. FROM THE PLEADINGS* — **General Rule.** — It is an almost universal rule that in any case where issues are submitted to a jury they are to be made up from the pleadings in the cause, and are designed for the trial of only those questions of fact which are distinctly put in issue by the pleadings.³

expense, and result in no possible advantage to any of the parties. *Waterman v. Dutton*, 5 Wis. 413.

So in *Indiana* the doctrine stated in the text has not been changed by any statutory provisions. A court of chancery rarely has occasion to take the opinion of a jury upon all questions involved in the suit. If it were otherwise, in a complicated case, involving many facts and separate interests, however much the court might wish the opinion of a jury upon a particular question, as of title, usury, or the like, it could never be taken. *Lapreese v. Falls*, 7 Ind. 695.

Issue as to One or All of Several Defendants. — Where several defendants set up the same matter in defense, or put in issue the same allegations in the bill, and a replication is filed to all such answers, an issue must be awarded as to all or neither. But if the defendants have not a common interest, or if their defenses are distinct, an issue may be awarded as to one defendant and refused as to the others. *New Orleans Gas Light, etc., Co. v. Dudley*, 8 Paige (N. Y.) 452.

1. *Gill v. Rice*, 13 Wis. 549; *Milk v. Moore*, 39 Ill. 587.

A chancellor, in order to inform his conscience as to any point arising in the cause, has the right to direct any issue to be tried as to that point, but in doing so the inquiry ought to be confined to the single point, and if more than one point arises the different points ought to be specially and particularly stated, and the jury, in their answer, should answer each separately; therefore, in *Ayers v. Scott, Sneed* (Ky.) 164, it was held that the court below erred in submitting the whole case arising upon the allegations contained in the bill and answer. See *supra*, X. 6. *Necessity of Framing Special and Distinct Issues.*

2. *Hess v. Miles*, 70 Mo. 203.

In *South Carolina*, under section 227 of the code in force in 1875, it was held that the judge might submit the whole issue made by the pleadings, or any specific question of fact involved therein, to a jury. *Flinn v. Brown*, 6 S. Car. 209. In a later case it was held that a reference to a jury of all issues in a chancery cause cannot be declared error, where it was done without objection and where no exception raises the question. *Frank v. Humphreys*, 24 S. Car. 338.

Kansas. — In this state the court may, in its discretion, send in all of the issues to a jury to be tried; if it sends all of such issues to a jury, it may do so by a general order and without even mentioning any particular issue. The jury may then (unless the court should otherwise order, either on its own motion or at the request of one of the parties) find a general verdict upon all such issues. *Hixon v. George*, 18 Kan. 258.

In New York. — Under the Code of Procedure, § 254, it was held that the court might order the whole issue or any specific question of fact involved therein to be tried by a jury. *Paul v. Parshall*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 138; *Church v. Freeman*, 16 How. Pr. (N. Y. Supreme Ct.) 298.

3. *Morgan v. Fuller*, L. R. 2 Eq. 296. See *supra*, VIII. 1. *Where Matters Are Not Alleged in Pleadings.*

"The issues to be tried are necessarily issues of fact, and cannot be properly presented except by appropriate pleadings. The chancellor may, and frequently does, submit questions of fact to a jury, but the issues are always made up from the pleadings in the action. We are aware of no state of the case in which the chancellor can compel a petitioner to establish his cause of action, or any fact essential thereto, to the satisfaction of a jury until he has first required the defend-

Issues Not Broader than Pleadings. — The issue presented to the jury, therefore, should not be broader than the issue raised by the pleadings in the case.¹

b. FROM THE PLEADINGS AND TESTIMONY. — Proceeding a step farther, it has been held that since as a general rule an issue can only be awarded at the hearing,² it must be confined not only to facts put in issue by the pleadings, but to facts concerning which some testimony has previously been introduced and read at the hearing.³

c. FROM OTHER SOURCES THAN PLEADINGS. — According to the practice in some cases, however, it is not necessary, in order to have a trial by jury, that the issues be made by the pleadings.⁴

ant to answer, and has thereby ascertained whether or not the existence of the fact is denied." *Horner v. Harris*, 10 Bush (Ky.) 360.

In Suits for Divorce feigned issues are only to be made up for the trial of facts contested by the pleadings. The allegations expressly made on one side and denied on the other, and those only, are to be tried. *Morrell v. Morrell*, 3 Barb. (N. Y.) 236. Therefore, in such a suit where a defendant recriminated generally, but gave no time, person, or place, the court would not let the issue (applied for by complainant) go to prove the complainant's conduct, although the defendant, when the issue was asked for, presented an affidavit stating names, and declared that he had been unable to put them in his answer. *Burr v. Burr*, 2 Edw. Ch. (N. Y.) 448.

1. *Chamberlain v. Juppiers*, 11 Iowa 513.

General Fraud Submitted Where Particular Fraud Plead. — Thus where the pleadings present the question of one particular fraud only, an issue on the general question whether there was any fraud is not warranted. *Brink v. Morton*, 2 Iowa 411. See *infra*, X. 11.

b. Application to Particular Cases.

Issues Embracing Acts Not Specified in Complaint. — In an action for separation, issues to a jury were framed upon motion, and were treated as the equivalent of specifications in an amended complaint. Upon the opening of the second jury trial the defendant's counsel objected to such of the issues as were not within the specifications of the complaint. The judge informed him that the only effect of his objection would be to delay the trial for an amendment which would cover what was new in the framed issues. Defendant's counsel proceeded, stating

that he did not wish to delay the trial, but still desired to make the objection. The court held that plainly there was no surprise, and that as the same objection was taken on the first jury trial, and after the disagreement of the jury, and before the second trial, the issues were resettled upon the defendant's own motion; he could not object that some of the issues embraced acts not specified in the complaint. *McBride v. McBride*, (Supreme Ct.) 5 N. Y. Supp. 388.

2. See *supra*, X. 4. *Time of Application and Order for Issue.*

3. *Dunn v. Dunn*, 11 Mich. 284, where the pleadings in a divorce case put in issue adultery committed by one of the parties in April, May, and June, 1858; but no testimony was taken tending to show its commission in April, and at the hearing issues were framed for trial by a jury covering the months named, and also December and January preceding. It was held that such issues, so far as they related to the months of December, January, and April, were irregular, and that a general verdict of guilty rendered thereon must be disregarded.

4. **Issue on Exceptions to Master's Report.** — As an instance of a case where an issue may be submitted to a jury though not raised by the pleadings, may be cited a case where an issue is granted on exceptions to a master's report. *Crabb v. Larkin*, 9 Bush (Ky.) 163. See generally article REFERENCES.

Matter Not in Issue Going to Very Right of Cause. — Where at the hearing of an equity cause a matter not in issue goes to the very right, the court will sometimes order an issue. *Balch v. Tucker*, 2 Ch. Ca. 40.

Additional Issues Raised by Evidence. — In *England* it has been held that after

9. The Preparation of the Issues—By Court. — The issues may be prepared by the court.¹

By Parties Under Direction or Approval of Court. — The issues may be made up by counsel, under the direction of the court,² or may be prepared by counsel and submitted to the court for approval.³ It is the province of the court to determine what facts are to be submitted, and neither party has a right to dictate the terms of any particular question.⁴

By Agreement of Parties. — If the issues as submitted were agreed to by the parties they will be bound thereby, and will not be per-

issues have been directed, a new issue not raised on the pleadings will not be added. *Morgan v. Fuller*, L. R. 2 Eq. 296.

In the *United States*, however, the contrary doctrine has at times been held. Thus in one case it appeared on the trial that the paper in question was discounted for the sole purpose of renewing a note previously due and discounted, on which payment was secured by the mortgage set forth in the complaint. To meet the case in this new phase the judge submitted to a jury such additional issues as were essential to bring to the view of the court all the facts material to a just and intelligent decision. The appellate court said: "To this we see no well-founded objection. He was invested with the same power at the circuit which he exercised at special term in framing the original issues; it was a question addressed to his sound discretion. We think he was clearly right in the disposition which he made of it; but if we entertained a different opinion, we should not be at liberty to reverse the judgment on a question of mere practice, in respect to which the court below is the ultimate arbiter." *Farmers', etc., Bank v. Joslyn*, 37 N. Y. 353.

1. *Pence v. Garrison*, 93 Ind. 345.

Settlement by Judge at Chambers or by Commissioner. — Where any difference arises in the making up of a feigned issue by the court, it was held that the issue must be settled before a judge at his chambers, or by a commissioner; not by the court. *Richards v. Brown*, 7 Johns. (N. Y.) 320.

Settlement by Court, Judge, or Referee. — By rule of court in *New York* the court or judge might settle the issues, or might send it to a referee to settle them. Rule 31, Gen. Rules of Practice.

2. *Tibbetts v. Perkins*, 20 N. H. 275; *Cooper v. Stockard*, 16 Lea (Tenn.) 143; *Hall v. Layton*, 10 Tex. 55; *Smith v. Rowe*, 4 Cal. 6.

Court Changing Issues. — *Tennessee* Code, § 5218, provides that the issues shall be made up by the parties under the direction of the court, and shall set forth briefly and clearly the true questions of fact to be tried. In the case cited below the complainant simply tendered a long list of issues, and the bill of exceptions recited: "The court allowed only such issues as appears in the decree showing the verdict of the jury, and the plaintiff excepted to the ruling refusing or modifying the issues submitted in his behalf." It was held that no error was pointed out. The objection to the action of the court was general, and might have been applied as well to the change of phraseology as to the substance: Besides, had the attention of the court been called to the particular change objected to, he might have had the issues corrected. But the reading of the issues as presented satisfied the appellate court that every material issue, rung with many changes, was presented to the jury. *Pearce v. Suggs*, 85 Tenn. 731.

Party Must Submit Proper Issue. — The party who asks for a jury in a chancery court in *Tennessee*, and submits for its determination an issue of fact, is bound at his peril to submit a proper issue. It is too late, after an appeal to the Supreme Court, to have the case remanded for trial upon a proper issue if the facts are so presented in the record that the Supreme Court can determine them for itself. *Gass v. Mason*, 4 Sneed (Tenn.) 508.

3. *Pence v. Garrison*, 93 Ind. 345. See also *Moore v. Albright*, 4 S. & R. (Pa.) 231.

4. *American Co. v. Bradford*, 27 Cal. 360.

mitted to allege that the issues were improper, either in form or substance.¹ If one of the counsel does not prepare, as requested by the court, a statement of such issues as he desires to have submitted to a jury, he cannot complain after verdict that all the issues made by the pleadings were not submitted by the court.²

10. General Form of Issues — Definiteness and Certainty. — Care should be exercised in selecting the form in which issues are to be submitted, and they should be in language so plain and perspicuous that no doubt can arise as to the meaning.³

Issues with Fictitious and Formal Pleadings. — In making up feigned issues it has been heretofore shown that formal and fictitious pleadings were resorted to.⁴

Action on Wager and Other Actions. — The form of the action or issue might be and often was on a wager, but formal pleadings in various other common-law actions were frequently used.⁵

1. *Hoobler v. Hoobler*, 128 Ill. 652. See *Whitney v. Whitney*, 76 Hun (N. Y.) 585.

2. *Jefferson v. Hamilton*, 69 Ga. 401. **Dissatisfaction of Counsel with Issues.** — If the counsel are not satisfied with such issues as are proposed, or if they desire that there should be others, they should suggest them and have them submitted to the jury or refused; otherwise they cannot complain. *Obear v. Gray*, 68 Ga. 182.

3. *Morris v. Morris*, 28 Mo. 114; *Milk v. Moore*, 39 Ill. 588; *Sumwalt v. Sumwalt*, 52 Md. 338; *Ellensolm v. Keyes*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 353.

Form of Issues Generally. — See *Ex p. Carter*, 1 G. & J. 326; *Frank v. Mainwaring*, 4 Beav. 37; *Wynne v. Styan*, 2 Phil. 303; *Guillamore v. O'Grady*, 2 Jones & L. 210.

Objections to the Form of Issues should be made in the court from which they are sent. *Bell v. Woodward*, 47 N. H. 539. They cannot be made for the first time on motion for a new trial. *Black v. Lamb*, 12 N. J. Eq. 108; *Bassett v. Johnson*, 2 N. J. Eq. 154. [See *infra*, XIV. 5. *Where Necessary Objections Were Not Made.*] Nor on appeal. *Barth v. Rosenfeld*, 36 Md. 605; *Chamberlain v. Juppier*, 11 Iowa 513. See *infra*, XVI. *Appellate Review.*

Form of Issues Not Usually Changed on motion for new trial. *White v. Lisle*, 3 Swanst. 351. See *infra*, XIV. 16. *Proceedings on the New Trial.*

4. See *supra*, II. 2. a. *Feigned Issues.*

Formal Declaration and Pleadings. — In forming a feigned issue there is a formal declaration filed, together with

other pleadings, making the issues of fact to be tried. *Milk v. Moore*, 39 Ill. 587.

5. See *supra*, II. 2. a. *Feigned Issues.* **Form of Issue Between Contesting Creditors to Test Validity of Judgment.** — See *Boyd v. Roberts*, 2 Pa. Co. Ct. Rep. 535.

Form of Issue on Damages for Property Condemned by Railroad. — See *Pittsburgh, etc., R. Co. v. Watson*, 2 Pittsb. (Pa.) 82.

Issue in Action of Assumpsit on Promise. — In *Barrow v. Bispham*, 11 N. J. L. 110, the question whether a bond on which a judgment by confession was entered had been obtained by fraud was tried upon a feigned issue in the form of an action of assumpsit on promise.

Issue in Action of Ejectment. — In *Decker v. Caskey*, 1 N. J. Eq. 427, on a bill filed for the discovery and production of a deed of conveyance alleged to have been lost or destroyed, and the foreclosure of a mortgage upon promises made by the grantee named in the conveyance, it being alleged in the answer that the deed was never delivered and that the grantor was not competent to make the conveyance, an issue as to the existence and validity of the deed was ordered to be tried at law, under the direction of the chancellor in the action on ejectment.

In *James v. Brooks*, 6 Heisk. (Tenn.) 150, the issue was made as in a case of ejectment.

Issue in Action of Trespass Quare Clausum Fregit. — Under the *Pennsylvania Act of February 17, 1831*, incorporating a railroad company, where an appeal

Issues Without Fictions and Formal Pleadings. — In modern practice issues are in many cases made up without the use of any formal declarations or pleadings, and the real point in dispute is submitted to the jury without resorting to a fictitious issue reciting patent absurdities;¹ and, as hereinbefore stated, in several of the states nothing more is requisite than a simple order for the trial of the issues.²

11. Scope, Contents, and Requisites — *a.* IN GENERAL. — The issues should, of course, embrace the object contemplated.³ They should not be too restricted, narrow, or sifting,⁴ nor, on the other hand, should they be too broad.⁵ Issues should not embrace general questions on the merits in addition to special questions of fact submitted.⁶

from the report of the jury appointed to estimate the damages had been entered by the owner of land upon which the road had been constructed, it was held that the court might order an issue to be made up between the parties in an action of trespass *quare clausum fregit*. Philadelphia, etc., R. Co. v. Smick, 2 Whart. (Pa.) 273.

1. In Pennsylvania, under the Act of 1815 relating to divorce proceedings, the practice as stated in the text is adopted. Winpenny v. Winpenny, 16 Phila. (Pa.) 24.

In Illinois it has been the practice to make an issue without using the common-law forms of pleadings. Milk v. Moore, 39 Ill. 588.

In the United States Circuit Court, where a feigned issue in an equity suit was directed, it was held that no declaration of any sort was requisite, and the case was put on the trial list and the jury sworn to try the issue in the words of the order itself. Wilson v. Barnum, 1 Wall. Jr. (C. C.) 342.

In the Probate Courts of Colorado the order of the court may specify and set down the issue or issues to be tried so as to avoid the necessity of formal pleadings. Abbott v. Monti, 3 Colo. 562.

2. See supra, II. 2. *b.* **Abolition of Feigned and Substitution of Direct Issues**; X. 3. **Order for Trial of Issue.**

3. If the Issues Do Not Embrace the Object Contemplated, the appellate court, according to the *Virginia* doctrine, will reverse the decree and remand the cause for proper proceeding on new issues. Braxton v. Willing, 4 Call (Va.) 288; Galt v. Carter, 6 Munf. (Va.) 245.

4. Galt v. Carter, 6 Munf. (Va.) 245.

Submission of Broad Questions and Main Issues. — In *Georgia*, on submitting

issues to a jury in an equity case, it is necessary that the judge propound only such broad questions and put such main issues as will enable him, from the answers thereto, the admitted or uncontested facts, the pleadings, and principles of law and equity, to decree on the entire case, and to adjudicate the rights of the parties. To put sifting questions would tend to confuse the jury, instead of drawing from them the main facts of the case. Macon v. Harris, 75 Ga. 761; Jefferson v. Hamilton, 69 Ga. 401; Coleman v. Slade, 75 Ga. 61; Creech v. Richards, 76 Ga. 36.

5. Dunn v. Dunn, 11 Mich. 290.

Issue Not Broader than Raised by Pleadings. — The issue presented to the jury should not be broader than the issue raised by the pleadings in the equity case. Chamberlain v. Juppier, 11 Iowa 513; Dunn v. Dunn, 11 Mich. 284.

Thus, where the pleadings present the question of one particular fraud only, an issue on the general question whether there was any fraud is not warranted. Brink v. Morton, 2 Iowa 411. See *supra*, X. 8. *From What Sources Issues Are Made Up.*

6. General Question as to Rescinding Sale. — Upon the trial of a suit in equity to rescind the sale of land where specific questions of fact are submitted to a jury, it is improper practice for the court also to submit, over objection of counsel, the question whether or not the sale should be rescinded, this being a question for the court to decide upon the other facts found by the jury. It would be useless generally to submit special questions of fact to a jury, if the general questions on the merits were submitted also at the same time. Bell v. Hutchings, 86 Ga. 571.

b. APPLICATION TO PARTICULAR CASES.—FRAUD AND DIVORCE—In General.—By the application of the foregoing principles, the scope and requisites of the issues in any particular case will be determined.¹

In Cases of Fraud the issue should be so specifically framed as to inform the party charged precisely what he is required to meet.²

Divorce.—It is said that there is no class of cases wherein more care is necessary to make definite issues than in divorce cases where adultery is charged.³ Everything should be excluded from

1. *Issue as to Past Damages.*—In an action to enjoin the operation of an elevated railway in a street in front of the plaintiff's premises and for past damages, it is necessary, in view of the plea of the statute of limitations, to state the exact date from which the right of recovery exists, in formulating an issue as to past damages. *Eggers v. Manhattan R. Co.*, 27 Abb. N. Cas. (N. Y. Super. Ct.) 463.

Issue on Claims under Marriage Articles and Settlements.—Where a party claims under marriage articles, and settlements made in pursuance thereto, it is not sufficient to direct an issue to try the validity of the articles only, but the issue should be extended to try the execution of the subsequent settlements. *Edgworth v. Swift*, 4 Bro. P. C. 654.

Issues Between Executrices as to Conversion of Testator's Property.—A bill was filed by one executrix against her co-executrix, charging her with having secretly and improperly possessed herself of part of the testator's property during his lifetime. The defendant, by her answer, denied the accusation and insisted that the spoliation was committed by the plaintiff, but did not file a cross-bill. It was held, that if an issue were directed to try the fact, the issue should be not merely whether defendant possessed herself of any part of the testator's property in the manner alleged, but also whether the plaintiff possessed herself of any part of it in like manner. *Lancaster v. Atkinson*, 2 Russ. 60.

2. *Wood v. New York*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 467.

Proper Issues in Fraud Case.—Where a bill was filed by the plaintiff, to set aside a conveyance on the ground that she was old and imbecile, an apoplectic, and speechless; that from her mental and physical condition she was an easy victim to fraud and imposition, and that she had been overreached and deceived by the representations of the vendee, and thereby induced to part with her

property; the allegations being denied; and an issue was submitted by the chancellor to a jury for the determination of the facts, it was held that such issues should be: "Was the complainant at the time she executed the conveyances laboring under mental imbecility and physically unable to communicate such ideas as she had; so much so as to render her an easy victim to importunities, undue influence, and imposition? And were these conveyances procured through these influences?" *Gass v. Mason*, 4 Sneed (Tenn.) 497.

Distinction Between Issue of Fraud and of Unfairness.—In a suit by a party to recover money paid on a bond and warrant of attorney, subsequently discovered to have been "fraudulently" obtained by the defendants from the principal obligor, an issue was directed, but the court disapproved the superadding of an issue whether the bond and warrant were "unfairly" obtained, because of uncertainty as to what, in a legal sense, constitutes unfairness as distinguished from fraud. *Parker v. Morrell*, 2 Phil. 453, 12 Jur. 253.

Issue Throwing Burden of Proof upon Party Charged.—An issue involving the question of fraud may, in the discretion of the court, be so stated as to throw upon the party charged the onus of establishing *bona fides*. *Browne v. McClintock*, 22 W. R. 521, L. R. 6 H. L. 434.

3. *Dunn v. Dunn*, 11 Mich. 290, where the court said: "No one can have had much experience at the bar without discovering how large a proportion of such charges are fabricated, and how often they are allowed to be proved by incomplete testimony. Circumstantial evidence is undoubtedly necessary, as a general thing, to prove such offenses; but this renders it the more necessary to secure to the party charged such information of time, place, and circumstance, as will enable him or her to meet the proof by legal evidence. It is

the issues to be tried in such cases, except what will affect the decision.¹ But the averments of the issue must be sufficiently definite and certain as to circumstance, time, place, and person, to apprise the party of the specific charges which he is called upon to meet.²

12. Parties — In General — Plaintiff. — The party who has the affirmative of an issue will usually be directed by the court to be the plaintiff therein.³ Ordinarily this will be the plaintiff in the suit in equity, but, as matter of convenience, the court may make any party plaintiff in the issue and is not confined in this behalf to the actor in the original proceeding.⁴

Issue Between Co-plaintiffs. — But the issue should not be made up between co-plaintiffs in a cause.⁵

Nominal or Real Parties in Interest. — The issue should be between

very manifest that in the case before us the vagueness of the issues, as well as their extension beyond the pleadings, has caused the introduction before the jury of testimony very well calculated to prejudice their minds against complainant, and yet in no sense evidence of any fact charged." See *supra*, X. 6. *Necessity of Framing Special and Distinct Issues.*

1. *Strong v. Strong*, 3 Robt. (N. Y.) 719, 1 Abb. Pr. N. S. (N. Y.) 233.

2. *Dunn v. Dunn*, 11 Mich. 290; *De Carrillo v. Carrillo*, 53 Hun (N. Y.) 359; *Strong v. Strong*, 3 Robt. (N. Y.) 719, 1 Abb. Pr. N. S. (N. Y.) 233; *Stewart v. Stewart*, 1 N. Y. Month. L. Bul. 92.

Time and Place. — Therefore, an issue whether plaintiff was guilty of adultery at any time generally, before the suit, with a person mentioned in the answer, should not be included where there is no statement of either time or locality. *Strong v. Strong*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 233, 4 Robt. (N. Y.) 621.

Mere Indefiniteness as to Time and Place, however, will not cause such allegations to be expunged on motion, where no objection was made. *Strong v. Strong*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 233, 4 Robt. (N. Y.) 621.

3. 2 Daniell Ch. Pr. (1st Am. ed.) 736; *Brown's Will*, 3 Luz. Leg. Reg. (Pa.) 27.

4. *Chapman v. Smith*, 2 Ves. 506; *Mott v. Blackwall R. Co.*, 2 Phil. 632; *Brown's Will*, 3 Luz. Leg. Reg. (Pa.) 27.

Defendant in Equity, Plaintiff in Issue of Fraud. — An issue directed by the court of chancery in a case where the bill charges the defendant with fraud in the purchase of land is not defective in

form because it directs the defendant in the suit to support the affirmative of the issue and show that the purchase, which is the subject of the issue, was made *bona fide*. *Browne v. McClintock*, L. R. 6 H. L. 456.

Where a Party Directed to Be the Plaintiff in Issue Refuses to Proceed with the trial thereof, the court may substitute other persons in his stead, security for costs of the trial being given. *Elliot v. Ince*, 7 De G. M. & G. 489.

Effect on Parties of Result of Issue. — If the court of equity directs an issue in a case where there are many parties, and selects some of them for conduct of the trial, giving all leave to attend, all are bound by the result. *Malone v. Malone*, 8 Cl. & F. 179.

But an order directing an issue "with the consent of all parties in the cause" is erroneous so far as it purports to be with the consent of an infant party; for it is a question whether if the infant gave consent he is bound by it. But where the order for the issue was a right order to be made if the infant had not consented, it is immaterial whether he ought to be bound by the consent or not, especially where he was relieved from the effect of the consent by being allowed, on coming of age, to make a new defense. *Malone v. Malone*, 8 Cl. & F. 179.

5. Thus, in a suit in which the assignor and assignees of an equitable interest are made plaintiffs, an issue directed to try the validity of a deed of assignment is improper as being an issue between co-plaintiffs and not between them and the defendant. *Fulham v. McCarthy*, 1 H. L. Cas. 703, 12 Jur. 757.

the real parties in interest, and not between merely nominal parties.¹

13. Additional Issues. — In addition to the issues primarily presented to a jury, the court may in some instances submit to them any others which it may deem proper and necessary to the full determination of the case;² but there will be no error in the refusal of the court to submit to a jury additional equitable issues asked for, where these were fairly comprehended in the issues which the court did submit.³

14. Reformation or Amendment of Issues — The Issues May Be Reformed. where the court considers this course necessary.⁴

1. *Pepper v. Bavington*, 1 Phila. (Pa.) 337.

Garnishee, Not Claiming Fund. — A held a judgment against B, and issued an attachment execution thereon against C as garnishee of B. In answer to interrogatories served on him, C stated that he had a certain sum in his hands, which was claimed by B and also by several others. C submitted to the court to determine the rights of the respective claimants. The Court of Common Pleas thereupon ordered a feigned issue to be framed, wherein the claimants should be plaintiffs and A and C defendants. It was held that a feigned issue should be framed between the opposing claimants of the money so far as they were known to the court, and it was an error to make a garnishee a party to the issue and submit him to expenses and costs when he made no claim to the fund, and was in no default. The judgment was reversed and the issue set aside with instructions to the court on application to order such an issue to be framed between the parties claiming the fund as it should deem necessary to determine their rights. *Fish v. Keeney*, 91 Pa. St. 138.

2. For submission of additional issues not raised by pleadings, see *supra*, X. 8, c. *From Other Sources than Pleadings*.

3. *Keithley v. Keithley*, 85 Mo. 217.

Striking Out Additional Issues. — In an equity case in *New York*, on appeal from the report of a referee, the general term of the Supreme Court ordered the framing of an issue to be submitted to a jury as to the mental incapacity of a party. Upon the hearing of an application for the submission of that issue, eight additional inquiries were added; on the trial of these issues the jury failed to agree. The succeeding trial was brought on, when all the additional issues not contemplated by the

direction of the general term were stricken out and the jury rendered a verdict answering the three issues which were returned. On appeal to the general term, the judgment was reversed for want of authority of the trial court to make the change in the issues. On motion afterwards made to the special term an order was made to strike out the additional inquiries, returning those which reduced the issues to the compass designed by, and within the decision of, the general term. The case being again appealed to the general term, the action of the special term in striking out such issues was held proper. *St. John v. Coates*, (Supreme Ct.) 9 N. Y. Supp. 202.

4. Reformation by Special Term in New York. — The special term of the Supreme Court of New York settled and framed eleven issues for trial by jury. Upon the trial at circuit the presiding judge, of his own motion, struck out all the issues except three, and upon each of these the jury found in the affirmative. Upon appeal by the defendants from the order striking out the issues, the general term reversed the order, on the ground that the justice at circuit had no power to strike out issues framed and theretofore tried. A motion was made at the special term to reform the issues. It was held that the decision of the general term, as above stated, was no objection to the reformation of the issues by the special term, simply because the parties had theretofore consented to other issues being tried, when there was no necessity or propriety whatever for such issues being presented to a jury, and did not preclude the court from taking them away from the jury when it was apparent that submission of such issues would only embarrass the case and would not subserve any useful pur-

Amendment of Issues.—The issues may, in proper cases, be amended.¹

15. Withdrawing Issues, Setting Aside Order, and Discharging Jury.—Since in an equity case the submission of issues is usually a matter of discretion in the court, it follows that the court may withdraw an issue which has been sent to a jury,² or annul and set aside the order directing the issue, and determine the whole case itself.³ And even after a jury has been impaneled, the

pose, but would only tend to obstruct the course of justice. *St. John v. Coates*, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 158.

1. Issues on Opening Judgments.—Where, upon the opening of several judgments, issues were awarded, and tried five times, upon subsequent discovery that one of the judgments opened had been omitted from the preliminary rule to show cause, the court permitted an amendment of the record *nunc pro tunc* so as to include it. *Kittanning Ins. Co. v. Adams*, (Pa. 1887) 10 Atl. Rep. 895.

Laches in Applying for Amendment.—On issues submitted to a jury in an action brought to foreclose a mortgage, a motion was made to amend the order awarding and settling the question to be tried by jury. It was held that no error should be predicated on the denial of the motion, since the defendants obtained this order on their own motion, had accepted and acted on it down to the final hearing of the case, without objecting to its form or sufficiency, in so far as was disclosed by the record, and that the motion came too late. *Madison University v. White*, 25 Hun (N. Y.) 490.

In Pennsylvania it was held that an issue directed under the sheriff's interpleader act cannot be amended on the trial. *Grant v. Hill*, 5 Phila. (Pa.) 173.

² *Cook v. Bay*, 4 How. (Miss.) 485. See *St. John v. Coates*, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 158.

No Issue Presented on Evidence.—The court, submitting issues in an equity case, commits no error in withdrawing one of the issues at the conclusion of the evidence, given at the trial, where there is no such issue on the evidence. *Keithley v. Keithley*, 85 Mo. 217. See *supra*, X. 8. b. *From the Pleadings and Testimony*,

3. Issue Not likely to Be Tried.—Where an issue had been directed to the law court and for seven years after-

wards no attempt had been made to try it, the Court of Chancery, seeing no reasonable hope that the issue would ever be tried by the Circuit Court, withdrew it, and, the complainants not appearing further to prosecute the issue, the chancellor annulled that portion of the interlocutory decree which ordered the issue, and took the trial and determination of the same upon himself. On appeal, this action was affirmed as eminently proper. *Cook v. Bay*, 4 How. (Miss.) 485.

Where Issue Should Not Have Been Ordered.—In *West Virginia* it was held that even after a verdict is rendered by a jury on an issue out of chancery, if, upon the proofs as they stood at the hearing, an issue ought not to have been ordered, it is the duty of the chancellor, notwithstanding the verdict, to set aside the order directing the issue and enter a decree on the merits as disclosed by the proofs on the hearing when the issue was directed. *McFarland v. Douglass*, 11 W. Va. 637; *Jarrett v. Jarrett*, 11 W. Va. 585; *Anderson v. Cranmer*, 11 W. Va. 562.

Order Set Aside at Subsequent Term.—The order from a chancery court directing an issue at law is interlocutory merely, and hence may be set aside by the court ordering it at a subsequent term. *Dabbs v. Dabbs*, 27 Ala. 646.

Interlocutory Decree Without Trying or Setting Aside an Issue.—It is completely in the discretion of a court of equity to ascertain a fact itself, if the testimony enables it so to do, or to refer the question to a jury, and consequently there is no error either in directing the issue or in discharging it. But where, without trying the issue or setting aside the order, the court made an interlocutory decree deciding the merits of the case, it was held that this interlocutory decree was an implied discharge of the order directing the issue and was substantially equivalent to such discharge; but that if the issue had been set aside in terms, in the body of the decree, or

court may discharge the jury without the rendition of any verdict, and take upon itself the final decision of the cause.¹

16. Dismissal of Bill — Before Issue Tried. — At any time before the issue is tried, even upon the hearing of the cause, the plaintiff may move and obtain an order for the dismissal of the bill with costs.²

After Issue Tried. — But after the issue has been tried and determined for the defendant, the plaintiff cannot then move to dismiss, because the defendant is then entitled to have the cause set down for a hearing in order to obtain a formal dismissal of the bill so as to enroll it as a final judgment and thereby make it pleadable.³

XI. THE TRIAL — 1. Trial to Be by Jury. — The mode of trial of issues out of chancery is, of course, by jury, since this is the very object of the submission. And a judge at law trying an issue cannot direct a trial in another manner, as by arbitration.⁴ But if the parties think proper to refer it to arbitration, and a reference

by previous order, it would have been more formal, though the situation of the case and of the parties would have been essentially the same. The court said: "The only real objection to the proceeding is, that the parties might not have been prepared to try the cause in court, in consequence of their expectation that it would be carried before a jury. There is, however, no reason to believe that this could have been the fact. Had there been any objection to a hearing on this ground, it would certainly have been attended to, and, if overruled, would have been respected by this court. But no objection appears to have been made, and the inference is that the cause was believed to be ready for a trial." *Field v. Holland*, 6 Cranch (U. S.) 22.

1. *Israel v. Jackson*, 93 Ind. 546, where the court said: "Whether any of the questions of fact presented in the cause should be sent to a jury for trial rested entirely in the discretion of the circuit court. For the same reason, any verdict which the jury might have returned would only have been for the information of the court and not obligatory upon it in the final disposition of the cause. The court, therefore, in the exercise of a sound discretion, could have disregarded any verdict which the jury might have rendered in the cause."
* * * The obvious inference, from what has been decided, is that where a jury has been impaneled in a cause of exclusively equitable jurisdiction to try some question of fact for the informa-

tion of the court, and there is a failure of proof sufficient to justify the return of a verdict for the plaintiff, the court may discharge the jury, without a verdict, and proceed to dispose of the cause as if the jury had not been impaneled."

2. *Carrington v. Holly*, Dick. 280; *Saylor's Appeal*, 39 Pa. St. 498.

3. *Gartside v. Isherwood*, Dick. 612; *Saylor's Appeal*, 39 Pa. St. 498.

On a bill for injunction against an infringement of copyright, and an account, the court of law, on an issue, having certified against plaintiff's right, the defendant cannot move to dismiss the bill. *Brooke v. Clarke*, 1 Swanst. 550.

Dismissal at Hearing, where Issue Improperly Directed. — If upon the state of the proofs at the time the issue is directed the bill should be dismissed, it is error to direct the issue; and though the issue be found in favor of the plaintiff, the bill should, notwithstanding, be dismissed at the hearing; and in such case, if the bill is not dismissed by the court below, it will be dismissed by the appellate court. *Vangilder v. Hoffman*, 22 W. Va. 1. See also *DeVaughn v. Husted*, 27 W. Va. 773.

Verdict Recorded After Dismissal of Bill. — Where the bill was dismissed after an issue had been awarded, it was ordered that the verdict, proving forgery of a deed, should be filed and become of record in the court. *Thompson v. Thompson*, 1 Desaus. (S. Car.) 136.

4. 2 Daniell Ch. Pr. (1st Am. ed.) 742.

is adopted by consent, the effect of that is to abandon not merely the direction to try the issue, but the whole proceeding.¹

2. In What Forum Issues Are Tried. — It was formerly the practice in *England* to have the issue in a chancery case which the court could not satisfactorily determine tried by a jury in a court of common law.² By the former practice in the *United States*, which still prevails to some extent, the trial of issues by a jury in an equity case is had before a separate court of law, either as matter of convenience or because the court of equity has no jury.³ There have, however, been many changes wrought by the statutes and codes of the various states, and now, in numerous jurisdictions, the trial of equitable issues may be by a jury at the bar of the court ordering them, or on its law side, the judge who directed the issues presiding at the trial thereof.⁴

1. *Woodley v. Johnson*, 1 Moll. 394.

Effect of Award Where Parties Choose Arbitration. — The Court of Chancery having directed an issue, the parties waived a trial by jury and submitted the question to five persons mutually chosen by them, and agreed that their report should be certified in lieu of a verdict. The court must consider such a report as an award, to be governed by the same rules and principles which prevail in cases of awards. *Pleasants v. Ross*, 1 Wash. (Va.) 156.

2. 2 Daniell Ch. Pr. (1st Am. ed.) 737; *Fernie v. Young*, L. R. 1 H. L. 63.

Plaintiff Having Choice of Court. — The party who had to sustain the affirmative was the plaintiff in the issue, and as such had the choice of the court in which it was to be tried. *Ex p. Malkin*, 2 Rose 27. See *Antrobus v. East India Co.*, 5 Madd. 3.

Issues Concerning Lands or Hereditaments. — Where issues concerned lands or other hereditaments, the trial was generally had in the county where they were located. *Chapman v. Smith*, 2 Ves. 506; *Sparke v. Ivatt*, 1 Sim. & S. 366.

Trial of Issue in Exchequer. — An issue would not be directed to be tried in exchequer, unless for some special reason and on motion made for that purpose. *Antrobus v. East India Co.*, 5 Madd. 3.

Trials at Bar. — "It is said that the court seldom or never directs a trial at bar, but only intimates that it would be desirable. This, however, is not strictly correct; for although the court, owing to the great increase of expense attendant upon trials at bar, is very cautious in directing an issue so to be tried, yet

frequent instances are to be found in which such trials have been directed."

2 Daniell Ch. Pr. (1st Am. ed.) 737 [citing *Baker v. Hart*, 3 Atk. 542, 1 Ves. 28; *Hite v. Salter*, 2 Dick. 495; *Richards v. Symes*, 2 Atk. 319; *Atty.-Gen. v. Montgomery*, 2 Atk. 378].

3. Common-law and Equity Tribunals Distinct. — When common-law and equity jurisdiction is vested in different courts, the issue is sent to a court of law for trial. *Milk v. Moore*, 39 Ill. 587.

In North Carolina, under the former practice, owing to the inconvenience and expense of having a jury and witnesses come to the court of equity, it was customary to send the issues to be tried at law. *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27; *Reid v. Barnhart*, 1 Jones Eq. (N. Car.) 142.

Unless some objection was suggested, the court of the county where the parties and witnesses resided was selected to try the issue. *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27.

New Hampshire. — Formerly in New Hampshire, where an issue was ordered by the court, it was to be made up under the direction of the court and sent to the Court of Common Pleas for trial. *Tibbetts v. Perkins*, 20 N. H. 275.

4. Illinois. — See *Milk v. Moore*, 39 Ill. 587.

In Indiana, under Code Civ. Pro. (Rev. Stat. 1881, § 409), the questions are not sent as formerly to another court presided over by another judge or to another side of the same court, but they are submitted by the judge who desires the information to a jury in the court over which he presides. The court thus hears the evidence heard

3. Change of Venue. — The method of obtaining a change of venue is by application to the court which directed the issue.¹ Although the authorities are not entirely uniform, yet it seems that ordinarily no right to a change of venue exists where issues

by the jury. If there be questions of fact involved in the trial of the cause other than those so submitted to the jury, the court may hear the evidence thereon and try them at the same time or at another time. *Pence v. Garrison*, 93 Ind. 349.

North Carolina. — See *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27.

Pennsylvania. — In *Maynard v. Esher*, 17 Pa. St. 222, the Court of Common Pleas of Philadelphia county was held to be a court of justice administering remedies both in the forms of law and chancery; that, unlike courts of chancery elsewhere, it had no need of the assistance of another court in administering justice, for it was bound to know both law and equity, and it had jurors at all times in attendance capable of trying all disputed facts arising in a suit. Where, therefore, issues of fact arose and a jury was demanded, that court should oversee and frame the issues, and order them to be tried by itself under a jury, and the District Court might very properly refuse to try an issue directed to it by the Court of Common Pleas; and in this case they had hesitation in allowing it to be tried before them. But it being shown on error to the District Court that an issue so tried was ancillary to a cause actually pending in the Common Pleas, the Supreme Court consented, in order to save delay and expense to the parties, to overlook the irregularity of the proceedings and to hear the case.

In South Carolina, when a judge, trying what would have been called a suit in equity before the Code of Procedure abolished the distinction between actions at law and suits in equity, orders an issue upon any question of fact, it is an interlocutory order made to enlighten his conscience, that should be set down on the law side of the court, not as an ordinary case for a jury, but as a submission. *Ivy v. Clawson*, 14 S. Car. 272.

In Virginia the court may direct an issue out of chancery to be tried on the law side of the court. *Ford v. Gardner*, 1 Hen. & M. (Va.) 71; *Meek v. Spracher*, 87 Va. 162.

Issue to Determine Usury. — The Vir-

ginia Code of 1860, c. 141, § 10, gives to a party the right to trial by jury of an issue of usury, where the bill does not require a discovery. This statute seems to contemplate that all the proceedings, including the trial of the issue, are to be had in the chancery court, instead of having the issue tried on the law side of the court. *Brockenbrough v. Spindle*, 17 Gratt. (Va.) 21, holding that there is no well-founded objection to the former course, and it may even be recommended by its simplicity and directness, but that if the latter course is pursued the substance and effect are the same.

In West Virginia the Code of 1868, c. 131, provided that "a circuit court wherein a chancery cause is pending may direct an issue to be tried in such court," and it was held no error to direct the issue to be tried at the bar of that court; but whether the trial should be at the bar or on the law side of the court was left undecided. *Ogle v. Adams*, 12 W. Va. 213. The code provision above quoted did not change the general chancery practice. It only specified where an issue might be tried. *Jarrett v. Jarrett*, 11 W. Va. 584.

In Washington it is not proper to send part of a trial on the merits into another department, or after the trial has progressed, to send the whole case to some other judge, merely because there are found to be questions in the equity case which might better be submitted to a jury. *Hill v. Young*, 7 Wash. 33.

In the Federal Courts it was held that the chancellor, being the judge before whom the issues were tried, committed no error in calling a jury into the chancery side of the court, though it would be more formal to order a jury to be impaneled on the law side. *Wilson v. Riddle*, 123 U. S. 608, where it was pointed out that the latter course was pursued in *Kerr v. South Park Com'rs*, 117 U. S. 379.

1. Lovett v. Lovett, 5 W. R. 5, 2 Jur. N. S. 1130.

In *Sparke v. Ivatt*, 1 Sim. & S. 366, it was held that where an issue is directed to prove the validity of moduses, and the plaintiff wishes to have it tried in a county different from that wherein

have been made and submitted in an equity case, and that the court will usually not allow such change unless for very weighty and material reasons.¹

4. Time of Trial. — This will be specified in the order directing the trial, and the parties will not be forced to proceed in advance of that time.²

5. Taking Issue Pro Confesso. — According to the English practice, it is customary for an order for an issue to contain a direction that the issue be taken *pro confesso* if the trial be not had at the proper time or according to the directions of the order.³ And it is an established rule that where an issue is directed to be tried at a certain time, and by the default of one party unexplained the trial is not then had, an order will be made to take the issue *pro confesso*.⁴ But having regard to the par-

the lands lie, an order for that purpose is not to be inserted in the decree, but to be obtained by petition.

On the Trial of an Action directed by the court instead of an issue, if the jury was dismissed without having found a verdict, the action must be considered as remaining in the same state as if no trial had taken place; and a change of venue, if there be a case for it, rests with the court of law. *Dowell v. Dew*, 7 Jur. 548.

1. See *M'Gregor v. Topham*, 3 Hare 488; *Hopwood v. Derby*, 1 Kay & J. 255; and generally article CHANGE OF VENUE, vol. 4, p. 384.

Trial Before Judge Alleged to Be Prejudiced. — The chancellor will not listen to an affidavit tending to show that a judge is prejudiced, as an objection to the trial of a feigned issue before him, in an action for divorce for adultery. *Walgrove v. Walgrove*, 3 Edw. Ch. (N. Y.) 227.

Issue from Probate Court. — In *California*, under the practice and statutes of that state, the Probate Court of one county has jurisdiction to change the place of trial of an issue of fact to the Probate Court of another county. *People v. Probate Ct.*, 46 Cal. 246.

Issue from Orphans' Court in Pennsylvania. — In *Woods v. Woods*, 17 S. & R. (Pa.) 12, it was held that a feigned issue directed from the Orphans' Court, on an administration account presented for confirmation, may be removed for trial by certiorari from the Court of Common Pleas to which it was sent to the District Court. The court said that such an issue from the Orphans' Court was unlike an issue out of chancery; it was to every legal intent an action, and

that the Orphans' Court was not to be governed exclusively by the opinion of the court to which the issue was sent, nor did it exercise any power of selection, as it could send an issue to no other court than the Court of Common Pleas; but that, as there was neither reason nor authority for restricting the trial of the issue to that court, it might be removed, subject to the limitations which are applicable to other actions.

2. *Daniell Ch. Pr.* (1st Am. ed.) 740.
3. *Oliver v. Leman*, 2 Ch. Rep. 124; — *v. —*, 4 Madd. 255.

Defendant Neglecting to Name an Attorney to try an issue was directed to do it in four days, or issue to be taken as tried, with a verdict for the plaintiff. *Wilson v. Ginger*, 2 Dick. 521.

Action Instead of Issue. — Though an issue may be taken *pro confesso*, it is not the practice to order that an action directed by the court to be brought and tried at the next assizes, and not so brought, should be taken as tried. *Bradbury v. Manchester*, etc., R. Co., 16 Jur. 1011.

4. *Hargrave v. Hargrave*, 8 Beav. 289; *Powell v. Wood*, 1 Russ. & M. 354; *Johnston v. Todd*, 3 Beav. 218; *Casborne v. Barsham*, 5 Myl. & C. 116, 4 Jur. 883; *Hartland v. Dancocks*, 5 De G. & Sm. 561; *Bearblock v. Tyler*, 1 Jac. & W. 225.

Day to Show Cause. — It has been held that a defendant making default at the trial of an issue shall have a day to show cause. *Peacock v. MacKericher*, Dick. 434.

Manner of Obtaining Pro Confesso Order. — Where there has been an order to take an issue *pro confesso*, it appears that if the issue was directed on the

ticular circumstances of the case, the rule need not always be applied.¹

6. The Jury — *a. SUMMONING, IMPANELING, AND QUALIFICATIONS — In General.* — The general method of and practice pertaining to summoning and impaneling a jury for the trial of issues, and the qualifications of the jurors, appear to be the same as in other cases where jury trials are had.²

Time of Impaneling. — Since issues in an equity case cannot be tried by the jury until it is impaneled, it has been held that there is no error in impaneling the jury before framing the special issues to be submitted to it.³ The jury may be impaneled immediately, and it is not necessary that it should be summoned to appear at the succeeding term of the court, unless either party should move on good cause shown to postpone the inquiry to a subsequent term.⁴

b. COMMON, SPECIAL, OR STRUCK JURY. — The jury trying the issues may be a common, special, or struck jury, according to the direction or permission contained in the order directing the trial or afterwards obtained from the court.⁵

hearing the cause should be set down for further hearing, at which time the issue will be taken *pro confesso* according to the order. If the issue was directed on an interlocutory application, before the hearing, the cause should be brought on for hearing in the usual manner. 2 Daniell Ch. Pr. (1st Am. ed.) 742.

If the party on whom rests the affirmative of the issues directed to be tried does not proceed to trial in the time directed by the order, the proper course is to move to have the issues taken *pro confesso*. Underwood v. Darracott, 8 Ir. R. Eq. 345. See Hartland v. Dancocks, 21 L. J. Ch. 449, 5 De G. & Sm. 561.

The Costs of an issue taken *pro confesso* should be paid by the party by whose fault and against whom it was so taken. Drake v. Smyth, McClel. & Y. 380. See Reeves v. Hodgson, 10 Hare, appendix xxiv.; — v. —, 4 Madd. 255; Hargrave v. Hargrave, 8 Beav. 289. See also *infra*, XV. *Costs*.

1. Hargrave v. Hargrave, 8 Beav. 289.

An order having been made for a new trial of an issue at a certain time, or that the issue should be taken *pro confesso* against the plaintiff, and the plaintiff having by mistake omitted to give notice of the trial in time, the court, under the circumstances of the case, refused to order the issue to be taken *pro confesso*, and made an order appointing a further time for the new

trial of the issue. Varty v. Duncan, 11 Jur. 809, *affirming* 11 Jur. 552.

Where Material Witnesses were unable to attend at the trial of the issue, and for this reason the issue was not tried, the rule as to taking it *pro confesso* was properly relaxed. Hargrave v. Hargrave, 8 Beav. 289, 14 L. J. N. S. Ch. 250.

2. See generally articles JURIES and STRUCK JURIES; and 2 Daniell Ch. Pr. (1st Am. ed.) 742.

Effect of Errors or Irregularities. — The submission of issues in an equity case being discretionary, and the verdict advisory, errors or irregularities committed by the court in summoning or impaneling the jury cannot be a subject of complaint by the defeated party. Peck v. Farnham, (Colo. 1897) 49 Pac. Rep. 364.

3. Baker v. Fireman's Fund Ins. Co., 79 Cal. 35.

4. Ayers v. Sneed, Sneed (Ky.) 162.

5. West v. White, 4 Ch. Div. 631; Anonymous, 2 P. Wms. 68; Lovett v. Lovett, 2 Jur. N. S. 1130; Shrubsole v. Schneider, 12 W. R. 359.

In Apthorp v. Comstock, 2 Paige (N. Y.) 482, the order directing the issue contained the proviso that the trial must be by a struck jury, if requested by either party.

In Bassett v. Johnson, 3 N. J. Eq. 422, the order stated that a special jury would be ordered by the court on the

c. SWORN TO TRY ISSUES SUBMITTED. — The jury should not as a general rule be sworn to try the matters in issue between the parties; it should be sworn to try the question and issues submitted to it.¹

7. **General Conduct and Control of Trial.** — Where an issue is directed from a court of equity to be tried by a jury before a court of law the trial will in general be regulated and conducted according to the practice of the law court.² It must be carefully noted, however, that the court of equity does not part with the cause in submitting an issue. The whole proceeding is still under its control, and the mode of trial before the jury is a matter within its discretion. It is accordingly a frequent practice for the submitting court to regulate to a greater or less degree the course of the trial, and to direct that strict legal rules, which would otherwise be applicable, be disregarded or modified.³ In jurisdictions

application of either party, subject to the preference given the plaintiff by the rules of the Supreme Court.

1. *Pence v. Garrison*, 93 Ind. 345.

In *Ikerd v. Beavers*, 106 Ind. 483, *distinguishing* *Lake Erie*, etc., R. Co. v. *Griffin*, 92 Ind. 487, the court, in an equitable case, caused the jury to be sworn to "well and truly try the issues in said cause."

In *Hornbrook v. Powell*, 146 Ind. 39, it was held that if under the *Indiana* Rev. Stat. (1881), § 409, in a suit on notes, and to set aside a conveyance as fraudulent, the court submitted certain issues to the jury, and the jury was sworn to "well and truly try the cause now in hearing," instead of being sworn to try such particular question of fact as the court for its own information submitted to them, the error was harmless.

In the *United States* Circuit Court for the Third Circuit a feigned issue directed for trial is put on the trial list and the jury is sworn to try in the form and in the words set forth in the order of issue. *Wilson v. Barnum*, 1 Wall. Jr. (C. C.) 342.

2. The court of law knows nothing of the equitable proceedings in the case, or whether there are any, or what are the pleadings in the court of equity. The court must try the issue, not as an equitable proceeding nor regulated by any statute or rules which are applicable to proceedings of an equitable nature. The issue must be tried as a straight issue of law, subject, however, to the regulation and control of the court of equity. *Black v. Lamb*, 12 N. J. Eq. 108.

In the *Orphans' Court of Maryland*, where issues are sent to a court of law for trial, it is held that the jury is substituted in aid of the *Orphans' Court* to ascertain the facts, and the proceeding is all the while within the probate powers of that court, and the court of law must decide on the same principles and rules as govern the *Orphans' Court*. *Yingling v. Hesson*, 16 Md. 112.

Joint or Several Trial. — Where several issues are sent from the *Orphans' Court of Pennsylvania* to the Common Pleas, the trial of them together or severally is a matter to be regulated by the sound discretion of the latter court. *Cobb v. Burns*, 61 Pa. St. 281.

3. *Black v. Lamb*, 12 N. J. Eq. 108; *American Dock*, etc., Co. v. *Public Schools*, 37 N. J. Eq. 266. See *Yingling v. Hesson*, 16 Md. 112, where issues were sent from the *Orphans' Court* to a court of law.

Thus in *North Carolina*, where, owing to the inconvenience and expense of having a jury and the witnesses come into the court of equity, an issue was sent to a court of law, the court of equity did not part with the cause or control of the issue, but simply called into requisition the aid of a court of law to act as a substitute for the jury which might have been summoned to attend and try the issue in the court of equity. *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27.

The manner of proceeding on a trial of a feigned issue is entirely under the control of the court of equity. It will often, by its order, suspend certain rules of evidence for the purpose of

where the practice prevails of calling in a jury before the court of equity and there submitting to it the issues instead of sending them to an independent court of law, the proceedings are, of course, under the control of the former court, and are governed, it seems, by the rules applicable to equitable trials in general.¹ But if the case, though it be in reality an equitable one, is treated by the court and parties as an action at law regularly triable by jury, and the trial of it as such is entered upon, and the proceedings until the jury has retired for consultation are conducted as in ordinary actions, the rules applicable to such actions must be substantially followed.²

8. Powers and Duties of Judge — In General. — The powers and duties of the judge presiding on the trial of issues appear to be similar to those governing the ordinary jury trial, in so far as his proceedings do not conflict with the directions or usurp the proper province of the court by which those issues were submitted.³ For example, he is to decide the legal questions arising upon the trial, regulate the admission or rejection of evidence when this has not been done by the submitting court,⁴ and oftentimes give the proper directions and instructions.⁵

Declining Trial or Changing Mode. — But the judge has no authority to decline to try the issues, nor to change the mode of trial thereof.⁶

Orders and Domain of Submitting Court. — And in general he must not in any way go contrary to the orders of the court from which the issues are sent, nor in any manner encroach upon the domain and jurisdiction of that tribunal.⁷

Functions Cease After Report. — After receiving the findings of the jury and making his report on the trial, the functions of the judge cease.⁸

affording facilities for the trial of the issue. It frequently will direct the examination of one or more parties to the suit. It will also direct that the parties are at liberty to read the depositions taken in a cause of such of the witnesses as upon the trial shall be proved to be dead or unable to attend to be examined. As the whole proceeding takes place for the purpose of informing the conscience of the court, it is not bound down strictly to the forms incident to a regular common-law trial. *Black v. Shreve*, 13 N. J. Eq. 455.

1. See *Summers v. Greathouse*, 87 Ind. 205.

2. *Summers v. Greathouse*, 87 Ind. 205.

3. **Correcting Statements of Counsel.** — A circuit judge in an equity case commits no error in correcting counsel's statements of the evidence to the jury. *Frank v. Humphreys*, 24 S. Car. 325.

4. *Pond v. Pond*, 10 Cal. 495. See *infra*, XI. 15. *Evidence*.

5. As to instructions, see *infra*, XI. 16. *Instructions*. As to directing verdict, see *infra*, XI. 17. *Directing Verdict*.

6. 2 Daniell Ch. Pr. (1st Am. ed.) 742. See *supra*, XI. 1. *Trial to Be by Jury*.

7. **Form of Issues.** — It is not for the presiding judge at a jury trial to say that issues sent from a court of equity are so improperly framed that they are not distinct from each other. *Bell v. Woodward*, 47 N. H. 539.

The Pertinency of the Issue sent on a matter raised before an auditor may be highly important, but it cannot be considered until the court comes to enter judgment on the whole record. *McDonough v. Norris*, 2 Phila. (Pa.) 266.

8. See *Pond v. Pond*, 10 Cal. 495.

In *Fisher v. Carroll*, 1 Jones L. (N.

9. Continuing or Postponing Trial. — The application to postpone the trial of an issue must be made to the court which directed it.¹ Under special circumstances, the application will be granted and a postponement ordered,² though it may and will be denied if under the circumstances of the case a postponement is not necessary or desirable.³

10. Presenting the Issues to the Jury. — The method of submitting the issues to the jury has already been treated.⁴ The actual presentation of them at the trial should be carefully and correctly made.⁵

11. Scope of Trial or Inquiry. — The trial or inquiry is to be limited to the issues submitted or raised by the pleadings, and is to be decided without reference to their bearing on the case out of which they arose.⁶

Car.) 27, the court said: "When an issue is sent to a court of law, the court of equity does not part with the cause or the control of the issue, but simply calls into requisition the aid of the court of law to act as a substitute for the jury which might have been summoned to attend and try the issue in the court of equity. The consequence is, that when the jury in the court of law return a verdict, that court, having done all it was requested to do, can take no further action, and returns the verdict of the jury, together with the judge's notes (or, as we term it, a statement of the case made by the judge), to the court of equity, where, the cause coming on for their directions, the court will examine into all that took place at the trial."

1. *Kebel v. Philpot*, 9 Sim. 614.

2. *Colvin v. Campion*, 8 Bligh N. S. 523. See generally article CONTINUANCES, vol. 4, p. 822.

3. **Probable Absence of Counsel** was held sufficient ground for postponing the trial. *Bearblock v. Tyler*, 1 Jac. & W. 225.

Absence of Material Witnesses may also be ground for postponement. *Kebel v. Philpot*, 9 Sim. 614.

3. *Hargrave v. Hargrave*, 9 Beav. 153.

Postponement on Account of Newspaper Publication. — In *Willis v. Farrer*, 3 Y. & J. 381, a motion to postpone the new trial of an issue in a tithe case from the summer to the spring assizes, on the ground that a report of the application for a new trial and the decision of the judge granting it, in which he observed that the verdict in the first trial was against the opinion of himself and the judge who tried it, had been re-

cently published in the newspapers and would influence the minds of the jury, especially as the issue would be tried before the same judge, was refused with costs.

4. See *supra*, X. 5. *General Methods of Submitting*.

5. **Reading Issues to Jury from Paper Separate from Bill and Answer.** — In a case in *Tennessee* the objection was insisted upon by the defendant's counsel that the petition and answer were not read to the jury as forming issues to be tried, but the matters submitted were drawn up on a distinct piece of paper. The court said: "We perceive no error in this; the matter in issue by the pleadings is the adultery of defendant with the negro Polly, and with other women unknown. This identical inquiry is the one which was submitted to the jury and to try which they were sworn. Whether it was read to them from the bill and answer or from a distinct piece of paper, can make no difference." *Richmond v. Richmond*, 10 Yerg. (Tenn.) 344.

6. *McDonough v. Norris*, 2 Phila. (Pa.) 266, where the issue submitted was raised before an auditor, and the court said that such a course would be "plainly at variance with the object of an issue, which is to narrow the controversy to a particular point without reference to what lies beyond it. Every issue must stand or fall by itself at the trial, and be decided by the jury with a view to its own truth or falsehood, without reference to the bearing which it may have on the controversy out of which it arises."

Inquiry Confined to Matters in Issue. — Where an issue of fact in a chancery

12. Powers and Duties of Counsel. — These appear in general not to differ from the same on ordinary trials, unless a difference is made by order of the submitting court.¹

13. Opening and Closing. — The party having the affirmative of the issue and the burden of proof, is entitled to open and close the case, on the trial of issues as on other trials.²

14. Burden of Proof. — The general rule, on the trial of issues as on other trials, is that the party holding the affirmative must take upon himself the burden of proof.³

15. Evidence — *a. GENERAL PRINCIPLES GOVERNING.* — Whether the principles of law or equity govern the introduction of evidence on the trial of issues before a court of law, is a matter of some dispute among the authorities. The doctrine that equitable principles govern has at times been adhered to,⁴ but it is believed that the best doctrine is that in so far as the evidence has not been regulated by order of the court of equity, the rules of law

proceeding in a probate court is framed for a jury, if the plaintiff replies to the answer, he admits it to be good and confines the inquiry to the truth of the matters at issue. *Clem v. Durham*, 14 Ind. 263, holding that such pleadings are conducted subject to the same rule as in other chancery proceedings. See *supra*, X. 8. *From What Sources Issues Are Made Up.*

1. Arrangement of Counsel as to Matters in Cause. — On the trial of the issue the common-law counsel entered into an arrangement as to all the matters in dispute in the case. It was held that the matters were not so distinct as to be beyond his authority. *Hargrave v. Hargrave*, 12 Beav. 408, 14 Jur. 212.

Counsel Questioning Jurymen. — Upon the trial of an issue in divorce, it was held not improper for the libellant's counsel to ask the jurymen before they were sworn whether they were conscientiously opposed to the granting of divorce. *Beck v. Beck*, 163 Pa. St. 649.

2. See generally article OPEN AND CLOSE.

General Rule Applicable to Equity Cases. — "There is no reason why the general rule of practice in this commonwealth, by which the plaintiff is entitled to the opening and close, should not be adhered to in equity, and there is nothing in the form of the order for an issue in the present case to take it out of the general rule. We are not required to decide what the effect might have been if the order, as

is often the case in England, had directed that the defendant in the cause should be plaintiff at the trial of the issue." *Dorr v. Tremont Nat. Bank*, 128 Mass. 357.

Issue to Try Validity of Claim. — Where a claim by an executor or any other creditor of an estate is resisted and issues are sent to try its validity, the claimant on the trial of such issues ought to open and conclude. *Yingling v. Hesson*, 16 Md. 112.

Under Interpleader Act in England. — In an issue under the Interpleader Act the plaintiffs averred in the declaration that certain goods were not the property of the plaintiffs, or either of them. The defendant pleaded that the goods were the property of the plaintiffs, or one of them. It was held that on this issue the defendant had the right to begin. *Hudson v. Brown*, 8 C. & P. 774, 34 E. C. L. 631.

3. *Yingling v. Hesson*, 16 Md. 112.

Burden of Proof Thrown on Party Charged. — An issue involving the question of fraud may in the discretion of the court be so stated as to throw upon the party charged the onus of establishing *bona fides*. *Browne v. McClintock*, 22 W. R. 521, L. R. 6 H. L. 434.

4. *Brown v. Clifford*, 7 Lans. (N. Y.) 46, in which case the court said: "It would be grossly unjust under pretense of trying a question of facts by a jury in an equitable action, to deprive the party of the right of having his rights determined according to the principles of equity which are administered in the court in which his action was brought."

govern its introduction and admissibility, and that it is for the law judge to enforce those rules.¹

b. ORAL TESTIMONY. — It is the usual course in the trial of issues out of chancery to take *viva voce* testimony.²

c. CONTROL OF EQUITY COURT, AND ORDER REGULATING — In General. — The proceeding being entirely within the control of the court of equity, it may, and perhaps should, by its order regulate the evidence and testimony to be used on the trial.³

Suspension of Strict Rules. — It will often suspend certain rules of evidence for the purpose of affording better facilities for the determination.⁴

Transmission of Evidence Already Taken. — The testimony taken in the chancery court may be transmitted to the trial court with the order that it be used there.⁵

Papers on File. — Directions ought to be given respecting the reading of papers filed in the chancery cause.⁶

1. *New Jersey.* — *Black v. Lamb*, 12 N. J. Eq. 108. See also *Black v. Shreve*, 13 N. J. Eq. 455. In the case first cited it was said: "The court must try the issue, not as an equitable proceeding, nor regulated by any statutes or rules which are applicable to proceedings of an equitable nature. The issue must be tried as a strict issue at law, and the rules of law in regard to evidence, its admissibility, and the weight of it, govern the proceedings, except so far as they have been otherwise regulated by the terms of the issue out of this court."

In *Massachusetts*, by rule of court, the issue is to be tried upon the like evidence as in a suit at law, together with such parts of the answer, depositions, and other proceedings in the cause, as the court shall order. Chancery Rule 33.

The Pertinency of the Evidence to the Issue is the only question which the court of law can consider in rejecting or admitting evidence. That court has nothing to do with its bearing on the main cause. *McDonough v. Norris*, 2 Phila. (Pa.) 266.

Further Evidence After Closing. — On trials before a jury, when the evidence has been closed on both sides and the argument of the cause has commenced, as a general rule, no further evidence should be received from either party; but the judge presiding at the trial, in the exercise of a sound discretion, may relax the rule under peculiar circumstances, and receive additional evidence, if the nature of the case and the

ends of justice require it. If the introduction of such additional evidence takes the adverse party by surprise, he should be allowed time and opportunity, if desired, to meet it with further evidence on his side. *George v. Pilcher*, 28 Gratt. (Va.) 310.

2. *Paul v. Paul*, 2 Hen. & M. (Va.) 525.

Issues Submitted After Depositions Published. — But if an issue is submitted to a jury after the written evidence has been taken and published, it has been held that the issue should be tried upon the same evidence on which it would have been tried had it taken the usual course of cases in chancery and been examined by the court, unless the court upon cause shown makes an order permitting further evidence to be introduced. *Marston v. Brackett*, 9 N. H. 350.

3. *Tibbetts v. Perkins*, 20 N. H. 275; *Black v. Shreve*, 13 N. J. Eq. 455; *Marston v. Brackett*, 9 N. H. 349.

4. *Black v. Shreve*, 13 N. J. Eq. 455.

5. *Dodge v. Griswold*, 12 N. H. 573; *Marston v. Brackett*, 9 N. H. 349; *Tappan v. Evans*, 11 N. H. 335; *Clark v. Congregational Soc.*, 44 N. H. 382; *Black v. Lamb*, 12 N. J. Eq. 108. See *infra*, XI. 15. *c. Reading Depositions.*

6. It has been held in *Virginia* that any papers may be read at the trial of the issue, which were read upon the hearing of the cause in chancery, or at a former trial. *M'Call v. Graham*, 1 Hen. & M. (Va.) 13; but that the court of chancery ought to give directions respecting the reading of these papers,

Further Evidence Adduced at Trial. — The order of the court need not be limited to directions concerning the testimony taken before it; the use of further evidence to be adduced at the trial may be ordered.¹

d. INTRODUCING AND READING ANSWER. — According to what is conceived to be the correct practice, the answer of the defendant filed in the main cause is not to be introduced as evidence and read to the jury at the trial of the issues, unless the chancellor so orders,² which, of course, it is competent for him to do.³

e. READING DEPOSITIONS. — The reading of depositions taken in the law court at the trial of issues, or taken in the chancery court from which those issues have been sent, where there is no order of that court on the subject, appears to be regulated by the rules pertaining to ordinary trials.⁴ When it is desired to have the depositions taken in a chancery cause read on the trial, an order will be made by the submitting court directing them to be so used.⁵ According to the English practice, the object of this direction is not to render the depositions evidence which ordinarily would not be admitted, but only to save the expense of proving the bill, answer, and proceedings.⁶ This doctrine, and the order

Ford *v.* Gardner, 1 Hen. & M. (Va.) 72; Paul *v.* Paul, 2 Hen. & M. (Va.) 525; and that otherwise the omission to read any of them on the trial will not be a ground for reversal, if the court of chancery refuses to grant a new trial, Ford *v.* Gardner, 1 Hen. & M. (Va.) 72.

1. Bentley *v.* Clark, 3 Dana (Ky.) 565; Tappan *v.* Evans, 11 N. H. 335, wherein the order provided that the parties might use the bill and answer, and any evidence legally taken to be used in the hearing in chancery, and also such further evidence as might legally be offered upon the trial at law. Clark *v.* Congregational Soc., 44 N. H. 382, where it was held that provision might be made for such further evidence as may be adduced, including the testimony of parties, as by law would be competent.

2. Black *v.* Lamb, 12 N. J. Eq. 108; Black *v.* Shreve, 13 N. J. Eq. 455; Jackson *v.* Spivey, 63 N. Car. 261.

In Tennessee it was said that, according to the modern practice in equity, answers are uniformly read to the jury. Hunter *v.* Wallace, 1 Overt. (Tenn.) 239.

3. Jackson *v.* Spivey, 63 N. Car. 261.

For a full discussion of answers as evidence, see article ANSWERS IN EQUITY PLEADING, vol. 1, pp. 910, 961.

4. See generally article DEPOSITIONS,

vol. 6, p. 471. And see the following cases arising on the trial of an issue or action directed: Fry *v.* Wood, 1 Atk. 445; Downes *v.* Revell, 3 Bro. P. C. 651; Howard *v.* Tremaine, 1 Salk. 278; Corbett *v.* Corbett, 1 Ves. & B. 335; Humphrey *v.* Pensam, 1 Myl. & C. 581; O'Hara *v.* O'Hara, 1 Hog. 284; Stockfleth *v.* De Tastet, 4 Campb. 10.

5. 2 Daniell Ch. Pr. (1st Am. ed.) 743, wherein the reason for this order, under the English practice, was stated as follows: "The ordinary method of proving depositions taken in the court of chancery, upon the hearing of a cause in another court, is by proving an examined copy of the bill and answer, which is done for the purpose of laying a foundation for the introduction of such evidence, by showing that there has been matter in issue, between the parties; but such rule has gradually been relaxed, and, in directing an issue to be tried at law, the court will order the depositions taken in the cause to be read at the trial of the issue, so as to dispense with the strict proof, which would otherwise be required, of the bill and answer."

6. Gordon *v.* Gordon, 1 Swanst. 166.

Therefore the general direction incorporated in the order is that "the depositions of the witnesses shall be read at the trial of the issue, in case such

under it, still leaves the actual determination of the admissibility of the depositions, in most cases, to the judge of the law court; and he will, before allowing them to be read, require strict proof of the witness's death or his inability to attend the trial.¹ In this country a view has been taken which renders the practice different from, or at least modifies, the English procedure. Here it has been declared a proper exercise of discretion for the court of equity to order that the depositions may all be read on the trial of the issues, unless in cases where the attendance of the witnesses is actually procured; that in this way it will be in the power of either party, by procuring the attendance of all witnesses, to substitute a *viva voce* examination for the deposition.² And it has also been judicially pointed out that when, by order of a court of chancery, certain depositions are authorized to be read on the trial, the law judge has nothing to do with the admissibility of the whole or any part of the evidence; the chancery court alone being responsible for its legality.³ It must be observed, however, that in this country, as in England, the order may limit the depositions to be read to those of such witnesses as are dead or cannot attend, in which case the death or inability must be proved at the trial.⁴

f. PRODUCTION OF RECORD. — When it is necessary that matters contained in the record of the cause in the chancery court be produced on the trial of the issues, the court will not usually order the original sent down, but will substitute therefor an office or certified copy.⁵ The application to take affidavits

witnesses or either of them shall be dead at the time of the trial, or shall be proved, at such trial, to be in such a state of health as not to be capable of attending the trial." See *Palmer v. Aylesbury*, 15 Ves. Jr. 176; *Turner v. Maule*, 2 De G. & Sm. 209; *Bellingham v. Pearson*, 1 Ves. & B. 339, note *a*; *Watkins v. Atchison*, 10 Hare, appendix xlv.; *Andrews v. Beauchamp*, 7 Sim. 65; *Lynch v. Lynch*, Drury 538.

1. 2 Daniell Ch. Pr. (1st Am. ed.) 745. See *Jones v. Jones*, 1 Cox 184, in which a motion was made for permission to read the deposition of a witness, aged or unable to attend. Lord Thurlow refused to make such an order, considering that the application should be made to the judge at the trial.

But even under this practice the rule is not carried so far as to preclude the court of equity from deciding whether or not a witness is dead or unable to attend. It may investigate the question, determine the fact, and order the depositions to be read, thereby dispensing with any proof on the point before

the court trying the issues. *Corbett v. Corbett*, 1 Ves. & B. 335. See also *Lynch v. Lynch*, Drury 538; *Watkins v. Atchison*, 10 Hare, appendix xlv.

2. *Clark v. Congregational Soc.*, 44 N. H. 382. See also *Marston v. Brackett*, 9 N. H. 350; *Tappan v. Evans*, 11 N. H. 335.

3. *Black v. Lamb*, 12 N. J. Eq. 108.

4. *Powell v. Manson*, 22 Gratt. (Va.) 177.

5. See *Jervis v. White*, 8 Ves. Jr. 313; *In re Seddon*, 10 Jur. 36; *Atty.-Gen. v. Ray*, 6 Beav. 335; *Anonymous*, 1 Ves. Jr. 152; *Stratford v. Greene*, 1 B. & B. 296; *Combes v. Spencer*, 2 Vern. 471; *Reeves v. Hodgson*, 1 W. R. 244.

It Is Discretionary with the court to allow the record or copies thereof to go down. In some cases it will so do; in others it will not. See *Ex p. Chater*, Buck 290; *Ex p. Harrison*, 2 Glyn & J. 135; *In re Seddon*, 10 Jur. 36.

A Stranger will not be given the benefit of the court's power. *Jervis v. White*, 8 Ves. Jr. 313; *Ex p. Munk*, 3 Dea. & Ch. 233.

and answers from the files will often be refused, but it will sometimes be granted, and original writs allowed to be produced.¹

g. PRODUCTION OF DOCUMENTS. — The rule is that the court, either in its original order directing the issue or by one afterwards obtained on motion, will direct the production at the trial of all documents which the court conceives will be useful upon that trial.² Questions relating to a production of documents have, however, been already elaborately treated in another article.³

h. EXAMINATION OF PARTIES. — It is competent for the court of equity in directing an issue to order the examination of one or both parties to the cause, where otherwise parties would not be called as witnesses.⁴ But this is a discretionary power to be carefully exercised, and the court will often refuse to exert it.⁵

i. ADMISSIONS. — If it is desired to have either of the parties admit certain facts, for the purpose of properly raising the question to be tried, the court sending the issue may, by its order, direct those admissions to be made.⁶ On the other hand it may, and sometimes should, refuse to direct any matters to be admitted,

The Proper Officer will be sent with the record or copies. See *Gretham v. Bell*, 5 Russ. 161; *Anonymous*, 1 Moll. 609; *Ex p. Munk*, 3 Dea. & Ch. 233; *In re Whitfield*, Montague 513; *Ex p. Warren*, 19 Ves. Jr. 162.

1. See *In re Seddon*, 10 Jur. 36; *Anonymous*, 1 Moll. 609; *Ex p. Whaley*, 1 Mont. & A. 634.

2. See *Marsh v. Sibbald*, 2 Ves. & B. 375; *Johnston v. Todd*, 3 Beav. 218; *Twentyman v. Barnes*, 2 De G. & Sm. 225; *Pindar v. Smith*, 6 Madd. 48.

Special Order. — It is said that a general order is not sufficient to insure the production of documents at the trial; that there must be a special order relating thereto, whether it be incorporated into the original one or obtained afterwards on application. 2 Daniell Ch. Pr. (1st Am. ed.) 739.

3. See article DISCOVERY, PRODUCTION AND INSPECTION, volume 6, p. 728. For various questions on this subject, under the English practice, see also the following cases: *Pulley v. Hilton*, 10 Price 118; *Burrell v. Nicholson*, 1 Myl. & K. 680; *Crowley v. Perkins*, 5 Sim. 552; *Marsh v. Sibbald*, 2 Ves. & B. 375; *Brown v. Thornton*, 1 Myl. & C. 243; *Pindar v. Smith*, 6 Madd. 48; *Cooke v. Marsh*, 18 Ves. Jr. 209; *Driver v. Wright*, 9 Sim. 261; *Taylor v. Sheppard*, 1 Y. & Coll. 284; *Smith v. Stone*, 18 L. J. N. S. Ch. 233; *Lamb v. Danby*, 9 W. R. 765.

4. See *De Tastet v. Bordenave*, Jac. 516; *Dixon v. Parker*, 2 Ves. 219;

Fletcher v. Glegg, Younge 345; *Fremmen v. Tatham*, 5 Hare 329; *Black v. Shreve*, 13 N. J. Eq. 455; *Marston v. Brackett*, 9 N. H. 349.

Waiver of Objections by Order. — By the order directing a party to be examined as a witness, on the trial of an issue, no objection is waived, except that which arises from his being a party to the cause. *Rogerson v. Whittington*, 1 Swanst. 39.

5. *Parker v. Morrell*, 2 Phil. 453, 12 Jur. 253; *Hepworth v. Heslop*, 6 Hare 622, 13 Jur. 384; *Howard v. Braithwaite*, 1 Ves. & B. 374.

Where Unfair Advantage Would Result.

— The practice of allowing the parties on the trial of issues to be examined was said to be rare in England, and never resorted to where from the position of the parties an unfair advantage would be given to one over the other. *Parker v. Morrell*, 2 Phil. 453, 12 Jur. 253.

Knowledge Peculiarly in Possession of Parties. — The court will not order the examination of persons at the trial of the issue who, by the rules of the court of law, could not be examined without order, except sometimes in cases where the facts in dispute rest only in the knowledge of the plaintiff and defendant. *Ex p. Dister*, Buck 234.

6. See *Sweet v. Cater*, 11 Sim. 572; *Sweet v. Shaw*, 8 L. J. N. S. Ch. 216; *Saunders v. Smith*, 7 L. J. N. S. Ch. 227.

or will specifically relieve a party from so doing.¹ And it is said that before the court will order the admission of any fact its admission on the pleadings must be quite clear and free from doubt.²

16. Instructions — General Power and Duty to Give. — The general rule is that in an equity case where a jury is called to try certain questions of fact, which, when found, are not obligatory but simply for the purpose of informing the conscience of the chancellor, the court is not bound to give instructions to the jury, and neither party has the right to ask the court for them.³ But under particular circumstances and in some jurisdictions it has been held that the court should properly instruct the jury.⁴

1. *Beaufort v. Morris*, 2 Phil. 683; *Cocks v. Purday*, 12 Beav. 451; *Elderton v. Lack*, 2 Phil. 680; *Rodgers v. Nowill*, 6 Hare 337.

2. *Beaufort v. Morris*, 2 Phil. 683. See also *Rodgers v. Nowill*, 6 Hare 337; *Elderton v. Lack*, 2 Phil. 680.

3. *Danielson v. Gude*, 11 Colo. 87; *Luce v. Barnum*, 19 Mo. App. 359; *Conran v. Sellow*, 28 Mo. 321. For general practice pertaining to instructions, see article INSTRUCTIONS, *ante*, p. 47.

Refusal to Give Not Reversible Error. — Where special issues are submitted to a jury in an equity case and the court adopts the findings of the jury and finds on any or all of the issues, the refusal to give instructions is not cause for a reversal. *Branger v. Chevalier*, 9 Cal. 353; *Hewlett v. Pilcher*, 85 Cal. 542; *Riley v. Martinelli*, 97 Cal. 575; *Conran v. Sellow*, 28 Mo. 321.

Where, at the trial, the verdict could not have been different had certain instructions been given, the refusal to give the instructions is not error for which the verdict will be set aside, and the rule is the same where the court gives, in lieu of the instructions asked for by a party, others substantially embodying the same ideas. *Snouffer v. Hansbrough*, 79 Va. 177.

Expression of Opinion by Judge. — In *Brown v. Parkinson*, 56 Pa. St. 337, on a writ of error from the trial of a feigned issue between two judgment creditors to try the validity of a judgment in favor of one of them, a complaint was made that the judge erred in treating the matter as an action at common law to be determined alone by a jury. The court said that this complaint arose from a vague notion that the judge should indicate to the

jury, in some strong way, his opinion on the fact; whereas, if this had been done in the case in hand, it would have been against the evidence, and complaint could justly be made that he threw his opinion into the jury-box, when the object of the issue was to have an unbiased verdict of the jury upon the facts presented for their decision.

4. Equity Case Treated as Action at Law. — In a pure equity case, perhaps neither party has a right to ask the court to instruct the jury; but when the action is tried as an action at law, and so treated by the courts and parties, it should at least be fully submitted to a jury and the law correctly stated to them. *VanVleet v. Olin*, 4 Nev. 95.

Issue of Quantum Damificatus. — In *Kentucky*, on trying this issue, the attention of the jury should be called particularly to points of inquiry. *Griffith v. Depew*, 3 A. K. Marsh. (Ky.) 183.

In the Circuit Court of Baltimore City under art. 29, § 58, of the Code of *Maryland*, when issues are framed for jury trial, the court has the right to instruct the jury. *Barth v. Rosenfeld*, 36 Md. 604.

Instructions as to Admissibility of Evidence. — In *Georgia* it is not only the province, but the duty, of the court on the trial of equity causes to instruct the jury what portions of the defendant's answer are responsive to the allegations in the complainant's bill, so that the jury may understand from the proper source what is legal evidence for their consideration, and what is not. *Beall v. Beall*, 10 Ga. 342; *Shiels v. Stark*, 14 Ga. 429. When the answer to the bill contains statements which

On the Law Applicable to the Case. — The verdict of the jury being simply for the purpose of informing the conscience of the court, general instructions as to the law applicable to the facts of the case are not proper, for the jury have nothing to do with the application of the law to the facts, this being the province of the court directing the issue.¹

On Evidence Given. — Instructions on the trial of issues should not, in general, comment on the evidence.² But though there is no error in refusing to charge the jury that under all the evidence the verdict must be in favor of the defendant,³ there is equally no error in the court instructing the jury to find for the defendant, if, upon all the evidence, the charges made in the petition were not established by the weight of the evidence.⁴

Pertinence of Instructions. — Instructions to the jury should be pertinent to the issue and not be addressed to a different inquiry than that contained therein.⁵

are not responsive to the allegations of the bill, and the court charges the jury that the answer is evidence, it should also charge them that the statements not in reply to the allegations are not evidence; and should, either by specific mention of the points not responsive, or by general instructions, according to the nature of the cause, point out to the jury the application of the rule. *Neal v. Patten*, 40 Ga. 363.

1. *Dominguez v. Dominguez*, 7 Cal. 424; *Swales v. Grubbs*, 126 Ind. 107; *Farmers' Bank v. Butterfield*, 100 Ind. 230.

Instructions on Law Applicable to All Issues in a Case. — Where instructions asked for embrace the law as applicable to all the issues in a case, and are not limited to such rules as would enable the jury to determine the questions of fact submitted to them, they are properly refused. *Farmers' Bank v. Butterfield*, 100 Ind. 230; *Stickel v. Bender*, 37 Kan. 457.

In Georgia all equity cases are tried by special jury under the direction of the court as to the law. *Brown v. Burke*, 22 Ga. 574; *Mounce v. Byars*, 11 Ga. 180.

2. *Morris v. Morris*, 28 Mo. 114; *Brown v. Burke*, 22 Ga. 574; *Mounce v. Byars*, 11 Ga. 180.

3. *Beck v. Beck*, 163 Pa. St. 649.

4. *Robinson v. Dryden*, 118 Mo. 539. See *infra*, XI. 17. *Directing Verdict*.

Instruction as to Competency of Finding for Plaintiff or Defendant on Different Issues. — It is not the province of the trial judge to determine that issues sent

from a court of equity are so improperly framed, as not to be distinct from each other. All that the jury have to do is to return a finding on each issue. The consequences resulting from their findings are to be determined by the court of equity. Therefore, an instruction to the jury by the trial judge "that it was competent for them to find either of the issues for the plaintiffs, and the other for the defendants," was correct. *Bell v. Woodward*, 47 N. H. 539.

5. *Henry v. Davis*, 7 W. Va. 715; *Branger v. Chevalier*, 9 Cal. 353.

And where the instructions asked for had no relevancy to the question submitted to the jury, there could be no error in refusing them, however pertinent they might have been to other portions of the case. *Carlisle v. Foster*, 10 Ohio St. 198.

Substitution of New Issues by Instruction. — On a bill to set aside a deed and contract on the ground of incompetency of the maker to transact business, and fraudulent and false representations, the court of equity, on submission of issues to a jury, instructed them that if either of these grounds were sustained, the allegations of the bill, that said instruments were wrongfully and improperly obtained, were made out. It was held that this instruction submitted to the jury issues different from those which they were impaneled to try, but that this was in no sense a substitution of new issues, and was only an instruction properly informing the jury as to what facts must be found

17. Directing Verdict. — The verdict of the jury on issues in an equity case being advisory, the chancellor may accept or reject the verdict and enter a decree according to his own determination;¹ or, what is equivalent to this, he may, when he presides at the trial of the issue, direct a particular verdict upon the facts, as being in accord with his own conclusions.²

18. Verdict — In General. — The general manner of arriving at and rendering a verdict on equitable issues, the formalities thereof, etc., are substantially the same as in an ordinary verdict in a court of law.³ The verdict should be sensible, consistent,

to entitle the complainant to a verdict upon the issues already submitted. *Hoobler v. Hoobler*, 128 Ill. 645.

As to New Trial and Appeal on questions pertaining to instructions, see *infra*, XIV. 8. *b. In Instructions or Directions*; and *infra*, XVI. *Appellate Review*.

1. See *infra*, XIII. *Proceedings in Court Directing Issue After Trial Thereof*.

2. *Galvin v. Palmer*, 113 Cal. 46; *Ely v. Early*, 94 N. Car. 1; *Cox v. Cox*, 91 Mo. 71; *Hess v. Miles*, 70 Mo. 203.

Even under Conflicting Evidence the court may reject verdicts, general or special, and enter a decree in accordance with its own determination; or, as an equivalent, direct the rendition of a particular verdict. *Galvin v. Palmer*, 113 Cal. 46.

General Instead of Special Direction. — If, in exercising the power of submitting certain issues to a jury, in a suit on notes and to set aside a conveyance as fraudulent, under *Indiana Rev. Stat.* (1881), § 409, the court directs a verdict as to the notes instead of directing a verdict on particular questions of facts concerning the notes, and the court disregards the verdict, the error will be harmless. *Hornbrook v. Powell*, 146 Ind. 39.

Judge of Law Court Directing Verdict. — Following the intimation in *Birdsall v. Patterson*, 51 N. Y. 43, upon the trial of special issues from the special term (substituted for feigned issues in equity cases), at the close of the evidence the judge at circuit directed the jury to find a verdict on all such issues in favor of the defendant. This was held not error in a case where the evidence was so overwhelmingly in favor of the defendants as to have made it the duty of the court to set aside any verdict which might have been rendered thereon for the plaintiff. *Browne v. Murdock*, 12

Abb. N. Cas. (N. Y. Supreme Ct.) 360. But see *McKinley v. Lamb*, 64 Barb. (N. Y.) 199, where it was said that it seems hardly consistent with the issues sent to the jury to be tried, that the court should direct a verdict on matters of law, and that such questions should be submitted to the court on an application for judgment on the verdict.

Issue to Determine Right to Subrogation. — In the trial of an issue instituted to determine a right to subrogation the court may direct the jury to find a verdict for the co-defendants of one by whom money was borrowed from a third person, and who agreed that the suit might be marked to the use of the lender, and then admit the declarations and admissions of the borrowing defendant for the purpose of binding him. An issue to determine a right to subrogation, like an issue out of chancery, is subject to the control and intended to inform the conscience of the court. *Eddy v. Reed*, 4 Phila. (Pa.) 116.

For General Practice Relating to Directing Verdict, see article DIRECTING VERDICT, vol. 6, p. 667.

3. See article VERDICT.

Finding on the Evidence. — As in other cases, the jury on determining issues are to find on the evidence submitted, which they will weigh and then render their verdict according to the preponderance thereof. *Smith v. Newton*, 84 Ill. 14.

In *Michigan* all objections to the competency, materiality, or relevancy of the testimony offered must be reserved until the final hearing. But all the evidence being admitted on the trial of the issue, if the verdict is contrary to the weight of such of the testimony as was properly admitted, the chancellor must give the verdict no effect whatever.

Reconsideration of Verdict. — Until the verdict rendered on the issues has been

and certain;¹ responsive to the issues, and a full and exhaustive finding on all of them.² It must not be too broad, nor contain findings on questions not submitted to the jury.³ Where special issues in an equity case have been submitted, each issue must be passed on separately; the verdict must be special and not general.⁴

received, the jury may retire to further consider it. This may be done of its own accord, or the court may send it back for such reconsideration. *Hageman v. Cantrell*, 40 N. Y. Super. Ct. 381.

1. *Kirby v. Newsance*, 2 Hawks (N. Car.) 105; *Cooper v. Branch*, 86 Ga. 234. See *infra*, XIV. 7. *d. Verdict Insensible, Contradictory, or Uncertain. Infra*, XIII. 6. *f. Verdict Uncertain.*

Issues Found for Both Parties. — Where two issues are sent from a court of equity, the jury may find one issue for the plaintiff and the other for the defendant, without any inconsistency. *Bell v. Woodward*, 47 N. H. 539.

Verdict on Issue in Action at Law. — In an action to recover a tract of land described by metes and bounds, an issue was submitted by consent to the jury as to the ownership of the lands. The verdict was for the plaintiff for the "land in dispute." This was held to be sufficiently certain and definite. *Robertson v. Sharpton*, 17 S. Car. 592.

2. *Duff v. Duff*, 71 Cal. 514, *affirmed* 87 Cal. 104; *Warring v. Freear*, 64 Cal. 54. See also *Marshall v. Marshall*, 18 W. Va. 395; *Parker v. Laney*, 58 N. Y. 469, *modifying* 1 Thomp. & C. (N. Y.) 590. See *infra*, XIV. 7. *b. Verdict Not Responsive or Determinative of Issue.*

The Jury Cannot Find on One Issue and Disagree on Another; the findings must be altogether or not at all, and the court will not receive the finding of the jury on one issue and discharge the jury as to the other. *Berry v. Wallen*, 1 Overt. (Tenn.) 186.

Sufficient Finding on All Issues. — The issues submitted were: (1) Whether the contract was made with the agent of the state as stated in the bill. (2) If so, was the complainant hindered or prevented from performing his contract by the acts of the agent of the state? (3) And if both these are found affirmatively, then the jury shall assess the damages (if any) that may be due and owing the complainant. The verdict was: "We, the jury, find for the complainant and assess his damages at eleven thousand two hundred dollars." It was held that this was a substantial

finding on all the issues, as the jury were not authorized to find damages unless they found the other issues for the complainant. *State v. Farish*, 23 Miss. 483.

Affirmative Finding Sufficiently Responsive. — Where the complaint alleged that by agreement at the time of executing a deed absolute on its face, it was received as security merely, a feigned issue presenting the question whether the deed was a mortgage having been found in the affirmative, is substantially the same as a finding that the agreement set out in the complaint had been made. *Brown v. Clifford*, 7 Lans. (N. Y.) 46.

3. See *Bailey v. Sewell*, 1 Russ. 239; *Brink v. Morton*, 2 Iowa 416. *Infra*, XIV. 7. *c. Verdict Too Broad.*

Finding Being a Conclusion of Law. — It is the province of a jury, in an equity suit, to try only such disputed facts as the parties, by the bill and answer, submit to them; but a finding that a sale is justifiable is a conclusion of law not submitted to them. *Jones v. Zollicoffer*, Term (N. Car.) 212.

4. *Martin v. Kline*, 157 Pa. St. 473; *Cobb v. Burns*, 61 Pa. St. 281; *Dunn v. Dunn*, 11 Mich. 284; *Warring v. Freear*, 64 Cal. 54; *Ivy v. Clawson*, 14 S. Car. 272; *Ketchum v. Brazil Block Coal Co.*, 88 Ind. 515.

In Georgia "special verdicts of the facts only may be found by the jury,*on the trial of chancery cases, when requested by counsel before the beginning of the introduction of the evidence, and the presiding judge when charging the jury, shall inform them what issues of fact are made by the pleadings in the cause. Before the passage of the Act of 1876, on this subject, the issues made by the pleadings were all tried and passed on by the jury, as now, but summed up in a general verdict; and these, from the number involved, often greatly confused the jury and made them return verdicts unsatisfactory to the chancellor, applicable only to part of the case, and frequently the result of a compromise of the special and material facts to reach a general finding. By this act a change is made, only to

19. Exceptions and Objections — In General — Where and to What Taken. — It is often proper and necessary that exceptions and objections should be taken to irregular procedure on the trial, such as the improper admission or rejection of evidence, or other erroneous rulings of the presiding judge, etc.¹

the extent of changing the finding from a general verdict on all the issues made by the pleading, to a special verdict on each issue separately, and which greatly aids both chancellor and jury in the proper adjudication of the rights of the parties." *Carter v. Lipsey*, 70 Ga. 422.

If the Jury Cannot Agree upon the special issues, but can agree to a general verdict, and both counsel consent to withdraw the special issues, the court commits no error in receiving a general verdict. *Mitchell v. Hockett*, 25 Cal. 539.

Where Both Special Findings and a General Verdict are returned for the same party, it is harmless error for the court to accept the special findings and render judgment on them. *McCauley v. McKeig*, 8 Mont. 389.

If the Court Disregards the Verdict, the error in directing a verdict generally instead of specially will be harmless. *Hornbrook v. Powell*, 146 Ind. 39.

Exceptions of Fact to an Auditor's Report must be passed upon seriatim. It will not be sufficient to find an aggregate amount for one party, nor to find generally for the other. *Mayo v. Keaton*, 78 Ga. 125.

Issue as to Compensation for Release of Right to Lands. — Under the *Pennsylvania* Act of 1810, authorizing an issue to decide a controversy between parties as to the share to which they were entitled of a sum of money, to be paid by the commonwealth in consideration of their having released their rights to several tracts of land within certain townships, etc., the jury in an issue so framed were to find generally for the plaintiff or defendant, and the verdict finding the sums due to each party was bad. *Moore v. Albright*, 4 S. & R. (Pa.) 231.

1. *Pence v. Garrison*, 93 Ind. 345.

Exceptions Might Influence Chancellor. — Exceptions to rulings are proper to be taken and noted; for upon a review of the whole case the mind of the chancellor may be influenced by them. *Watt v. Starke*, 101 U. S. 247.

Exceptions to Directions. — Exceptions to wrong or improper directions given by the court should be taken in the

trial court. *Dodge v. Griswold*, 12 N. H. 573.

To Misconduct of Jury. — Likewise to the misconduct of the jury. *Dodge v. Griswold*, 12 N. H. 573.

To Consideration of Improper Evidence. — So, too, exceptions should be taken to the admission of improper evidence. *Dodge v. Griswold*, 12 N. H. 573.

If the testimony given upon the trial of issues in a chancery case is not objected to at the time, it is competent and will not be considered on appeal. *Minton v. Pickens*, 24 S. Car. 592.

Where the court directing issues in an equity case to be submitted to a jury transmits certain evidence to the trial court with the order that it may there be used on the trial of the issue, such order does not preclude exceptions to any particular portion of the testimony as irrelevant, improper, or inadmissible for any cause. Such exception must still be taken at the trial court, or it will be considered as waived. *Dodge v. Griswold*, 12 N. H. 573.

To Be Taken by Party. — It is not the proper province of the trial court to take exceptions to any particular part of the testimony sent down from the court directing the issues, because such exceptions are left for the party to take in the progress of the trial. *Dodge v. Griswold*, 12 N. H. 573.

In Michigan the practice differs from that generally used, for whether the evidence is taken before a circuit court commissioner or in open court, all objections made to the competency, materiality, or relevancy of the testimony offered must be reserved until the final hearing. "This avoids sending the case back because of the rejection of evidence which the circuit or appellate court might consider proper and material. That such practice enables counsel, sometimes in good faith, to offer and introduce evidence clearly incompetent, there is no doubt; but as the evidence must be passed upon by the court no harm is done, except in the matter of costs, which the court can generally so regulate as to prevent any very great abuse of the practice." *Collins v. Jackson*, 43 Mich. 561.

Transmission of Exceptions. — These exceptions should be certified, or brought to the attention of the court which ordered the issues,¹ and it appears are to be used there, as upon a motion for a new trial.²

Bills of Exceptions. — But a bill of exceptions as such cannot usually be taken, or if taken can be used only on a motion for a new trial to the court ordering the issues. This general rule, however, is not universal in its application.³

20. Dismissal of Complaint. — An order dismissing the complaint cannot properly be made upon the trial before a jury of issues settled in an equitable action. The verdict in such case must be rendered and the cause afterwards heard by the equity court, where the proper disposition will be made of the case.⁴

21. Nonsuit. — The judge of a court of law to which issues out of chancery are sent for trial cannot order a nonsuit; he has no authority but to try the case and report back the result.⁵

Effect of Failure to Make Proper Objections. — See the preceding notes, and *Infra*, XIV. 5. *Where Necessary Objections Were Not Made; infra*, XVI. *Appellate Review*.

1. *Dodge v. Griswold*, 12 N. H. 573. As to certification of exceptions and objections taken, see *infra*, XII. 5. *Exceptions and Objections*.

Failure to Bring to Attention of Court. — If these exceptions are not brought to the notice and attention of the court which sends the issues, no objections can be raised in an appellate court. *Brockett v. Brockett*, 3 How. (U. S.) 691.

2. See *infra*, XIV. 4. *Upon What the Court Proceeds for Determination; and infra*, XVI. *Appellate Review*.

3. This phase of the question will be more appropriately and conveniently treated elsewhere. See, as to application or motion for new trial, *infra*, XIV. 3. *u. Propriety and Necessity of; and further on the subject, infra*, XVI. *Appellate Review*.

4. *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Toch v. Toch*, 9 N. Y. App. Div. 501. See *infra*, XII. *Return of Findings and Proceedings at Trial; and infra*, XIII. *Proceedings in Court Directing Issue After Trial Thereof*.

5. *Woolfolk v. Graniteville Mfg. Co.*, 22 S. Car. 332; *McEwen v. Mazyck*, 3 Rich. L. (S. Car.) 210; *Gentner v. Geiler*, 4 W. N. C. (Pa.) 139; *Birdsall v. Patterson*, 51 N. Y. 47.

"We do not understand that the plaintiffs asked leave to discontinue their whole case, but that they might

have an order of nonsuit as to the issue ordered, leaving the proceeding in equity still standing. We do not see how the judge could have granted a nonsuit as to the issue, which was not an independent action, 'but 'an issue from chancery,' ordered at the instance of the plaintiffs themselves, to determine (in a manner they had a right to demand) a question which had arisen in the progress of the cause. We suppose the plaintiffs might have brought an original action at law, or possibly may have obtained an order in their case, that an action at law should be brought; but, probably for some good reason, they chose not to do so. They instituted on the equity side of the court an action for partition, and obtained an order out of chancery for the issue. This being the case, the officer who tried that issue sitting as a law judge, could not grant a nonsuit, for that would have been precisely equivalent to revoking the order. He had no right to do that, or refuse to try the issue, or to grant a new trial or nonsuit. He had no option but to try the case and report back the result." *Woolfolk v. Graniteville Mfg. Co.*, 22 S. Car. 335.

Nonsuit Where Trial Is Had on Pleadings. — The *New York Code Civ. Pro.*, § 1544, provides that an issue of fact joined in an action for partition is triable by jury, and that unless the court directs the issues to be stated as prescribed in section 970 of the Code, the issues may be tried upon pleadings. Under these provisions the special

22. Judgment. — On issues submitted to be tried before a jury of another court, or on the law side of the same court, the judge presiding can give no judgment upon the finding of the jury. His duty is to certify the record of the finding to the court which directed the issue, which court, on further hearing of the case, will enter the appropriate judgment or decree.¹

23. New Trial. — See *infra*, XIV. *New Trial*.

XII. RETURN OF FINDINGS AND PROCEEDINGS AT TRIAL — 1. In General. — After an issue has been tried, the judge should certify his return thereof to the court directing the issue.²

term directed that the cause be placed on the calendar of the Circuit Court for trial, "and that upon the trial the issues proper to be submitted to a jury be so submitted under the direction of the court as to form and substance." At the trial, the plaintiff producing no evidence, a nonsuit was directed. The Appellate Court held that by the order of the special term the court declined to submit specific issues to be tried, and only directed that the issues proper to be submitted should be so submitted. There being no evidence to support the plaintiff's allegations, there were no issues proper to be submitted to the jury, and the direction of nonsuit was properly made. *Tucker v. Tucker*, (Supreme Ct.) 45 N. Y. St. Rep. 458.

1. O'Connor v. Malone, 6 Cl. & F. 572; *Toch v. Toch*, 9 N. Y. App. Div. 501; *Peake v. Peake*, 17 S. Car. 427; *Kelly v. Herb*, 14 Pa. Co. Ct. Rep. 22; *Baker v. King*, 6 Verg. (Tenn.) 402.

Judgment on Law Side by Judge Who Directed Issues. — A judgment entered on the law side of the court to which issues from the chancery side have been sent, on a verdict rendered on such issues, is erroneous, and upon proper motion should be set aside; and this though the judge on the chancery side who ordered the issues be the same one who on the law side tried them. *Sloan v. Westfield*, 11 S. Car. 445.

Motion in Arrest of Judgment on Mistrial. — Where there has been a mistrial on an issue directed by a court of equity, there can be no motion in arrest of judgment, such a motion being incompatible with the nature and object of the trial of issues in aid of a court of equity. *Mosley v. Davies*, 11 Price 162.

Judgment on Issues from Probate and Orphans' Court. — In *Pond v. Pond*, 10 Cal. 495, the following points were decided: The Probate Court of California

does not lose its jurisdiction over a subject by directing an issue; the finding of the jury being merely in aid of its jurisdiction, by settling the facts and thus furnishing the material upon which it is to act. After the finding the functions of the district judge cease. He is not in the exercise of an original, but of a special jurisdiction, given him for a special and limited purpose. He is to certify back his findings, which then become a part of the record of the Probate Court. There is no authorization of a withdrawal of any portion of the jurisdiction of the Probate Court, by giving a power to the District Court of rendering a final decision or judgment upon the findings.

The Orphans' Court in *Pennsylvania* directed an issue to the Common Pleas, for which purpose the parties entered an amicable action by agreement. The jury found for the plaintiff, and the court entered judgment according to the verdict. On appeal, it was held that this judgment was erroneous because contrary to the agreement of the parties. Matters in issue were to be found, and a certificate transmitted to the Orphans' Court, which would then proceed in the case. The judgment was reversed. *Finney v. Moore*, 8 S. & R. (Pa.) 345.

2. As to general methods of procuring the transmission of proceedings and evidence, see *infra*, XIV. 4. *c. Procurement of Proceedings and Evidence*.

Certificate Where Same Judge Directs and Tries Issues. — Where the judge who directs the issue from the chancery side also superintends the trial on the law side of the court, a certificate of the result by the judge presiding on the trial to himself as chancellor was held to be unnecessary, although it would have been more formal if the verdict had been certified by the clerk to the equity side. *Wilson v. Riddle*, 123 U. S. 608.

2. Verdict. — The verdict or findings of the jury are, perhaps, the most important part of the certificate, and should, of course, be returned.¹

And since the union of jurisdictions of law and chancery in *Virginia*, though it might be well to observe this formality, it would be going too far to hold that the order made by the judge on the chancery side of his court in a cause there depending, setting aside the verdict, which he thought contrary to the evidence, should be reversed because he had not observed the formality of certifying to himself that it was against the evidence. *Lavell v. Gold*, 25 Gratt. (Va.) 473.

Certificate of Record. — The finding of a jury on an issue sent from a court of chancery to be tried in a court of law must appear by the record certified by the judge. A certificate of the judge made from memory will not be sufficient. The chancellor having proceeded to a decree on such a judge's certificate, the decree was reversed by the appellate court, and a trial *de novo* on the issues ordered, which, when regularly certified to the chancellor, was to be the basis of the decree. *Baker v. King*, 6 Yerg. (Tenn.) 402.

To What Court Return Is Made. — Where an issue is awarded by the Chancery Court in *New Jersey*, to be made up in the Supreme Court, and is tried by the Circuit Court, the record and *postea*, together with the usual certificate of the judge that he is satisfied with the verdict, should be returned to the Chancery Court, and not to the Supreme Court. Where an action at law is directed by a court of equity, the *postea* must be returned to the court in which the suit at law is instituted; the cause is there, and motions for a new trial and all other proceedings are to be had in that court; but when an issue is directed by the court of equity, the *postea* must be returned to the court which ordered the issue, and all subsequent proceedings are in that court. *Trenton Banking Co. v. Rossell*, 2 N. J. Eq. 492.

A judge in directing a jury trial of issues of fact in an action for partition, to which the parties are entitled by *New York Code Civ. Pro.*, § 1544, should not direct in the order that the verdict be certified to himself. It should require that the verdict be certified to the Supreme Court at special term, in order that the proper decree

may be entered upon the issues as determined by the verdict. *Cuthbert v. Ives*, (Supreme Ct.) 20 N. Y. Supp. 469.

Proper Term for Return and Recordation of Certificate. — The evidence and rulings of the court on the trial of an issue which are certified by the court as authentic and correctly reported, and which the decree cites to be the basis of its findings, will not be disregarded by the appellate court because they were not certified and spread on the record at the same time at which the decree was entered. The subsequent certificate merely ascertains and verifies what proceedings took place before the court at the time of the hearing, and although they should regularly be on the record at the same time, there is no rule of chancery practice or procedure which forbids the making of a *nunc pro tunc* order to supply such omission, to prevent injustice. *Kerr v. South Park Com'rs*, 117 U. S. 379.

Probate Courts. — In *California*, when the place of trial of an issue of fact in the Probate Court is changed to another county, the clerk of the court to which the case is sent should certify a transcript of the proceedings and result of the trial back to the court from which the cause was sent, on entering appropriate judgment. *People v. Almy*, 46 Cal. 246.

1. *Sloan v. Westfield*, 11 S. Car. 445.

Probate and Orphans' Court. — This is true likewise in the Probate and Orphans' Court. *Pond v. Pond*, 10 Cal. 495; *Finney v. Moore*, 8 S. & R. (Pa.) 345.

The Result of Each Finding should be so certified, if several issues have been submitted. *Cobb v. Burns*, 61 Pa. St. 281.

Any Special Circumstances Found by the jury which may be material in taking action on the verdict should be indorsed on the *postea*, and the order of the court will often direct this to be done. *White v. Lisle*, 3 Swanst. 342.

Character of Certificate of Verdict. — The whole of the proceedings at the trial of an issue out of chancery, so far as they are spread on the record, properly constitute a certificate of the verdict, and of course become a part of the chancery record, and though, to save costs, the verdict only is certified

3. Statement of Trial. — And the judge should not only send the *postea*, but go further and furnish to the court a fair statement of the trial.¹

4. Evidence. — The character of the evidence given upon the trial, with notes thereon, should usually be stated.² But it is not necessary that the judge should recite the evidence itself.³

5. Exceptions and Objections. — The return should also show the exceptions and objections taken on the trial.⁴

6. Instructions. — If required, the instructions given to the jury are also to be certified.⁵

in practice, yet in strictness the whole record should be so. But were it otherwise, still the order to certify the verdict necessarily implies that everything should be certified which was spread upon the record as part of the proceedings at the trial. *Watkins v. Carlton*, 10 Leigh (Va.) 586.

Verdict Sufficiently Identified in Transcript. — The verdict of the jury on issues submitted to them in an equity case is sufficiently identified as such, so as to be considered on appeal, when the clerk of the trial court certifies "the foregoing to be a full, true, and correct transcript of the issues submitted, and answers thereto, and verdict of the jury thereon, in the foregoing entitled action, as appears from the original thereof on file in my office, and of the whole thereof." Such verdict is a part of the judgment roll, and will be presumed to have been properly recorded and entered by the clerk in the minutes of the court, as required by *California Code Civ. Pro.*, § 628. *Goldman v. Rogers*, 85 Cal. 574.

1. *Bassett v. Johnson*, 2 N. J. Eq. 161.

2. *Bassett v. Johnson*, 2 N. J. Eq. 154; *Sloan v. Westfield*, 11 S. Car. 445.

3. *Bassett v. Johnson*, 2 N. J. Eq. 154.

Where Same Judge Directs and Tries the Issues. — It is true that the evidence is usually certified along with the verdict. This is done so that the chancellor may know whether the verdict accords with the weight of evidence, and to enable him to determine whether he ought to disregard the finding or send the issue to another jury. But where, as is generally the case in *Pennsylvania*, the issue is tried before the same judge who sits as chancellor, this reason for certifying the evidence does not exist, and it is no valid objection, therefore, to a decree, that the evidence was not returned with the verdict to the equity

side of the court. *Saylor's Appeal*, 39 Pa. St. 495.

Evidence as Part of Record — New Trial. — In *Duff v. Fisher*, 15 Cal. 379, it was said that the verdict or findings of the jury are certified to the chancellor, without evidence, which is not called for except upon expressed application, with a view to a motion for a new trial. The evidence upon such issues taken before a different tribunal forms no part of the record before the chancellor, for, after the findings are objected to, the evidence is presented upon a statement prepared for that purpose and brought before the court on motion for new trial. The evidence then becomes a part of the record, and the order made on the motion a subject of review on appeal.

Certifying Evidence Instead of Facts Proved. — Where there is a conflict of evidence on the trial of an issue out of chancery, it is sufficient if the court finds it his duty, on the trial, to certify the evidence instead of the facts proved. *Nease v. Capehart*, 15 W. Va. 299.

4. *Bassett v. Johnson*, 2 N. J. Eq. 154; *Sloan v. Westfield*, 11 S. Car. 445; *Dodge v. Griswold*, 12 N. H. 573; *Brockett v. Brockett*, 3 How. (U. S.) 691. See *supra*, XI. 19. *Exceptions and Objections*.

Exceptions Included in Certificate of Verdict. — Where exceptions are taken on the trial of an issue out of chancery and made part of the record, the certificate of the verdict by the court of law is a certificate of the whole record, and exceptions, though not expressly certified, become a part of the chancery record. *Johnson v. Harmon*, 94 U. S. 371; *Watkins v. Carlton*, 10 Leigh (Va.) 586.

5. *Bassett v. Johnson*, 2 N. J. Eq. 154; *Watkins v. Carlton*, 10 Leigh (Va.) 586.

7. **Satisfaction or Dissatisfaction of Judge.** — It is proper also for the judge to certify whether or not he is satisfied with the verdict of the jury.¹

8. **Statement Not Sufficiently Full.** — If the statement made by the judge is not sufficiently full, an additional statement will be ordered; but this will not be a cause for granting a new trial on the issue.²

9. **Weight and Effect.** — See *infra*, XIII. 3. *b. Certificate of Judge*; XIV. 8. *a. In Admission or Rejection of Evidence.*

XIII. PROCEEDINGS IN COURT DIRECTING ISSUE AFTER TRIAL THEREOF — 1. **Further Hearing and Trial** — *a. GENERALLY.* — Where issues out of chancery have been submitted to a jury, whether such submission was a matter of discretion or of right, there must be a further hearing, after the return of the findings, before the court which ordered the issues, and further action by it on the whole case.³

1. *Ross v. Pynes*, 3 Call (Va.) 568.

Manner of Showing Dissatisfaction. — If the court before which the issues in chancery are tried is dissatisfied with the verdict, the dissatisfaction must be certified on the record by the court; or, if refused, it should be put on the record by bill of exceptions; it is not to be supplied by affidavit, especially of counsel in the cause. *Stannard v. Graves*, 2 Call (Va.) 369.

2. *Bassett v. Johnson*, 2 N. J. Eq. 154.

3. An order directing an issue is an interlocutory order, made to enlighten the conscience of the judge, in which the consideration of further questions in the cause is reserved until after the trial of the issue. *Ivy v. Clawson*, 14 S. Car. 272.

"But, as before stated, there was no trial of the cause. It is an equity suit in which a trial cannot be had elsewhere than in that branch of the court having cognizance of such causes. Although it is such a suit, yet the parties are entitled as matter of right to a trial by jury of the issues; but that does not change the inherent nature of the action, nor authorize the justice at the trial term to dismiss the complaint or make a final determination of the action. The issues may be tried upon the pleadings or on framed issues, but it is a trial of issues only, preliminary to the hearing of the cause, after which the final judgment can be directed at the special term and nowhere else. The verdict is binding on the court at special term as the trial by jury is a matter of right; but before any judg-

ment can be pronounced the court at special term must act on the whole case. Nothing has been changed in this regard by the abolition of the circuit courts and the institution of the new judicial system." *Toch v. Toch*, 9 N. Y. App. Div. 502.

Verdict Alone as Evidence in Collateral Suit. — In a Federal case the court, *per* Story, J., in deciding against the admissibility as evidence of a verdict on issues submitted to a jury, said: "No hearing was ever had by the court subsequently to the verdict, and no decree rendered upon the merits of the case. A verdict upon an issue ordered by a court of equity is in no just sense final upon the facts it finds, or binding upon the judgment of the court. * * * But it can never be known what effect is given to the verdict, or whether any is given to it, until the subsequent hearing upon the merits, and a decree rendered thereon by the court. Under such circumstances, it is plain to me that this verdict is not admissible in evidence, for it has not been sanctioned or established by the court, and without such sanction it is no proof of any fact but that it was actually rendered in the case, and not proof of the facts found thereby." *Allen v. Blunt*, 3 Story (U. S.) 742.

Hearing and Judgment at Chambers. — On consent of parties that the hearing of a motion for a new trial of issues submitted in an equity case be had at chambers, a judge in *South Carolina*, after refusing the motion, has no power to proceed to render final judgment in

b. WHERE VERDICT DOES NOT COVER ENTIRE CASE. — Where the questions submitted to the jury do not embrace all the issues of fact in the case,¹ or where the verdict does not respond to all the issues submitted, it becomes the duty of the court, if it adopts the verdict, to proceed and find upon the evidence which has been given, and any other which may be offered by the parties, as to the issues not covered by the verdict.²

c. WHERE VERDICT COVERS ENTIRE CASE. — If, however, the questions submitted to and answered by the jury, together with the facts admitted by the pleadings, cover the whole case, so that no further facts need be proved, no further trial is necessary, and motion may at once be made for judgment.³

the cause in favor of the plaintiff, the defendant not consenting thereto. The appellate court, in setting aside such a judgment, held that there was no statutory authorization for its rendition at chambers, and that notwithstanding the verdict the parties had a right to have a hearing before the court upon the merits. *Grierson v. Harmon*, 16 S. Car. 618.

Where the Issue Is Not Tried. — When the cause is brought on for further hearing, and it appears that the parties have not gone to trial on the issue directed, the court will still direct it to be tried, if the grounds upon which is based the failure to try the issue are unsatisfactory to the court. *Legh v. Holloway*, 8 Ves. Jr. 213.

1. *Stahl v. Gotzenberger*, 45 Wis. 121; *Goldsborough v. Turner*, 67 N. Car. 403.

Failure to Try Remaining Issues. — The trial court, having taken the verdict of a jury upon two of the issues presented by the pleadings in an equity case, adopted the verdict and rendered judgment upon the whole case without trying the remaining issues; this was held to be erroneous. *Leeper v. Lyon*, 68 Mo. 216.

Trial of Untried Issues. — Where the court submits several issues to a jury, reserving for itself or a referee the determination of the remaining issues, and upon the coming in of the verdict, orders judgment entered "upon the findings of the jury," but does not try the other issues, a party will be entitled to a trial of the untried issues upon motion made therefor, but not to a new trial of the issues tried by the jury. *Cobb v. Cole*, 44 Minn. 278.

Judgment Entered by Clerk Where Other Issues Remain for Trial. — The court may properly set aside a judgment entered upon the verdict of a jury in an

equity case, where it appears that it had been inadvertently entered by the clerk, without judicial sanction, when other issues of fact remained to be determined by the court, and the court may proceed with the trial of such issues, and may adopt the advisory verdict of the jury upon the special matter therein involved, making findings as to the other issues, and have a new judgment entered. *Cummings v. Ross*, 90 Cal. 68.

2. *Warring v. Freear*, 64 Cal. 54.

Where All the Issues in the case are ordered to be tried by a jury, and the verdict does not determine all the material facts, it has been held that the court should not find additional facts, but should set aside the verdict as defective and grant a new trial. *Parker v. Laney*, 58 N. Y. 469.

3. *Hammond v. Morgan*, 101 N. Y. 186, 3 How. Pr. N. S. (N. Y.) 438, *reversing* 51 N. Y. Super. Ct. 472.

It is only where the question tried before the jury does not really embrace the determination of all the issues of fact in the action, that the law requires a further trial by the court of remaining issues. *Acker v. Leland*, 109 N. Y. 5.

And it was held that where in an equitable action the order of the court directed all the issues of fact in the case to be tried by a jury, as authorized by the *New York Code of Procedure*, § 254, they must all be so tried, while the order remained in force, and therefore, while the order so remained, it was irregular for the trial judge to find additional facts upon which, together with the verdict, judgment should be given. If the order directed the trial of some specific question of fact only, such a proceeding would be proper, but not where all the issues.

d. SETTING DOWN FOR FURTHER HEARING. — For the purposes of the further hearing the cause should be set down within a reasonable time.¹

2. Final Decision by Court — *a.* NECESSITY OF — In General. — The verdict of the jury does not end the trial, and the final completion thereof must be established by a decision of the court.²

Issues of Right. — If the submission of the issues to a jury was a matter of right in the parties, the verdict is conclusive and the decision of the court must be in accordance therewith.³

were submitted. *Parker v. Laney*, 58 N. Y. 469. See *Browne v. McClintock*, 22 W. R. 521, L. R. 6 H. L. 434.

Motion for Judgment. — In *Indiana* a motion for judgment upon the answers of the jury to interrogatories was held to have been properly overruled, as such a motion is unauthorized on the trial of an equitable cause by the court. Such motions are only entertained when a cause is tried, and a general verdict, with answers to interrogatories, is returned by the jury. *Farmers' Bank v. Butterfield*, 100 Ind. 229.

In *New York*, if the verdict and facts admitted by the pleadings cover the whole case, motion may at once be made for judgment. Upon such motion both parties have a right to be heard, and the court may order judgment upon the case as then made, or may set aside the findings of the jury, or use some of them, and it may allow either party to give further evidence. So, if the motion for judgment be not at once made, it must be brought in upon motion so that both parties may be heard. But if the findings of the jury, together with the facts admitted in the pleadings, do not cover the whole case, and other issues remain to be tried, or other facts requisite for equitable relief remain to be proved, then the case must be regularly brought to a hearing before the court, when it may or may not adopt the findings of the jury. *Hammond v. Morgan*, 101 N. Y. 186, 3 How. Pr. N. S. (N. Y.) 438, reversing 51 N. Y. Super. Ct. 472.

1. English Practice. — By the early English practice, the cause was not to be set down for further hearing until after the first four days of the term next after the trial had elapsed, in order that the party against whom the verdict was found might have an opportunity of moving for a new trial. 2 Daniell Ch. Pr. (1st Am. ed.) 758; 1

Newl. Ch. Pr. 357. This practice was afterwards changed and the cause allowed to be set down as soon as the trial had taken place. *Rogers v. Nowill*, 6 Hare 338.

Stay of Hearing Pending Appeal. — The further hearing is not to be stayed because of the pendency of an appeal from an order refusing a new trial. *M'Gregor v. Topham*, 4 Hare 162.

2. *Bates v. Gage*, 49 Cal. 126; *Pence v. Garrison*, 93 Ind. 353; *Gadsden v. Whaley*, 9 S. Car. 147; *Reno v. Moss*, 120 Pa. St. 49; *Vermilyea v. Palmer*, 52 N. Y. 475; *Mandeville v. Avery*, (Supreme Ct.) 3 N. Y. Supp. 745; *MacNaughton v. Osgood*, 114 N. Y. 574 [citing *Acker v. Leland*, 109 N. Y. 5]; *Carroll v. Deimel*, 95 N. Y. 252.

The New York Code Civ. Pro., §§ 972, 1003, has not changed the former practice nor made the verdict of the jury the final determination of the issue. The enactment that questions not submitted to a jury must be tried by the court is not a declaration that the questions submitted to the jury must not be tried by the court. It simply provides in what manner the issues not tried shall be tried, leaving the issues which have been tried to be determined the same as formerly, upon the final hearing. *Learned v. Tillotson*, 97 N. Y. 6.

Whether the Jury's Findings Are or Are Not Controlling, they must be approved by the court before they are made the basis of a judgment, and, if approved, they become, by adoption, the findings of the court. *Vermilyea v. Palmer*, 52 N. Y. 474.

Judgment Interlocutory. — A judgment on an issue out of chancery is interlocutory. *Woodside v. Woodside*, 21 Ill. 207.

Adoption of Verdict Equivalent to Finding, see *infra*, XIII. 5. *Adopting Verdict*.

3. See *infra*, XIII. 6. 1. *Where Issues Are of Right with the Parties*.

Issues Discretionary. — If the submission was discretionary with the court, the verdict is merely an aid, and the judge alone is responsible for the final determination of the facts; it is his exclusive jurisdiction to find them and make the decree.¹

Duty to Determine According to Convictions. — Notwithstanding the verdict, the duty still devolves upon the court to determine the case according to its own convictions of the law and the facts, in doing which it may accept or reject the conclusions reached by the jury.²

Pro Forma Decree or Judgment. — It follows that a *pro forma* decree or judgment rendered on the verdict of the jury alone, without any independent finding by the court, is erroneous.³

1. The Judge Can Only Delegate to the Jury the authority to find facts, in such manner as to make him finally responsible for their decision. *Creighton v. Hershfield*, 1 Mont. 639. See also *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27.

A Chancellor Cannot Surrender to a Jury, even if he would, his high prerogative and duty of deciding upon facts according to the convictions of his conscience. *Baker v. Williamson*, 4 Pa. St. 469.

The Judge's Findings Are Decisive of the Facts, whether he was or was not aided in his findings by the answers returned by the jury. *Koons v. Blanton*, 129 Ind. 393. Therefore, where the court finds on the issues differently from the jury, the finding of the court determines the fact. *Freeman v. Stephenson*, 63 Cal. 499.

Decree Without Regard to Verdict. — A suit in equity is properly tried by the court that bases the judgment and decree upon the pleadings, evidence, and proceedings in the case, in accordance with its convictions, and without any regard to the finding of the jury upon questions that were submitted to aid the conscience of the court or any other considerations. *Gallagher v. Basey*, 1 Mont. 457.

Jury's Finding Set Aside. — If one of the parties asks the court to make additional findings, such party cannot complain, though the subsequent findings of the court set aside a part of the special findings of the jury, when the judgment is based upon the findings of the court and those of the jury approved by the court. *Frank v. Jones*, 39 Kan. 236.

2. Guild v. Hull, 127 Ill. 523; *Grierson v. Harmon*, 16 S. Car. 619; *Brownlee v. Martin*, 21 S. Car. 402; *Adickes v. Lowry*, 12 S. Car. 97; *Charlotte,*

etc., *R. Co. v. Earle*, 12 S. Car. 53; *Talbott v. Sandifer*, 27 S. Car. 623; *Gadsden v. Whaley*, 9 S. Car. 147; *Ivy v. Clawson*, 14 S. Car. 272; *Gill v. Rice*, 13 Wis. 549; *Stahl v. Gotzenberger*, 45 Wis. 121. See *infra*, XIII. 3, 4, 5, and 6.

The trial of the issues is simply for the information of the court, and may be wholly disregarded, but whether disregarded or not, it is necessary that the court make its own finding; inasmuch that, were all the jury proceedings stricken from the record, there would still be a complete trial, finding, and judgment of the court left. *Garard v. Garard*, 135 Ind. 15, where this course was pursued, and the verdict of the jury was treated as advisory and a source of information, but the court was careful to make its own finding, viz.: "And the court, being advised of and concerning the verdict of the jury in this cause, does now find for the plaintiff; and that the plaintiff recover of the defendant," etc.

Findings by Court and Waiver Thereof. — In an equity case where issues have been submitted, express findings by the court are necessary unless they are waived. But the absence of such findings in the record on appeal is not a fatal defect, unless it affirmatively appears that they were not waived. *Richardson v. Eureka*, 110 Cal. 441. See *Warring v. Freear*, 64 Cal. 54.

Error Cured by Court's Finding. — Error in overruling an objection to a proposed issue is cured, if the court, notwithstanding the answer of the jury, finds all the facts connected with such issue. *Graham v. Stewart*, 68 Cal. 374.

3. McLaughlin v. Del Re, 64 Cal. 472; *Ikerd v. Beavers*, 106 Ind. 483; *Lake v. Lake*, 99 Ind. 339; *Guild v.*

b. UPON WHAT EVIDENCE AND FACTS. — In arriving at his decision the judge should consider all the evidence, facts, and circumstances in the cause, and render judgment according to his conclusion.¹

Hull, 127 Ill. 523; Rynerson *v.* Allison, 28 S. Car. 81; Brownlee *v.* Martin, 21 S. Car. 402; Adickes *v.* Lowry, 12 S. Car. 97; Charlotte, etc., R. Co. *v.* Earle, 12 S. Car. 53.

Presumption as to Consideration of Evidence. — Where the decree is based on the verdict alone, there can be no presumption that the chancellor acts upon proper evidence only and rejects that which is incompetent, and in such a case the decree will be reversed if the finding of the jury was the result of or was influenced by the admission of improper evidence, or by improper instructions. In such a case the effect is the same as though the decree was based on improper evidence, or a misconception of the law. Thus where the chancellor submits to a jury the questions of the sanity of the maker of a deed, and undue influence in procuring the execution of the deed, and the jury finds that the maker was not sane, and that there was undue influence, and the chancellor enters a decree setting aside the deed "*pro forma* and *pro forma* only," this will preclude the idea or presumption that he acted upon his own judgment of the truth of the allegations upon which the deed was set aside, and will be error, as the parties are entitled to the judgment of the chancellor and his consideration of the evidence, notwithstanding the verdict. Guild *v.* Hull, 127 Ill. 523.

Extent of the Rule. — Whether the judge hearing the cause on the equity side of the court be the one who tried the issues on the law side, or whether he only heard the evidence on the equity calendar, with the verdict of the jury and the evidence on which it rests certified to him by the law judge who tried the issues, in neither case can he enter up judgment on the verdict or order it to be done, but must grant or refuse the relief demanded according to his own findings of fact and conclusions of law upon a full hearing of the whole cause on the merits, on the equity side of the court. Peake *v.* Peake, 17 S. Car. 421.

Error in Rendering Judgment on Verdict Cured by Subsequent Decree. — Where a judgment in a chancery case was ren-

dered in accordance with the verdict upon issues submitted, without any independent decision, but subsequently a decree was filed in which the judge gave a statement of the case and his own conclusions upon the facts, and specifically directed judgment for the defendants, it was held that the former error was thereby cured. Shaw *v.* Cunningham, 16 S. Car. 631.

1. McGan *v.* O'Neil, 5 Colo. 58; Guild *v.* Hull, 127 Ill. 523; Ivy *v.* Clawson, 14 S. Car. 272; Peake *v.* Peake, 17 S. Car. 421.

Evidence Heard by or Certified to Judge. — The judge's decision is to be made according to the conclusion he may have arrived at upon hearing the evidence, if he presided at the trial, or may form from a careful review thereof, if certified to him by the judge who did preside at the trial of the issues. Peake *v.* Peake, 17 S. Car. 421.

Presumption that Court Acted on Evidence. — Where it does not appear in any legitimate form that the court adopted the facts as found by the jury, if the finding is general, the presumption must be in favor of the action of the court — that it acted on the evidence in the cause and made such finding as it thought the evidence required. Sheets *v.* Bray, 125 Ind. 36.

Recourse to Record for Evidence and Facts. — In *West Virginia* it was held that after a verdict is rendered upon an issue properly directed, the court cannot look at the record for the facts submitted in the issue, nor to the facts or evidence certified upon the trial of the issue, but must accept the verdict of the jury for such facts, unless under the rules governing courts of equity in such cases it should set aside the verdict and grant a new trial. The verdict must be responsive to the issue directed, otherwise the court has not before it the very facts to ascertain which the issue was directed. Marshall *v.* Marshall, 18 W. Va. 395; Nease *v.* Capehart, 15 W. Va. 299.

Evidence on Trial as Evidence on Final Hearing. — It has been held that the evidence used on the trial of an issue is not before the chancellor upon the final hearing except collaterally, to be

Further or Additional Evidence. — Whether or not the judge will hear further or additional evidence than that given on the trial of the issues, is a matter of discretion with him. He may do so, or he may predicate his findings on the evidence already given.¹

c. REQUISITES OF AND PROCEEDINGS UPON — (1) *In Writing.* — It is frequently provided by statute that the decision of the court must be in writing.²

(2) *Statement of Facts and Law.* — In some jurisdictions the judgment must state the facts found and the conclusions of law drawn from them.³

used in determining what weight was to be given the verdict. *Prudden v. Lindsley*, 29 N. J. Eq. 615, where the court said: "Doubtless the chancellor might properly order the proofs offered before the jury to stand as testimony in the cause, but it would not be fair to the party who had secured the verdict to regard those proofs as comprising all the evidence which he should be allowed to produce as to a matter of fact not actually disputed in the forum of litigation. * * * If the verdict is not warranted by the proofs upon all the points which should have been decided in the issue, then the parties should be permitted to bring in their evidence on the points not so settled, the verdict standing as conclusive upon the other points, or the verdict should be set aside and all points be thrown open to controversy. But if the verdict be vacated, then the cause is not ripe for decision upon disputed questions of fact."

1. *Clavey v. Lord*, 87 Cal. 413; *Wingate v. Ferris*, 50 Cal. 105; *Kelly v. Kelly*, 126 Ill. 555; *Hickey v. Drake*, 47 Mo. 371; *Madison University v. White*, 25 Hun (N. Y.) 490; *Peake v. Peake*, 17 S. Car. 421, where it was said that while it would be an unusual thing for the judge to hear further testimony upon the issues passed upon by the jury, yet he has the power to do so, and for good and satisfactory cause would do so.

In *West Virginia* it was held that generally the depositions of witnesses taken after the verdict on issues submitted out of chancery, to which there is no sufficient objection, and before the decree, cannot be read upon the final hearing of the cause, because if that principle were admitted it would be a needless waste of time to try an issue, and would be a premium put upon the grossest negligence. *Nease v. Capehart*, 15 W. Va. 299.

2. *Warring v. Freear*, 64 Cal. 54; *Mandeville v. Avery*, (Supreme Ct.) 3 N. Y. Supp. 745; *MacNaughton v. Os-good*, 114 N. Y. 574, citing *Acker v. Leland*, 109 N. Y. 5; *Carroll v. Deimel*, 95 N. Y. 252.

3. *California.* — Code Civ. Pro., §§ 632, 633; *Warring v. Freear*, 64 Cal. 54.

New York. — Code of Procedure, § 267; Code Civ. Pro., § 1022; *Vermilyea v. Palmer*, 52 N. Y. 474; *Mandeville v. Avery*, (Supreme Ct.) 3 N. Y. Supp. 745; *Lowenthal v. Lowenthal*, 92 Hun (N. Y.) 385, holding that an order directing judgment in favor of the plaintiff in divorce proceedings, for the relief demanded in the complaint, is not the decision contemplated by the code. These principles are applicable not only when the issues are discretionary and the verdict advisory, but also where the issues are of right and the verdict conclusive. *Vermilyea v. Palmer*, 52 N. Y. 474; *Lowenthal v. Lowenthal*, 92 Hun (N. Y.) 385.

In *Indiana* it is not necessary for the court to state its findings upon the issues except generally, for the plaintiff or defendant, unless one of the parties requests the court to state the facts in writing and the conclusions of law thereon. *Pence v. Garrison*, 93 Ind. 345.

It is too late, after a general finding has been announced by the court, for a party to request it to make a special finding. *Brundage v. Deschler*, 131 Ind. 174.

In *Sheets v. Bray*, 125 Ind. 35, an action for partition of land, the court, of its own motion, called a jury, to whom it submitted questions of fact for the information of the court. Upon return of the answers the court prepared what purported to be a special finding of the facts proven in the cause, and its conclusions of law thereon. It did not appear that the court made such

(3) *Filing and Exceptions.* — The decision is to be filed and the defeated party is at liberty to file exceptions to it.¹

3. General Effect of Verdict and Certificate of Judge — *a. VERDICT.* — In an Equity Case, where issues have, in the discretion of the court, been submitted to a jury, whether under the original chancery practice or under the codes, the verdict is for the enlightenment and information of the conscience of the court, and it is merely advisory to and in no way binding or conclusive on the court.²

special findings at the request of any of the parties to the suit. The Supreme Court considered, therefore, that they were not at liberty to treat it as a special finding, but must treat the case as one in which the court entered a general finding.

1. In California, until the decision provided for by the Code Civ. Pro., §§ 632, 633, has been made and filed, the case cannot be considered as tried unless the filing of such a decision has been waived. *Warring v. Freeear*, 64 Cal. 54.

In New York the Code Civ. Pro., § 1022, provides as stated in the text. *Mandeville v. Avery*, (Supreme Ct.) 3 N. Y. Supp. 745; *Lowenthal v. Lowenthal*, 92 Hun (N. Y.) 385.

In Wisconsin the court should file its findings on the whole case, and direct the entry of the appropriate judgment. *Stahl v. Gotzenberger*, 45 Wis. 121.

In Virginia, where the chancellor has set the verdict aside, if either party is dissatisfied with the order setting aside the verdict he should except to it, and have the facts proved on the trial or the evidence spread upon the record, and thus have the order reviewed. *Lavell v. Gold*, 25 Gratt. (Va.) 473.

2. Alabama. — *Marshall v. Croom*, 60 Ala. 121; *Mathews v. Forniss*, 91 Ala. 157.

California. — *Gray v. Feton*, 5 Cal. 448; *Haggin v. Raymond*, 67 Cal. 302; *Stockman v. Riverside Land, etc., Co.*, 64 Cal. 57; *Warring v. Freeear*, 64 Cal. 54; *Bates v. Gage*, 49 Cal. 126; *Sweetser v. Dobbins*, 65 Cal. 531; *Johnson v. Powers*, 65 Cal. 179; *Spottiswood v. Weir*, 66 Cal. 525; *Be'l v. Marsh*, 80 Cal. 411; *Wallace v. Maples*, 79 Cal. 434; *Clavey v. Lord*, 87 Cal. 413; *Richardson v. Eureka*, 110 Cal. 441. See *Duff v. Fisher*, 15 Cal. 330.

Colorado. — *Abbott v. Monti*, 3 Colo. 562; *McGan v. O'Neil*, 5 Colo. 58; *Hall v. Linn*, 8 Colo. 264; *Kirtley v. Marshall Silver Min. Co.*, 8 Colo. 279; *Gilpin v. Gilpin*, 12 Colo. 504; *Tabor v.*

Sullivan, 12 Colo. 136; *McDonald v. Thompson*, 16 Colo. 13.

Illinois. — *Garrett v. Stevenson*, 8 Ill. 279; *Farrin v. Cox*, 47 Ill. App. 273; *Sibert v. McAvoy*, 15 Ill. 106; *Milk v. Moore*, 39 Ill. 588; *Phillips v. Edsall*, 127 Ill. 537; *Russell v. Fanning*, 2 Ill. App. 632, affirmed in 94 Ill. 386; *Guild v. Hull*, 127 Ill. 523; *Kelly v. Kelly*, 126 Ill. 555.

Kansas. — *Moors v. Sanford*, 2 Kan. App. 243; *Missouri Valley Lumber Co. v. Reid*, 4 Kan. App. 4.

Missouri. — *Hickey v. Drake*, 47 Mo. 371; *Burt v. Rynex*, 48 Mo. 311; *Ham-bright v. Brockman*, 59 Mo. 52; *Gay v. Ihm*, 69 Mo. 586; *Snell v. Harrison*, 83 Mo. 651; *Bronson v. Wanzer*, 86 Mo. 408; *Bevin v. Powell*, 11 Mo. App. 224, affirmed in 83 Mo. 365; *Keithley v. Keithley*, 85 Mo. 217; *Robinson v. Dryden*, 118 Mo. 539; *Hulett v. Stockwell*, 34 Mo. App. 601; *Weeke v. Senden*, 54 Mo. 130. *Cochran v. Moss*, 10 Mo. 416, is overruled by these cases.

North Carolina. — *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27; *Goldsborough v. Turner*, 67 N. Car. 403.

Pennsylvania. — *Baker v. William-son*, 4 Pa. St. 456; *Scheetz's Appeal*, 35 Pa. St. 94; *Cake v. Cake*, 106 Pa. St. 472; *Reno v. Moss*, 120 Pa. St. 49, holding that in an equitable ejectment the verdict of the jury on issues submitted is advisory.

South Carolina. — *Flinn v. Brown*, 6 S. Car. 209; *Gadsden v. Whaley*, 9 S. Car. 147; *Adickes v. Lowry*, 12 S. Car. 97; *Peake v. Peake*, 17 S. Car. 425; *Ivy v. Clawson*, 14 S. Car. 272; *Frank v. Humphreys*, 24 S. Car. 326.

United States. — *Goodyear v. Providence Rubber Co.*, 2 Cliff. (U. S.) 351; *Van Hook v. Pendleton*, 1 Blatchf. (U. S.) 187; *U. S. v. Samperyac*, Hempst. (U. S.) 118; *Basey v. Gallagher*, 20 Wall. (U. S.) 670; *Prout v. Roby*, 15 Wall. (U. S.) 471; *Garsed v. Beall*, 92 U. S. 684; *Quinby v. Conlan*, 104 U. S. 420; *Watt v. Starke*, 101 U. S. 247;

That this is the well-settled rule in the vast majority of equity cases, there can be no doubt from an examination of the numerous decisions cited in the notes, and the few instances in which this doctrine does not obtain constitute exceptions to the general

Kohn *v.* McNulta, 147 U. S. 238; Clyde *v.* Richmond, etc., R. Co., 72 Fed. Rep. 121.

In *Indiana*, under Rev. Stat. (1881), § 409, providing for the submission of issues in cases which were of exclusive equitable jurisdiction prior to 1852, the verdict of the jury is simply advisory, which the court may or may not use in rendering the final decree. *Lake Erie, etc., R. Co. v. Griffin*, 92 Ind. 487; *Evans v. Nealis*, 87 Ind. 262; *Pence v. Garrison*, 93 Ind. 345; *Ikerd v. Beavers*, 106 Ind. 483; *Garard v. Garard*, 135 Ind. 15; *Ariden v. Ariden*, 129 Ind. 288; *Bingham v. Stage*, 123 Ind. 281; *Brundage v. Deschler*, 131 Ind. 174; *Whitlock v. Consumers' Gas Trust Co.*, 127 Ind. 62; *Koons v. Blanton*, 129 Ind. 392; *Platter v. Elkhart County*, 103 Ind. 360; *Jennings v. Durham*, 101 Ind. 392; *Sheets v. Bray*, 125 Ind. 36; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; *Hendricks v. Frank*, 86 Ind. 278; *Carmichael v. Adams*, 91 Ind. 526; *Israel v. Jackson*, 93 Ind. 546.

Where, in a case of equitable jurisdiction, the trial is not proceeded with under the provision above mentioned, but the case is tried by jury as an ordinary action at law, the verdict will be treated as binding and conclusive in all respects as in a law case; and especially will this be so if an unsuccessful effort was made to secure a trial as in chancery. *Summers v. Great-house*, 87 Ind. 205; *Dawson v. Shirk*, 102 Ind. 188.

In *Kentucky*, according to the earlier cases, the verdict on issues was held not to bind the chancellor. *Whittemore v. Stout*, 3 Dana (Ky.) 427; *Moore v. Payne*, 7 Dana (Ky.) 380. A later case held, however, that where a verdict was found and a motion for new trial overruled, the court could not, at a subsequent trial, disregard the verdict and find the issue the other way, since the same weight should be given the verdict of a jury on an issue in equity as in an action at law. *Moore v. Shepherd*, 2 Duv. (Ky.) 132. But still later, the court said that the jury having been impaneled only to help the chancellor to a right conclusion, their finding was not entitled to the

more conclusive effect of the ordinary verdict. *Hendrix v. Money*, 1 Bush (Ky.) 309.

In *Massachusetts* it has been held in two cases that the verdict of the jury upon the issue is conclusive, unless set aside for good cause shown. In the first case cited below the court considered the jury trial upon the issues a constitutional right. In the second the submission was deemed discretionary, but it was said that the court, in the exercise of its discretion, should not order such a trial unless it was satisfied that the issue could be better tried by a jury. *Franklin v. Greene*, 2 Allen (Mass.) 519; *Ross v. New England Mut. Ins. Co.*, 120 Mass. 117.

In *Michigan* the verdict on an issue upon the legality of a marriage, under How. Annot. Stat., § 6622, is advisory. *Maier v. Lillibridge*, (Mich. 1897) 70 N. W. Rep. 1032.

In *Montana* the statute regulating proceedings in civil cases, and declaring that an issue of fact shall be tried by a jury unless a jury trial be waived, does not apply to equity cases, and does not require the court in such a case to regard the findings of the jury as conclusive, though no application to vacate the findings be made by the parties, if in its judgment they are not supported by the evidence. *Mantle v. Noyes*, 5 Mont. 287; *Black v. Black*, 5 Mont. 15; *Beck v. Beck*, 6 Mont. 318; *Basey v. Gallagher*, 20 Wall. (U. S.) 680, a case governed by the Montana law.

In *New York* neither the Code of Procedure nor the Code of Civil Procedure made any change in the long-established rule that the office of a verdict on issues submitted in an equity case is advisory, and simply to inform the conscience of the court, and that the court on the final hearing is not precluded from rejecting it, and finding the fact for itself. *Learned v. Tillotson*, 48 N. Y. Super. Ct. 239, *affirming* 97 N. Y. 1; *Vermilyea v. Palmer*, 52 N. Y. 471; *Wallace v. American Linen Thread Co.*, 16 Hun (N. Y.) 404; *Madison University v. White*, 25 Hun (N. Y.) 490; *Carroll v. Deimel*, 95 N. Y. 252; *Acker v. Leland*, 109 N. Y. 11; *American Primitive Methodist Soc. v.*

rule. It must be observed that this and the following sections deal for the most part with the effect of the verdict, where the submission of the issues is discretionary with the court, reserving for a subsequent section its effect where the submission is of right in the parties.¹

In Probate and Orphans' Courts. — Whether the verdict on issues sent from a Probate, Orphans', or like court is advisory or conclusive, depends on the various statutory provisions of the several states and the nature of the proceeding.²

Brooklyn El. R. Co., 46 Hun (N. Y.) 530; Hatch v. Peugnet, 64 Barb. (N. Y.) 189; Jones v. Stewart, 7 Civ. Pro. Rep. (N. Y. Supreme Ct.) 164; Mandeville v. Avery, (Supreme Ct.) 3 N. Y. Supp. 745; Brown v. Clifford, 7 Lans. (N. Y.) 46.

The case of Griffith v. Griffith, 9 Paige (N. Y.) 315, holding that the verdict of the jury, upon issues framed under the Act of 1838, was conclusive on the court unless a new trial of the issues was granted by the court of law in which such issues were tried, was decided under the special provisions of that act, afterwards repealed, and does not now express the law.

In Tennessee when the chancellor, on his own motion, calls a jury and submits a question of fact to them, the rule that their verdict is only advisory still remains in force, and he may disregard it and find the facts for himself. This does not apply to issues made up and submitted to a jury upon application of either party, as provided for in the code. London v. London, 1 Humph. (Tenn.) 1; Orgain v. Ramsey, 3 Humph. (Tenn.) 580; Timmons v. Garrison, 4 Humph. (Tenn.) 148; Lowe v. Traynor, 6 Coldw. (Tenn.) 633.

In West Virginia the discretion to submit issues is somewhat limited, and it is held that when an issue is properly directed and regularly tried and a verdict is rendered by the jury, unless there is some sufficient ground for setting it aside it must be considered conclusive of the facts submitted; the chancellor's conscience must be satisfied by such a verdict, and he must render a decree in accordance therewith. Setzer v. Beale, 19 W. Va. 289; Nease v. Capehart, 15 W. Va. 299; Hickman v. Baltimore, etc., R. Co., 30 W. Va. 296.

In Wisconsin the verdict is advisory. Gill v. Rice, 13 Wis. 549; Law v. Grant, 37 Wis. 548. The Wisconsin Act of 1867, c. 79, prohibiting courts from trying an

action to foreclose a mortgage without the intervention of a jury, where there are issues of fact, except upon the written stipulation of the parties, and giving the verdict the same force and effect as in actions at common law, was declared unconstitutional. Callanan v. Judd, 23 Wis. 343. Wisconsin Rev. Stat., § 3323, gives either party to an action to foreclose a mechanic's lien the right to demand a jury. But the court is not thereby prevented from submitting issues on its own motion and for its information, and when it does this the verdict is still advisory. Huse v. Washburn, 59 Wis. 414.

1. For the effect of the verdict where issues are of right, see *infra*, XIII. 6.
l. Where Issues Are of Right with the Parties.

2. **Pennsylvania.** — In Wills's Appeal, 22 Pa. St. 325, it was held that where it becomes necessary to settle a doubtful fact in a controversy involving a guardian's account, in the Orphans' Court, and an issue is submitted, the verdict ought to be treated as conclusive unless produced by the illegal admission or improper rejection of evidence. But the verdict is not entitled to rule the decree if the findings were on immaterial facts; if the jury was influenced by erroneous rulings on evidence, or by misdirections on the law; or if the verdict was palpably founded on insufficient evidence. If the verdict is open to these objections it should be disregarded.

Under the Act of March 29, 1832, the verdict on issues directed is held to be no more binding on the Orphans' Court than is an auditor's report. Whether the finding is by the verdict of a jury or by the report of an auditor, the court is bound to revise it, and is responsible for its rectitude. Thompson's Appeal, 103 Pa. St. 606.

Maryland. — Under the Maryland Code, § 250, art. 93, the findings on the issues are conclusive upon the Or-

In Actions at Law. — Where special issues are submitted to a jury, in an action at law, a conclusive effect will generally attach to the verdict.¹

b. CERTIFICATE OF JUDGE. — The certificate of the judge before whom the issue out of chancery was tried, where the trial was had before another court than the one ordering it, expressing his satisfaction or dissatisfaction with the result, is advisory and not conclusive, and though it is entitled to great weight and will ordinarily be followed, yet the matter is within the sound discretion of the court, which will be governed by the certificate or not as it deems best.²

4. General Power of Court over Verdict and Findings. — Since, therefore, the verdict in an equity case is merely advisory, the court may approve the findings in whole or in part, may qualify or alter any of them, may disregard them wholly or partly and find the facts itself, or it may set aside the verdict and grant a new trial.³

5. Adopting Verdict — In General. — Though the verdict of the jury is not binding on the court, yet it is entitled to much weight and respect and will ordinarily be adopted as the basis of its final decision, if the court is satisfied that at the trial justice has, upon the whole, been substantially done.⁴

phans' Court, which has no discretion, but must enter judgment in conformity with the findings of the jury. *Sumwalt v. Sumwalt*, 52 Md. 338.

For Further References see *supra*, VII. *From Probate Courts and Other Courts of Like Nature.*

1. In an action at law, where the court submits special issues to the jury, the defenses being legal defenses, it was held that the verdict cannot be deemed merely advisory to the court, as is the case in equity, and the court cannot enter the verdict contrary to the will of the jury, or render a judgment contrary to the verdict. *Montgomery v. Sayre*, 91 Cal. 206.

For the effect of a verdict on legal issues involved in an equitable action, see *infra*, XIII. 6. *u. General Power of Court — Decision Contrary to Verdict.*

2. *Bassett v. Johnson*, 2 N. J. Eq. 154; *Prudden v. Lindsley*, 31 N. J. Eq. 436; *Dunn v. Dunn*, 11 Mich. 284. See *infra*, XIV. 8. *u. In Admission or Rejection of Evidence.*

3. *Alabama.* — *Marshall v. Croom*, 60 Ala. 121.

California. — *Sweetser v. Dobbins*, 65 Cal. 531.

Illinois. — *Sibert v. McAvoy*, 15 Ill. 106; *Milk v. Moore*, 39 Ill. 588; *Guild v. Hull*, 127 Ill. 523; *Russell v. Fan-*

ning, 2 Ill. App. 632, *affirmed* in 94 Ill. 386; *Kelly v. Kelly*, 126 Ill. 555.

Indiana. — *Bingham v. Stage*, 123 Ind. 281; *Platter v. Elkhart County*, 103 Ind. 360; *Lake Erie, etc., R. Co. v. Griffin*, 92 Ind. 487; *Pence v. Garrison*, 93 Ind. 345; *Black v. Shreve*, 13 N. J. Eq. 455.

New York. — *Randall v. Randall*, 114 N. Y. 499, *referring* to *Lansing v. Russell*, 2 N. Y. 563; *Colie v. Tift*, 47 N. Y. 119; *Clarke v. Brooks*, 1 Abb. App. Dec. (N. Y.) 355.

See next section and XIII. 6. *Setting Aside or Disregarding Verdict*, and XIV. *New Trial.*

4. *Collins v. Hare*, 1 Dow N. S. 139, 2 Bligh N. S. 106; *Ringrose v. Todd*, 12 Price 650; *Waters v. Waters*, 2 De G. & Sm. 591; *Crabb v. Larkin*, 9 Bush (Ky.) 163. See also *infra*, XIII. 6. *Setting Aside or Disregarding Verdict*, and XIV. *New Trial.*

The Verdict Will Not Be Lightly Disturbed. — *Jackson v. Spivey*, 63 N. Car. 261.

It Is Entitled to Great Consideration, and will be sustained if not contrary to the directions of the court. *Hoffman v. Smith*, 1 Md. 475.

It Should Be Respected as the Opinion of Twelve Men, intelligent and impartial, upon doubtful facts which they were

Adoption Equivalent to Finding by Court. — If the verdict is adopted by the court it becomes equivalent to a finding by the court.¹

6. Setting Aside or Disregarding Verdict — *a.* **GENERAL POWER OF COURT — DECISION CONTRARY TO VERDICT.** — As before observed, although the court may adopt the verdict on the issues, yet it is equally within the court's power to disregard it altogether and to render such judgment as the evidence and facts warrant, though it be directly contrary to the verdict.²

peculiarly qualified to determine, and were therefore summoned to determine. *Lee v. Beatty*, 8 Dana (Ky.) 204.

Verdict Coupled with Immaterial Matter. — Where a party in chancery is entitled to damages the amount of which does not appear, as where work or materials are put upon a building contrary to contract, it may be referred to a jury to assess the damages, and their verdict upon the single question will be entitled to much influence, but if the question is coupled with other matters, immaterial to the true issue or calculated to mislead the jury, their finding will be entitled to no weight whatever. *Whittemore v. Stout*, 3 Dana (Ky.) 427.

Decree on Verdict Where No Issue Necessary. — A decree in an equity case is not vitiated because based on the verdict of a jury, even though it might have been made without a jury. *Pfeiffer v. Riehn*, 13 Cal. 644.

Verdict Not on Precise Issue Directed. — Where an issue is directed to determine a question of fact, a verdict which puts an end to the question involved will support the subsequent decree, though it is not on the precise issue directed by the court. *Farrell v. Crosbie*, Wall. Lyn. 154.

1. *Warring v. Freear*, 64 Cal. 54; *Clink v. Thurston*, 47 Cal. 22; *Bates v. Gage*, 49 Cal. 126; *Sweetser v. Dobbins*, 65 Cal. 531.

Necessity of Word "Adopt." — In adopting the verdict of the jury on issues submitted to them in an equity case, it is not necessary that the word "adopt" be used in order to show that the verdict was adopted. Where it clearly appears from the record that the verdict was adopted, this is sufficient. *Goldman v. Rogers*, 85 Cal. 574. See *supra*, XIII. 2. *Final Decision by Court.*

2. *California.* — *Gray v. Eaton*, 5 Cal. 448; *Johnson v. Powers*, 65 Cal. 179; *Clavey v. Lord*, 87 Cal. 413;

Goode v. Smith, 13 Cal. 81; *Shirley v. Shirley*, 92 Cal. 44.

Colorado. — *McDonald v. Thompson*, 16 Colo. 13.

Illinois. — *Phillips v. Edsall*, 127 Ill. 537; *Fanning v. Russell*, 94 Ill. 386, *affirming* 2 Ill. App. 632; *Meeker v. Meeker*, 75 Ill. 260; *Waddams v. Humphrey*, 22 Ill. 661.

Indiana. — *Evans v. Nealis*, 87 Ind. 262; *Pence v. Garrison*, 93 Ind. 353; *Brundage v. Deschler*, 131 Ind. 174; *Jennings v. Durham*, 101 Ind. 392; *Koons v. Blanton*, 129 Ind. 392; *Reddick v. Keesling*, 129 Ind. 136; *Hornbrook v. Powell*, 146 Ind. 39.

Kansas. — *Missouri Valley Lumber Co. v. Reid*, 4 Kan. App. 4; *Moors v. Sanford*, 2 Kan. App. 243.

Kentucky. — *Moore v. Payne*, 7 Dana (Ky.) 380; *Lee v. Beatty*, 8 Dana (Ky.) 207. See *Moore v. Shepherd*, 2 Duv. (Ky.) 132.

Michigan. — *Dunn v. Dunn*, 11 Mich. 284.

Mississippi. — *Pittman v. Lamb*, 53 Miss. 596.

Missouri. — *Weeke v. Senden*, 54 Mo. 131; *Gay v. Ihm*, 69 Mo. 586; *Hess v. Miles*, 70 Mo. 203; *Snell v. Harrison*, 83 Mo. 651; *Keithley v. Keithley*, 85 Mo. 217; *Bronson v. Wanzer*, 86 Mo. 408. These cases virtually *overrule* *Cochran v. Moss*, 10 Mo. 416; *Hall v. Mulvanphy Planing Mill Co.*, 16 Mo. App. 454. See also *Bevin v. Powell*, 11 Mo. App. 224.

Montana. — *Mantle v. Noyes*, 5 Mont. 287; *Black v. Black*, 5 Mont. 15; *Beck v. Beck*, 6 Mont. 318; *Arnold v. Sinclair*, 12 Mont. 248.

New York. — *Learned v. Tillotson*, 48 N. Y. Super. Ct. 239, *affirmed* in 97 N. Y. 1; *Smith v. Chasseaud*, 1 N. Y. Wkly. Dig. 117; *Schneider v. Quosbarth*, 19 N. Y. Wkly. Dig. 527, in full, N. Y. Daily Reg., Sept. 13, 1884; *Acker v. Leland*, 109 N. Y. 11; *Wallace v. American Linen Thread Co.*, 16 Hun (N. Y.) 404; *American Primitive Methodist Soc. v. Brooklyn El. R. Co.*, 46 Hun (N. Y.) 530;

Particular Cases. — Thus in such equity causes as interpleader and intervention, divorces, injunctions, suits on mortgages, and the like, or where, though the cause is legal, equitable issues are involved and the court in its discretion has submitted issues to a jury, the verdict is advisory and may be set aside or disregarded and the facts determined by the court.¹

Hatch v. Peugnet, 64 Barb. (N. Y.) 189; *Hegeman v. Cantrell*, 40 N. Y. Super. Ct. 386; *Mandeville v. Avery*, (Supreme Ct.) 3 N. Y. Supp. 745; *Carroll v. Deimel*, 95 N. Y. 252; *Vermilyea v. Palmer*, 52 N. Y. 474.

North Carolina. — *Goldsborough v. Turner*, 67 N. Car. 403.

Pennsylvania. — *Cake v. Cake*, 106 Pa. St. 472; *Scheetz's Appeal*, 35 Pa. St. 94.

South Carolina. — *Flinn v. Brown*, 6 S. Car. 209.

Tennessee. — *Lowe v. Traynor*, 6 Coldw. (Tenn.) 633; *London v. London*, 1 Humph. (Tenn.) 1.

Virginia. — *Reed v. Axtell*, 84 Va. 231.

Wisconsin. — *Taylor v. Collins*, 51 Wis. 123.

United States. — *U. S. v. Samperyac*, Hempst. (U. S.) 118; *Goodyear v. Providence Rubber Co.*, 2 Cliff. (U. S.) 351; *Van Hook v. Pendleton*, 1 Blatchf. (U. S.) 187; *Clyde v. Richmond*, etc., R. Co., 72 Fed. Rep. 121; *Garsed v. Beall*, 92 U. S. 684; *Prout v. Roby*, 15 Wall. (U. S.) 471.

See also the two preceding sections, and *supra*, XIII. 3. *General Effect of Verdict and Certificate of Judge.*

1. Interpleader and Intervention. — In *Indiana* interpleader is a case of exclusive equitable jurisdiction, in view of Rev. Stat. (1881), § 409, and the verdict of a jury upon questions of fact may be disregarded by the court and a decree may be made according to its own judgment. *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515.

So in *New York*, where, in an action at law, a third party claiming to own the cause of action has been brought in and substituted as a defendant, and the original defendant has been discharged upon payment into court of the amount of the demand, in pursuance of the provision of Code Civ. Pro., § 820, the action thereafter becomes an equitable one, triable by the court, and neither party has a right to trial by jury. Where, therefore, in such an action, the trial judge impaneled a jury and submitted to them a single

question of fact, but disregarded their finding and found the fact to the contrary, it was held that judgment entered pursuant to the finding and conclusions of the court was regular. *Clark v. Mosher*, 107 N. Y. 118, 13 Civ. Pro. Rep. (N. Y.) 215, reversing (Supreme Ct.) 5 N. Y. St. Rep. 84.

Upon an intervention in a railway foreclosure proceeding for the recovery of damages against the receiver of the road for personal injury suffered by an employee, the verdict on an issue submitted as to the amount of damages, if there was any liability, is merely advisory, and the court may set it aside and dismiss the intervening petition. *Kohn v. McNulta*, 147 U. S. 238.

Divorce Cases. — In *Montana*, under Rev. Stat., § 508, divorce cases are of chancery jurisdiction; the decree must proceed from the chancellor, and verdicts or special findings may be approved or disregarded, as the conscience of the chancellor may demand. *Beck v. Beck*, 6 Mont. 318. So where issues have been referred to a jury upon the question of alimony and custody of children, the chancellor is not bound by the findings, but may set them aside and make other findings, and decree accordingly. *Black v. Black*, 5 Mont. 15.

In *Colorado*, under the general statutes, where a divorce case is tried by issues framed for a jury, one party charging upon the other the commission of a matrimonial offense which the other party denies, the verdict of the jury is entitled to great weight, notwithstanding the statutory provision that like process, practice, and proceedings shall be had in such cases as are usual to other cases in chancery; but to be binding upon the court, such verdict must be sustained by evidence and instructions free from substantial error. *Gilpin v. Gilpin*, 12 Colo. 504.

See also *infra*, XIV. 15. *Where Issues of Right, and Verdict Conclusive.*

Suit for Injunction. — An injunction proceeding is one of exclusive equitable jurisdiction, and the court is not

b. WITH OR WITHOUT NEW TRIAL. — In disregarding or setting aside the verdict, the court may order a new trial and resubmit the issue,¹ but it is not necessary to do this, and the final determination may be made without either formally setting aside the verdict or granting a new trial.²

c. PROCEEDINGS AND EVIDENCE NOT REPORTED. — Where there is no report of the testimony submitted to the jury, nor of the questions of law raised on the trial, nor any report of the case

bound by the finding of the jury. *Whitlock v. Consumers' Gas Trust Co.*, 127 Ind. 62; *Platter v. Elkhart County*, 103 Ind. 360. And where, in such a suit, an issue is framed and submitted to a jury as to the amount of damages, the verdict will be set aside or disregarded if deemed unwarranted, and the amount of compensation determined by the court in its discretion. *Carpenter v. Easton*, etc., R. Co., 26 N. J. Eq. 168.

Mortgage — Foreclosure. — The verdict of a jury on issues submitted in suits to foreclose mortgages is advisory and may be set aside or disregarded by the court in rendering its final decree. *Johnson v. Powers*, 65 Cal. 179; *Rariden v. Rariden*, 129 Ind. 288; *Farrin v. Cox*, 47 Ill. App. 273; *Moors v. Sanford*, 2 Kan. App. 243; *Carroll v. Deimel*, 95 N. Y. 252; *Gleason v. Hamilton*, 64 Hun (N. Y.) 96; *Mandeville v. Avery*, (Supreme Ct.) 3 N. Y. Supp. 745; *Truman v. McCollum*, 20 Wis. 360; *Callanan v. Judd*, 23 Wis. 343.

A Petition to Enforce a Mechanics' Lien is, in *Illinois*, governed by the same rules as a chancery case, and is in effect a chancery proceeding, and the object of a verdict of the jury is to advise the conscience of the chancellor. He has the same power to change or reject the finding of the jury in the case as he has where an issue of fact is submitted to a jury in a chancery case and verdict returned. *Sharkey v. Miller*, 69 Ill. 560.

In *Montana* this proceeding is equitable in its character, and the court may set the verdict aside and render a contrary judgment. *O'Rourke v. Butte Lodge No. 14*, (Mont. 1897) 48 Pac. Rep. 1106.

Equitable and Legal Issues in Same Action—*Equitable Issues in Legal Action.* — Where, in a legal action, there are equitable issues which, in the discretion of the court, have been submitted to a jury, the verdict on these equitable

issues is merely advisory, and may be disregarded or set aside by the court in arriving at its final determination. *Haggin v. Raymond*, 67 Cal. 302; *Wallace v. Maples*, 79 Cal. 434; *Tabor v. Sullivan*, 12 Colo. 136; *Adiekes v. Lowry*, 12 S. Car. 97.

Legal Issues in Equitable Action. — But the foregoing principle does not apply where there is a distinct legal issue in an equitable action. In that case a jury trial of the legal issues is a matter of right, the verdict is conclusive and not merely advisory, and the court cannot disregard or set it aside and make findings contrary thereto without a motion for and the granting of a new trial. *Hughes v. Dunlap*, 91 Cal. 385; *Hill v. Phillips*, 87 Ky. 169.

1. See *infra*, XIV. *New Trial*.

2. *California.* — *Wingate v. Ferris*, 50 Cal. 105, where the verdict was set aside by the District Court and a new trial granted, but the Supreme Court, considering a new trial unnecessary, reversed the order on that point, and affirmed it as to the setting aside.

Illinois. — *Garrett v. Stevenson*, 8 Ill. 279; *Meeker v. Meeker*, 75 Ill. 260; *Russell v. Fanning*, 2 Ill. App. 632, affirmed in 94 Ill. 386; *Guild v. Hull*, 127 Ill. 523.

Missouri. — *Snell v. Harrison*, 83 Mo. 651, *disapproving* *Cochran v. Moss*, 10 Mo. 416.

Pennsylvania. — *Baker v. Williamson*, 4 Pa. St. 456.

United States. — *Idaho*, etc., *Land Imp. Co. v. Bradbury*, 132 U. S. 509.

In an Action at Law, where special issues have been submitted to the jury, and the court, upon hearing the evidence, makes findings upon all of the issues contrary to the verdict, this is in effect a setting aside and vacating of the verdict, and it becomes the duty of the court to order a new trial by jury, and it has no power to determine the cause without so doing. *Montgomery v. Sayre*, 91 Cal. 206.

by the presiding judge, the court may properly refuse to receive the verdict and may find the facts in a contrary manner.¹

d. COURT DISSATISFIED WITH VERDICT GENERALLY. — Where the court is dissatisfied with the verdict, it is not only at liberty to set it aside or disregard it, but it is its plain duty to do so and to proceed with the cause in such manner as to accomplish complete justice between the parties.²

e. VERDICT AGAINST EVIDENCE OR WEIGHT THEREOF. — Where the chancellor considers that the verdict is unsupported by the evidence, he may disregard it and render judgment according to his own view thereof.³ And if the verdict is clearly against the weight of evidence, the court should and will set aside or disregard it, either granting a new trial or rendering a decree on the evidence heard on the trial of the issue.⁴

1. *Small v. Small*, 16 S. Car. 70. But it is held that when no certified exceptions are brought before the court, and the record does not show what evidence was adduced on the trial before the jury, the appellate court cannot say that the plaintiff was entitled to a decree *non obstante veredicto*, because the finding of the jury is not sustained by the depositions on file in the cause. *Adams v. Munter*, 74 Ala. 339.

2. *Abbott v. Monti*, 3 Colo. 562; *Milk v. Moore*, 39 Ill. 588.

Finding Clearly Wrong. — Where the chancellor believes the finding is clearly wrong, it is his duty to disregard it and have the issue retried, or proceed with the trial of the cause and find the issue himself. *Meeker v. Meeker*, 75 Ill. 260.

Conscience Not Satisfied. — If, on reflection and due consideration of the verdict and entire evidence in the cause, the chancellor is of the opinion that the verdict is one which in conscience ought not to be adopted, he is not concluded by it, but it becomes his plain duty to disregard it. *Snell v. Harrison*, 83 Mo. 651. The chancellor will examine the notes of evidence by the judge who tried the cause, listen to explanation of counsel, and at last, if his conscience is not satisfied, will decide the cause according to his own conviction, disregarding the verdict of the jury. *Baker v. Williamson*, 4 Pa. St. 469.

Verdict Contrary to Rules of Chancery. — The chancellor has the right, and it is even his duty, to disregard the verdict and find the facts contrary thereto, if the same was not authorized by the rules governing courts of chancery.

Lowe v. Traynor, 6 Coldw. (Tenn.) 633.

Showing Cause for Setting Aside. — It has been decided that where in a chancery case the verdict is supported by the proofs, it is the duty of the judge setting aside such verdict to show of record the cause therefor, and if this be not done, the proceeding will be held to be erroneous. *Owens v. Owens*, Hard. (Ky.) 162.

3. *Caldwell v. Brown*, 56 Kan. 566; *Moors v. Sanford*, 2 Kan. App. 243; *Upton v. Hugos*, 7 S. Dak. 476; *Lowe v. Traynor*, 6 Coldw. (Tenn.) 633.

In Montana the provision in the statutes of 1867 regulating proceedings in civil cases, declaring that "an issue of fact shall be tried by a jury, unless a jury trial is waived," did not require the court, in an equity case, to regard the findings of a jury called in a case as conclusive, though no application to vacate the findings were made by the parties, if, in its judgment, they were not supported by the evidence. *Basey v. Gallagher*, 20 Wall. (U. S.) 670, controlled by the Montana law.

4. *London v. London*, 1 Humph. (Tenn.) 1; *Smith v. Newton*, 84 Ill. 14.

The verdict may be disregarded and issue found by the chancellor, as, in his judgment, the weight of evidence may justify, although the verdict is not so clearly against the weight of evidence as would be cause for new trial in an action at law. So the court in an equity suit in which the issue of sanity is sent to a jury may set aside the verdict, although it is not so manifestly contrary to the evidence as to raise the presumption of fraud or undue prejudice where the presumption,

f. VERDICT UNCERTAIN. — If the court is satisfied upon the facts in the case, a verdict need not be set aside for uncertainty, but the court may act independently of it.¹

g. GENERAL INSTEAD OF SPECIAL VERDICT. — Where special issues in an equity case have been submitted to a jury, a general verdict is not determinative of the issues involved, and the court should not receive it or render judgment thereon.² Such a general verdict is to be set aside or disregarded, and the facts must be found by the court.³

h. DISAGREEMENT OF JURY. — Where there are several issues of fact in an equity case the jury cannot find one issue and disagree as to the other; the finding must be altogether or not at all.

before inquest found, is in favor of sanity. *Stevens v. Shannahan*, 160 Ill. 330.

Verdict on Conflicting Evidence. — It has been held that where the evidence is irreconcilably conflicting, the court will not interfere with the finding unless it is seen to be clearly wrong. *Smith v. Newton*, 84 Ill. 14. See also *Steptoe v. Flood*, 31 Gratt. (Va.) 323.

But in *Missouri* it is said that if the evidence is conflicting, the verdict should not be taken as the basis of the decree. *Luce v. Barnum*, 19 Mo. App. 359.

1. *Humphreys v. Blevins*, 1 Overt. (Tenn.) 178.

2. *McLaughlin v. Del Re*, 64 Cal. 472; *Learned v. Castle*, 67 Cal. 41, holding that if a judgment be rendered on such a verdict it must be reversed for a failure of the court to find upon the issues. To the same effect see *Hulley v. Chedic*, 22 Nev. 127. See also *supra*, XI. 18. *Verdict*.

General Verdict Where Court Makes Separate Findings. — Where the issues are submitted to the court and a jury is called to inform the court as to the facts merely, if without objection the court takes the advice of the jury by means of a general verdict, making its own finding and treating such verdict as advisory merely, it is held not reversible error. *Ikerd v. Beavers*, 106 Ind. 483 [*citing Farmers' Bank v. Butterfield*, 100 Ind. 229; *Evans v. Nealis*, 87 Ind. 262].

General Verdict by Consent. — Where special issues are submitted to a jury and they announce that they cannot agree upon them, but can agree upon a general verdict, and by consent of counsel on both sides the special issues are withdrawn and a general verdict is

received by the court, no error is committed. *Mitchell v. Hockett*, 25 Cal. 539.

Both General and Special Verdicts Returned. — The fact that in an equity case the jury are allowed to return a general verdict is harmless error, where they also return special findings for the same party which are accepted by the court, and on which judgment is rendered. *McCauley v. McKeig*, 8 Mont. 389.

Special Finding Immaterial. — Where a question for a special finding which, answered either way, would be immaterial to the issues in view of the evidence, was submitted to a jury and such question was not answered, there was no prejudicial error in rendering a judgment on a general verdict without previously requiring a finding on the question indicated. *Doane v. Smith Bros. Loan, etc., Co.*, (Neb. 1897) 70 N. W. Rep. 909, *affirming Towne v. Missouri Pac. R. Co.*, (Neb. 1897) 70 N. W. Rep. 402.

3. *Wingate v. Ferris*, 50 Cal. 105; *Brandt v. Wheaton*, 52 Cal. 430.

General Verdict on Issues Irregularly Framed. — Where the jury renders a general verdict upon issues which have been irregularly framed because some of them were upon matters not put in issue by the pleadings or evidence at the hearing, it is to be disregarded. *Dunn v. Dunn*, 11 Mich. 284.

Verdicts Both General and Special. — Where the jury has found upon the special issue submitted to them, and has also returned a general verdict, the court may set aside the general verdict and substitute its own findings of fact for the special finding of the jury. *Idaho, etc., Land Imp. Co. v. Bradbury*, 132 U. S. 509. See also *Warring v. Freear*, 64 Cal. 54.

The court will not receive the finding of a jury upon one issue and discharge it as to the other.¹ And where a jury impaneled to try an issue either in a law or in an equity court fails to agree thereon, the court may refuse to call another jury and may decide the case on the evidence already heard.²

i. **ISSUE IMPROPERLY DIRECTED.** — In some of the states, at least, if an issue out of chancery has been improperly directed, it is the duty of the court on the final hearing to disregard the findings of the jury and enter a decree on the merits, and if it does not do this, the error will be corrected by the appellate court.³

j. **TIME OF SETTING ASIDE, ETC.** — The time within which the court must act on the verdict, in disregarding or setting it aside, does not appear to be governed by any fixed rules.⁴

k. **REINSTATEMENT OF VERDICT SET ASIDE.** — Where the court has set aside the verdict on the issues submitted, another judge holding a subsequent term cannot set aside the order of the judge at the previous term and reinstate the verdict.⁵

l. **WHERE ISSUES ARE OF RIGHT WITH THE PARTIES.** — In some of the states, by statutory or constitutional provisions, the trial by jury of all or some of the issues in equity cases is not dependent on the discretion of the court, but is a matter of right in the parties, and in such cases the verdict is conclusive and of the same effect as a verdict in an action at law. Therefore, unless set aside and a new trial granted, it must stand as the determination of the facts, and the court cannot disregard it and find according to its own conclusions.⁶

1. *Berry v. Wallen*, 1 Overt. (Tenn.) 186.

2. *Keithley v. Keithley*, 85 Mo. 217; *Adams v. Soule*, 33 Vt. 538.

3. *Wise v. Lamb*, 9 Gratt. (Va.) 294; *McFarland v. Douglass*, 11 W. Va. 637; *Jarrett v. Jarrett*, 11 W. Va. 584; *Anderson v. Cranmer*, 11 W. Va. 562; *Vangilder v. Hoffman*, 22 W. Va. 1.

4. Thus the fact that no action was taken by the court on the verdict for three months after each party had moved for judgment on it was held no objection to the action of the court in then disregarding it and hearing additional evidence, it not appearing what was the cause of the delay, or that any objection thereto was urged by the appellants. *Clavey v. Lord*, 87 Cal. 413.

So where the court was dissatisfied with a verdict rendered on an issue awarded on the opening of a judgment, it was held within the court's power to set aside the verdict and a judgment thereon, though two years had elapsed from the rendition and en-

try thereof. *Wilson v. Wilson*, 142 Pa. St. 572.

5. *Laveil v. Gold*, 25 Gratt. (Va.) 473.

6. **Massachusetts.** — In *Franklin v. Greene*, 2 Allen (Mass.) 522, it appears that the court considered it a duty imposed by the constitution to allow the parties to submit to a jury all such material facts as were proper to be decided by it, and held that where the verdict was not set aside for good cause shown, it would be regarded as settling the facts in issue conclusively. In *Ross v. New England Mut. Ins. Co.*, 120 Mass. 117, though the court considered the submission of issues discretionary, it stated the effect of the verdict to be as above noticed.

New York. — *Where a Jury Trial Is a Matter of Right*, the court has no power, even in an equity case, when the issues have been tried in the exercise of that right, to disregard the verdict, as in the case of special issues on a question not triable by jury as of right. *Mellen v. Mellen*, 27 Abb. N.

XIV. NEW TRIAL — 1. In General. — As previously seen, the court, on setting aside or disregarding a verdict on discretionary issues, is not obliged to grant a new trial, but may, without doing

Cas. (N. Y. Supreme Ct.) 99; 21 Civ. Pro. Rep. (N. Y.) 301.

Action for Partition. — While partition is an equitable action, yet the statute in New York has given the absolute right to a trial thereof by jury, and the verdict of the jury cannot be disregarded. *Mellen v. Mellen*, 27 Abb. N. Cas. (N. Y. Supreme Ct.) 99, 21 Civ. Pro. Rep. (N. Y.) 301; *Jones v. Jones*, 120 N. Y. 589.

Determining Value of Property or Damages. — The Code Civ. Pro., § 970, providing for a trial by jury in a case where the party, as a matter of right, is entitled to an order stating specific questions of fact for trial by jury and providing that the findings of the jury upon each question so stated is conclusive in the action unless the verdict is set aside or a new trial is granted, was, by Laws of 1891, c. 208, amended by adding at the end thereof the following: "Where one or more questions arise on the pleadings as to the value of property, or as to the damages which a party may be entitled to recover, either party may apply, upon notice, at any time to the court for an order directing all such issues or questions to be distinctly and plainly stated for trial accordingly [by jury]." Under this provision the court, considering that the parties had a right to have the issues submitted to a jury, accordingly so submitted them, and no objection was made by either party. On the coming in of the verdict the court refused to abide by it, and, ignoring the verdict, rendered judgment in hostility to it. It was held on appeal that although the amendment above quoted did not apply to cases of a purely equitable nature, and hence that the order of the court submitting the issues was erroneous, yet since the court had decided that the defendant had a right to have these questions stated for trial by jury, and no objection had been made by the plaintiff, the verdict rendered was conclusive until set aside. *Danziger v. Metropolitan El. R. Co.*, 81 Hun (N. Y.) 5.

Tennessee — Early Chancery Practice. — Formerly, in Tennessee, the issues were submitted for the information of the chancellor, and if he was not satis-

fied with the verdict he might set it aside and proceed to decree as if no issues had been submitted to the jury. See *Humphreys v. Blevins*, 1 Overt. (Tenn.) 178; *Orgain v. Ramsey*, 3 Humph. (Tenn.) 581; *London v. London*, 1 Humph. (Tenn.) 1.

Issue of Right in Chancery Suits Under Statutes. — Under the legislation of 1846 and the provisions of the code, §§ 4465, 4469, either party to a suit in chancery may have a jury to try issues of fact in the case, the finding of the jury to have the same force and effect as on a trial at law. Under these enactments the verdict upon a material issue has all the weight of a verdict at law, errors in the proceeding must be corrected in the same mode, and the court cannot disregard the verdict and decree against it without setting it aside and granting a new trial. *James v. Brooks*, 6 Heisk. (Tenn.) 150; *Morris v. Swaney*, 7 Heisk. (Tenn.) 591; *Memphis First Nat. Bank v. Oldham*, 6 Lea (Tenn.) 718.

Verdict on Immaterial Issues. — But if the party applying for a jury trial fails to submit proper issues the verdict will necessarily be immaterial, and the verdict upon immaterial issues may be set aside and a decree pronounced as if no trial by jury had been had. *Gass v. Mason*, 4 Sneed (Tenn.) 508; *Ragsdale v. Gossett*, 2 Lea (Tenn.) 740; *Nelson v. Claybrooke*, 4 Lea (Tenn.) 687. See *Memphis First Nat. Bank v. Oldham*, 6 Lea (Tenn.) 720.

Submission on Chancellor's Own Motion. — And if the chancellor upon his own motion submits issues to a jury the effect of the verdict is advisory, as it was prior to the code, and may be disregarded. *Lowe v. Traynor*, 6 Coldw. (Tenn.) 633. See *supra*, XIII. 3. a. *Verdict.*

Virginia — Issue to Determine Usury on Bill Not Requiring Discovery. — Code of Virginia of 1860, c. 141, § 10, provides that "upon a bill requiring no discovery of the defendant, but praying an injunction to prevent the sale of property conveyed to secure the repayment of a sum of money or other thing borrowed at usurious interest, the court shall cause an issue to be made and tried at its bar by a jury, whether or no

so, proceed to a final determination of the case. It may, however, and often does order the issues to be tried anew, where it sees fit.¹

the transaction be usurious," etc. Such an issue is not a mere incident to the suit as an ordinary issue out of chancery, but is the sole object of the suit. It is not to inform the conscience of the court, but the court is bound to decree according to the verdict, unless for good cause a new trial be granted. It is to be tried in the same manner and the verdict is to have the same effect as if the suit were an action at law to recover a debt alleged to be usurious. *Brockenbrough v. Spindle*, 17 Gratt. (Va.) 21.

South Carolina. — In *Peake v. Peake*, 17 S. Car. 421, the court seems not to accept the general doctrine where issues are of right. "If we assume, as contended here, that by the code and the rules of court parties have a right to demand an order for the trial of the issues of fact in an equity case before a jury, I do not find it anywhere laid down that the verdict is conclusive, or that the judge has no right to hear the whole case on the testimony and exercise an original jurisdiction on hearing the whole case, when it is his duty under the constitution and law to render judgment on the law and the facts. Unless the will of the legislature to restrict a circuit judge hearing an equity case as a chancellor to the testimony taken before a jury on the trial of issues at second hand, without seeing the witnesses and without any control over the process by which the testimony was introduced, was expressed in clear and unmistakable language, I would hesitate long before I would adopt such a construction of the code or rules of court. To hold that a circuit judge who hears an equity case after verdict on issues tried by a jury is bound to render a judgment as proposed by the motion now before me would seriously interfere with the jurisdiction conferred on him by the constitution. The motion must, therefore, be refused."

In *Montana* the general doctrine appears not to obtain, for the court said that even conceding without deciding that under section 250 of the Code Civ. Pro. the parties had a right to demand that the issue of the existence of a co-partnership be submitted to a jury, yet

nothing was found in that statute which indicated an intention to change or trench upon the equity functions of the court respecting the finding of the jury on an issue presented to it in an equitable action. *Arnold v. Sinclair*, 12 Mont. 248.

Divorce Cases. — In *Tennessee* a party has by statute a right to have the issue of adultery in a divorce case tried by a jury, and it is not competent for the chancellor to disregard the verdict and decide the cause upon his own conclusions of fact. *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343.

In *Wisconsin*, under Rev. Stat., § 2843, the issue of adultery in a divorce case must be tried by a jury unless waived. Hence a verdict on that issue cannot be disregarded and the fact found differently, but, if set aside, a new trial must be ordered. *Poertner v. Poertner*, 66 Wis. 644.

In *New York*, under Code Civ. Pro., § 1757, in an action for divorce for adultery, either party is entitled to have that issue tried by jury, and the case is therefore within Code Civ. Pro., § 970, providing that "the finding of the jury upon each issue or question so stated is conclusive in the action, unless the verdict is set aside or a new trial is granted." *Carpenter v. Carpenter*, (Supreme Ct.) 9 N. Y. Supp. 583. See *Whitney v. Whitney*, 76 Hun (N. Y.) 585; *Lowenthal v. Lowenthal*, 92 Hun (N. Y.) 385. This conclusive effect, however, does not necessarily apply to issues in the case other than adultery, and therefore where the court, through a misapprehension of the form of a question, directed the jury to find that the plaintiff had consented to the acts of adultery on the defendant's part, and there was no proof justifying such a finding, the court on the final hearing may disregard such finding and determine the fact according to the truth of the matter. *Lowenthal v. Lowenthal*, 92 Hun (N. Y.) 385.

1. *Bevin v. Powell*, 11 Mo. App. 224; *Weeke v. Senden*, 54 Mo. 130. For further illustrations of the practice see *supra*, XIII. 4. *General Power of Court Over Verdict and Findings*, and XIII. 6. *a. General Power of Court — Decision Contrary to Verdict.*

Discretion of Court. — The entire matter is within the discretion of the court, to be exercised upon sound principles.¹

2. Upon Application or Ex Mero Motu — **Upon Application.** — The new trial may be granted on application for that purpose, made by the party dissatisfied.²

Ex Mero Motu. — Or the court may direct it *ex mero motu*, without any application therefor.³

3. Application or Motion for — *a.* **PROPRIETY AND NECESSITY OF.** — If either party is dissatisfied with the findings of fact and desires a review or a new trial thereof, his proper course in most cases is to make application for a new trial to the court which ordered the issues.⁴ If this is not done the appellate court is

1. *Gray v. Eaton*, 5 Cal. 448; *Black v. Lamb*, 12 N. J. Eq. 108; *Black v. Shreve*, 13 N. J. Eq. 455; *Clayton v. Yarrington*, 33 Barb. (N. Y.) 145; *Gray v. Simon*, 2 Phila. (Pa.) 348; *Stace v. Mabbot*, 2 Ves. 552; *Locke v. Colman*, 2 Myl. & C. 42.

2. See *infra*, XIV. 3. *Application or Motion for.*

3. **New York** Supreme Court Rule 40, which provides that neither party, where a feigned issue has been tried, shall question the rulings at the final hearing, or subsequently, unless he has moved for a new trial, does not preclude the court, when the case is brought on for final hearing, from rejecting the verdict and ordering a new trial *ex mero motu*, or from deciding the question of fact for itself. *Brown v. Clifford*, 7 Lans. (N. Y.) 46.

4. *Barnett v. Montgomery, etc.*, R. Co., 51 Ala. 555; *Mathews v. Forniss*, 91 Ala. 157; *Duff v. Fisher*, 15 Cal. 379; *Gagliardo v. Hoberlin*, 18 Cal. 395; *Deputy v. Stapleford*, 19 Cal. 302; *Fanning v. Russell*, 94 Ill. 386, *reversing* 2 Ill. App. 632.

New York. — Under the old code, the remedy for error of the judge at circuit who tried the issues in admitting or rejecting evidence was by motion to the general term for a new trial upon a case. It seems that a bill of exceptions and appeal to the general term were not appropriate remedies. *Snell v. Loucks*, 12 Barb. (N. Y.) 385.

Maryland. — Upon the rendition of the verdict upon issues submitted to a jury by the Circuit Court of Baltimore City, in virtue of section 58, art. 29 of the code, the party against whom it is given, if he thinks it contrary to evidence, has the right to move for a new

trial, or proceed to take further testimony. *Barth v. Rosenfeld*, 36 Md. 605.

Motion for Decree in Conflict with Verdict. — The Code of *Colorado* requires that when a party objects to a finding of a jury on issues submitted to it in chancery cases, as being against the evidence, a motion for a new trial must be interposed; but it is held that a motion for a decree in conflict with the verdict is sufficient compliance with the code as to the motion for a new trial. *Hall v. Linn*, 8 Colo. 264.

Motion to Dismiss Bill for Defect of Evidence. — In *Missouri*, where, in a chancery cause, an issue is tried by a jury, or the court sitting as a jury, if the unsuccessful party wishes the verdict revised he must move for a new trial before the decree is pronounced. A motion to dismiss the bill for defect of evidence will not bring the question before the Supreme Court. *Woodson v. McClelland*, 4 Mo. 495.

Bills of Exceptions, as such, are not applicable in most cases where the verdict is advisory. The verdict, therefore, can only be set aside on a motion for a new trial, based not on mere errors of the judge, but upon a review of the whole case as submitted to the jury. *Barnett v. Montgomery, etc.*, R. Co., 51 Ala. 555; *Mathews v. Forniss*, 91 Ala. 157; *Barth v. Rosenfeld*, 36 Md. 604; *Snell v. Loucks*, 12 Barb. (N. Y.) 385; *Harrison v. Rowan*, 3 Wash. (U. S.) 580; *Brockett v. Brockett*, 3 How. (U. S.) 691; *Johnson v. Harmon*, 94 U. S. 371; *Watt v. Starke*, 101 U. S. 247. Under the practice in some of the states, however, bills of exceptions are used. As to this, see *supra*, XI. 19. *Exceptions and Objections*; and *infra*, XVI. *Appellate Review*.

often precluded from reviewing the case.¹ It is to be observed, however, that the necessity of making this application exists only so far as an appellate court is concerned, since the court directing the issues may direct a new trial *ex mero motu*, without any application.²

b. WHERE MADE. — According to the former chancery practice, and in those states which substantially follow it, where equity issues have been submitted to a jury, a new trial is to be sought, and motion therefor made, in the court which directed the issues and not in the court which tried them.³

1. See *infra*, XVI. *Appellate Review*.

2. See the preceding section.

3. *Alexander v. Alexander*, 5 Ala. 517; *Fanning v. Russell*, 94 Ill. 386; *Gray v. Simon*, 2 Phila. (Pa.) 348; *Taylor v. Mayrant*, 4 Desaus. (S. Car.) 505; *Johnson v. Harmon*, 94 U. S. 371; *Watt v. Starke*, 101 U. S. 247; *Clyde v. Richmond*, etc., R. Co., 72 Fed. Rep. 121; *Fowkes v. Chadd*, 2 Dick. 576; *Carstairs v. Stein*, 2 Rose 178; *Ex p. Kensington*, Cooper 96; *Hope v. Hope*, 10 Beav. 581; *Bourke v. Rothwell*, 2 B. & B. 56; *Footner v. Figs*, 2 Sim. 319; *Boote v. Blundell*, 19 Ves. Jr. 500.

Same Judge Ordering and Trying Issues.

— A motion on the law side of the court for a new trial of an issue out of chancery, upon the ground that there was no evidence to sustain it, is irregular and properly refused. Such motion cannot be granted, and should be made to the chancery side ordering the issue. It makes no difference that by a statute the judge ordering the issue tries the same. *Sloan v. Westfield*, 11 S. Car. 445, explaining *Flinn v. Brown*, 6 S. Car. 209.

The Principle on which the motion is made to the court of chancery and not to the court of law is that the former court reserves to itself the review of all that passes at law, and regards the judge's report with a view to determine whether the information collected before the jury, together with what appears upon the record, is sufficient to enable it to proceed satisfactorily. *Boote v. Blundell*, 19 Ves. Jr. 500.

Resignation of Judge Who Directed Issue. — The application for new trial must be made to the judge who directed the issue; by this is meant the same jurisdiction, although the judge may have resigned. *Footner v. Figs*, 2 Sim. 319.

Issue Directed at Rolls. — In *Pemberton v. Pemberton*, 11 Ves. Jr. 50, it was

held that where an issue was directed by the Master of the Rolls, a motion for a new trial might be made to the Lord Chancellor. In *Bourke v. Rothwell*, 2 B. & B. 56, where motion for new trial was refused at the Rolls upon an issue directed by the Master of the Rolls, the Lord Chancellor would not, by way of appeal, entertain a similar application.

Distinction Between Issue and Action at Law. — The distinction between the cases where an issue is directed for the information of the court and an action at law directed to be prosecuted for the settlement of legal rights is to be carefully noted. In the former the application for a new trial is to be made to the court directing the issue; in the latter, to the court in which the trial is had. See *Fowkes v. Chadd*, 2 Dick. 576; *Ex p. Barker*, 1 Cox 418; *Carstairs v. Stein*, 2 Rose 178; *Ex p. Kensington*, Cooper 96; *Hope v. Hope*, 10 Beav. 581; *Re Horner*, 2 Moll. 442. See *infra*, XVII. *Action Directed Instead of Issue*.

New Trial by District Court on Issue From Probate Court — California. — In *Pond v. Pond*, 10 Cal. 500, the point as to the authority of the District Court to grant a new trial did not arise, the question being as to the effect of the decision of the District Court; but the court thought it very questionable whether the District Court could grant a new trial of an issue framed by the Probate Court. In *Matter of Bowen*, 34 Cal. 687, the court arrived at an opposite conclusion, and in reviewing the case of *Pond v. Pond*, above cited, said: "We, on the contrary, entertain no doubt that that court [District Court] possesses the requisite power to grant a new trial; and this from the very necessities of the case, for otherwise the party is without remedy in case of misconduct of the jury, accident, sur-

In New York, while the chancery practice was in vogue, this was the rule.¹ But under the provisions of the Code of Civil Procedure, the judge who tries the issue may direct the motion to be made upon his minutes,² or he may direct exceptions to be heard in the first instance before the court at general term.³ But where the judge who presided at the trial of the issues neither entertains a motion for a new trial on his minutes, nor directs exceptions to be heard at the general term, a motion for a new trial can be made only at the term where motion for final judgment is made or the remaining issues of fact are tried, as the case requires.⁴

prise, newly discovered evidence, or insufficiency of the evidence to justify the verdict."

1. Under the Early Chancery Practice in New York, when a feigned issue was directed by the court of chancery, application for a new trial might be made either to the court of chancery which ordered the issue or to the Supreme Court. *Doe v. Roe*, 1 Johns. Cas. (N. Y.) 402, 25; *Den v. Fen*, 1 Cai. (N. Y.) 487. Under the later practice, however, the proper course was to move for the new trial in the court of chancery which ordered the issue. *Doe v. Roe*, 1 Cow. (N. Y.) 216; *Doe v. Roe*, 6 Cow. (N. Y.) 55; *Apthorp v. Comstock*, 2 Paige (N. Y.) 482; *Mulock v. Mulock*, 1 Edw. Ch. (N. Y.) 14. See *Snell v. Loucks*, 12 Barb. (N. Y.) 387, in which the cases are reviewed and the early and modern practice stated.

2. Sufficient Direction for Motion. — Under a rule of the Supreme Court, a motion for a new trial, on issues, could not be made before the judge on the trial, unless he specifically directed that it should be so made. The court, on appeal, said, without formally so holding, that when a judge allowed a motion for a new trial in such case to be made before him on his minutes, without objection by counsel, and the judge did not refuse to hear it, it would hesitate to decide that such action was not tantamount to a direction of the judge that it shall be heard, and did not satisfy the rule. *Keck v. Werder*, 37 N. Y. Super. Ct. 219.

Appealability of Order Denying Motion for New Trial Made on Minutes of Trial Judge. — The order of a judge at circuit refusing a new trial upon his minutes is not, in a case of trial of special issues in an equity action, appealable; but the defeated party must wait until after the trial of the action at special term, or at least until after the motion

at special term for a new trial has been heard. *Hatch v. Peugnet*, 64 Barb. (N. Y.) 189.

The Old Code did not provide for the new trial of issues, but it was settled by the Supreme Court that such motions on issues directed by a special or general term should be made by the party dissatisfied with the decision, directly to the general term, upon a case settled according to the course and practice of the court in other trials. *Snell v. Loucks*, 12 Barb. (N. Y.) 387. See also *Brown v. Clifford*, 7 Lans. (N. Y.) 46.

3. An Action for Divorce is triable by the court, except that by Code Civ. Pro., § 1757, upon the application of either party, the court must, and upon its own motion it may, direct the trial by a jury of the issue of adultery. Therefore, the issue having been tried by jury, the order of the circuit for the hearing of the exceptions at general term, in the first instance, was properly made in accordance with the Code Civ. Pro., § 1003, which extends the provisions of section 1000 to cases in which there has been a trial by jury "of one or more specific questions of fact arising upon the issues in an action triable by the court." And the defendants' exceptions will be allowed or disallowed, and a new trial granted or refused by the general term, in the same manner and with the same effect as if the exception had been heard on a motion for a new trial at special term, under section 999, before the same judge who presided at the trial. *Carpenter v. Carpenter*, (Supreme Ct.) 9 N. Y. Supp. 583.

4. N. Y. Code Civ. Pro., § 1003; *Chapin v. Thompson*, 80 N. Y. 275; *Whitney v. Whitney*, 76 Hun (N. Y.) 585.

Motion at Special Term Preferable. — Under N. Y. Code Civ. Pro., the motion for a new trial of specific questions

c. WHEN MADE — As to Time. — The motion for a new trial must be made within a reasonable time.¹

As to Stage of Proceedings. — In *England* it was said that the application must in all cases be made before the cause comes on for the further hearing.² In the *United States* not only may the new trial be moved for at the final hearing, upon the equity reserved,³ but in many of the states, where discretionary issues have been submitted to a jury, the motion is not to be made until the case has been completed by the rendition of the court's final decision upon the verdict and all the facts; for the court may adopt or reject the verdict, and until its final action there is nothing on which to base such a motion.⁴

of fact in an equity case, submitted to a jury, may be made upon the minutes before the judge who presided at such trial, yet the preferable and more usual course is to leave the motion for a new trial to be made at the term when the motion for final judgment shall be made, or the remaining issues of fact tried, upon a case and exceptions as provided in the code. *Jones v. Stewart*, 7 Civ. Pro. Rep. (N. Y. Supreme Ct.) 164.

1. *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148.

In *Betts v. De Vitre*, 15 W. R. 701, there were circumstances under which a defendant was allowed to move for a new trial, although upwards of two years had elapsed since the trial of the issues. In *Legard v. Daly*, 1 Ves. 192, a new trial was refused on account of the great length of time elapsing between the verdict and the application for a new trial. The time was five and a half years, and the chancellor said that would be an objection even in a court of law. He further observed that although the cause had not been set down upon the equity reserved till lately, it could not be said that the other side should not have applied for a new trial; for perhaps the defendant might have no reason to set it down.

2. 2 Daniell Ch. Pr. (1st Am. ed.) 755; *Rogers v. Nowill*, 6 Hare 338.

In *Atty.-Gen. v. Montgomery*, 2 Atk. 378, the chancellor declared that an original motion must be made for a new trial, and that the court would not answer a petition for it where the cause came on upon the equity reserved.

3. *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148; *Apthorp v. Comstock*, 2 Paige (N. Y.) 482.

4. *California* — *Motion Premature Before Final Decision*. — In California the

findings of the jury in equity actions are merely advisory, and an application for a new trial is premature if made before the final decision by the court. *Gray v. Eaton*, 5 Cal. 448; *Bates v. Gage*, 49 Cal. 126; *Spottiswood v. Weir*, 66 Cal. 525; *Duff v. Duff*, 71 Cal. 513, affirmed in 87 Cal. 104.

Time to Give Notice of Motion After Final Decision. — And so it has been held that the ten days allowed to give notice of the motion do not begin to run until the court has either adopted or rejected the findings of the jury. *Bates v. Gage*, 49 Cal. 126; *Warring v. Freear*, 64 Cal. 54; *Bell v. Marsh*, 80 Cal. 414. The rule is that notice of a motion for a new trial must be given within ten days after notice of the filing of the final decision in the case. Where, therefore, no notice of such filing has been given, notice of motion for a new trial is proper, though the time has elapsed, and the party is entitled to be heard on his exceptions on appeal from the refusal of the new trial. *Duff v. Duff*, 71 Cal. 513, affirmed in 87 Cal. 104.

Rules Applicable to Equitable Defense in Legal Action. — The foregoing rules apply to the trial by jury of an equitable defense to an action at law, upon which special issues are submitted to the jury, if the case is treated by the court and by the parties in all respects as an action in equity, whether properly or improperly. *Bell v. Marsh*, 80 Cal. 411.

Indiana — *Motion for New Trial of Entire Case*. — In Indiana the only motion for a new trial in an equity case where issues have been submitted to a jury, the overruling of which may be assigned in the appellate court as error, is one made after the finding of the court and having reference to the former trial as a whole. Where such

d. HOW MADE.—The application for a new trial may in some instances be made upon the minutes of the judge before whom the issues were tried, and in others upon exceptions properly taken.¹

e. NOTICE OF MOTION.—The motion should generally be made upon notice.²

4. Upon What the Court Proceeds for Determination—*a.* IN GENERAL.—If the chancellor who ordered the issues did not preside on the trial thereof, he must be acquainted with the proceedings, rulings, evidence given, etc., so that he may exercise his own judgment.³

motion is made before final judgment, it presents no question on appeal. *Pence v. Garrison*, 93 Ind. 345; *Ikerd v. Beavers*, 106 Ind. 483; *Garard v. Garard*, 135 Ind. 15.

In *Nevada* it is held that when the court in the trial of an equity case calls a jury to decide special issues, and the jury also find a general verdict, the presumption is that the court only called the jury as advisory; that until the verdict has been sanctioned by the court it is no proof that it was actually rendered in the case, and that the party against whom the verdict is found is entitled to ten days after the findings are filed by the court in which to give his notice to move for a new trial. *Duffy v. Moran*, 12 Nev. 94.

New York—*Motion for New Trial of Issues Made Before Judgment*.—Under N. Y. Code Civ. Pro., § 1003, a motion for a new trial of the issues submitted to a jury in an equity case, made upon a case and exceptions, must be made before judgment; otherwise, the errors are not available on appeal. *Chapin v. Thompson*, 80 N. Y. 275 [reversing 18 Hun (N. Y.) 446], followed in 23 Hun (N. Y.) 12, affirmed in 89 N. Y. 270.

Motion for New Trial of Action Made After Judgment.—The N. Y. Code Civ. Pro., § 1005, providing for a motion for a new trial after judgment, has reference to a new trial of the action itself, not to a new trial upon the feigned issues which may have been awarded therein. It is, therefore, not inconsistent with section 1003, under which the motion for a new trial upon the issues submitted must be made before judgment. *Chapin v. Thompson*, 80 N. Y. 275.

1. In New York, under the old code, it was held that the motion to the general term for a new trial of issues sent from the special term to the circuit

should be upon a case. Such case, if made to set aside the verdict for an error of law, should contain no more of the evidence than is necessary to raise the question. If made because the verdict was against evidence, it should contain all the evidence given on the trial, or so much thereof as was material. *Snell v. Loucks*, 12 Barb. (N. Y.) 385. Rule 40, Supreme Court Rules, 1874, requires either party feeling aggrieved by the determination of the special issues, and desirous of a new trial on the ground of any error of the judge, or on the ground that the verdict is against the evidence, to make such motion upon a case and exceptions to be served and settled as provided in other cases, except where the judge trying the issues directs such motion to be made upon his minutes. *Keck v. Werder*, 37 N. Y. Super. Ct. 219; *Hegeman v. Cantrell*, 40 N. Y. Super. Ct. 386. See *supra*, XIV. 3. *b.* *Where Made*.

2. Hearing on Motion by Party Not Giving Notice.—Where the plaintiffs in equity gave notice of motion for a new trial of the issues, but the defendants gave none, it was held that nevertheless the defendants might be heard in support of the motion. *Johnston v. Todd*, 5 Beav. 394.

3. Watt v. Starke, 101 U. S. 247.

Proceedings and Evidence Must Be Secured.—The party applying for the new trial must secure for the use of the chancellor notes of the proceedings of the trial and the evidence there given. *Watt v. Starke*, 101 U. S. 247; *Clyde v. Richmond*, etc., R. Co., 72 Fed. Rep. 121.

Evidence Not Before the Court.—Where the evidence adduced upon the trial of issues out of chancery proceedings in a probate court, under *Indiana Rev. Stat.* 1843, was not before the court to

b. CONSIDERATION OF EXCEPTIONS. — For this purpose the exceptions taken on the trial and certified back to the court may be considered.¹

c. PROCUREMENT OF PROCEEDINGS AND EVIDENCE. — The party moving for a new trial may have the proceedings and evidence brought before the court, either by having them reported with the verdict, or by moving the court to send to the judge who tried the issues for his notes of trial, or by procuring a statement of the same in some other proper mode.²

d. RECORD OF PROCEEDINGS AND EVIDENCE FOR APPELLATE COURT. — The evidence and proceedings then become a part of

which the verdict was returned, a motion to set the verdict aside and grant a new trial was properly refused. *Clem v. Durham*, 14 Ind. 263.

1. It has been seen that exceptions may properly be taken and certified back to the court for use on the motion for a new trial, and that they must be so certified or brought to the attention of the court. *Watt v. Starke*, 101 U. S. 247; *Brockett v. Brockett*, 3 How. (U. S.) 691. And that, though a bill of exceptions as such has no place in the courts of most of the states, yet if taken it may be used on the motion for the new trial. *Johnson v. Harmon*, 94 U. S. 371; *Watt v. Starke*, 101 U. S. 247; *Watkins v. Carlton*, 10 Leigh (Va.) 586. See *supra*, XII. 5. *Exceptions and Objections*.

In *Mississippi* it is held that since a verdict upon issues sent to a jury is by statute placed upon the same footing with verdicts rendered in courts of law, if a motion for a new trial be made there must be a bill of exceptions embodying the evidence to enable the appellate court to determine as to the propriety of the action of the chancellor's court. *State v. Farish*, 23 Miss. 483.

As to certification of the exceptions taken at the trial, see *supra*, XI. 19. *Exceptions and Objections*; and XIII. 5. *Adopting Verdict*.

2. *Watt v. Starke*, 101 U. S. 247. As to certifying evidence and proceedings on the trial of issues, see *supra*, XII. *Return of Findings and Proceedings at Trial*.

Application for Judge's Notes. — The application to the chancery court for the judge's notes of the proceedings and evidence, on the trial, is *ex parte*, and not granted as of course, but on a showing that there is reasonable ground for questioning the verdict, and

for sending to the judge for his notes. *Ex p. Chuck*, 3 Mont. & A. 15, *nom.* *Ex p. Church*, 2 Dea. 72; *Anonymous*, 6 Madd. 58; *Morris v. Davies*, 3 Russ. 318; *Hungerford v. Jagoe*, 1 Jones & L. 691.

Copies of the Judge's Notes may be allowed by the court to be made for the parties, if they agree thereto. *Hargrave v. Hargrave*, 10 Jur. 957.

Affidavits of Facts Not in the Judge's Notes may be allowed, and the facts proved in this manner. *East India Co. v. Bazett*, Jac. 91; *Gibbs v. Hooper*, 2 Myl. & K. 353; *Wilson v. Beddard*, 12 Sim. 2; *Hargrave v. Hargrave*, 13 Jur. 463; *Shields v. Boucher*, 1 De G. & Sm. 40; *M'Gregor v. Topham*, 3 Hare 488.

A Shorthand Writer's Notes of Evidence may be allowed where they are necessary to aid the court. *De La Warr v. Miles*, 19 Ch. Div. 80; *Watson v. Great Western R. Co.*, 6 Q. B. Div. 163; *Malins v. Price*, 1 Phil. 590.

Evidence Not Actually Used at the Trial may be referred to. *Slaney v. Wade*, 7 Sim. 595.

Order for State of Case and History of Trial. — In *New Jersey*, on motion for a new trial on issues at law, in order to enable the chancellor better to decide whether or not a new trial should be granted, the solicitor of the party applying for the rule was ordered to prepare a state of the case and the history of the trial, and to serve a copy thereof upon the opposite solicitor. It was further ordered that in case said solicitors could not agree upon the state of the case, the points in difference between them should be settled by the judge before whom the feigned issue was tried. When the state of the case was finally agreed upon or settled, it was directed to be filed in the chancery court among the papers in the cause.

the record and go up to the court of appeal if an appeal be taken.¹

5. Where Necessary Objections Were Not Made. — It is oftentimes necessary, in order to save a point, that an objection be interposed at the proper time, and in many cases if this be not done the party cannot obtain relief on a motion for a new trial.²

6. General Principles Governing Granting or Refusing — *a.* **WHERE ISSUES ARE DISCRETIONARY OR OF RIGHT.** — The general principles governing the granting of a new trial, where the direction of issues is in the court's discretion, differ in many respects

Trenton Banking Co. *v.* Rossell, 2 N. J. Eq. 492.

1. *Watt v. Starke*, 101 U. S. 247; *Clyde v. Richmond, etc., R. Co.*, 72 Fed. Rep. 121.

2. See *supra*, XI. 19. *Exceptions and Objections.*

Objection to Form of Issue. — An issue out of chancery was made up with the concurrence of the parties, the order having the indorsement of the solicitor upon it, no objection or suggestion being made as to the form or substance of the issue. The issue was made up by the counsel of the complainants and was wholly in the handwriting of their solicitor. After the verdict was returned, on motion for a new trial, an objection to the form of the issue was taken. It was held that the objection not having been taken before, its defects were waived. *Black v. Lamb*, 12 N. J. Eq. 108.

Objection that Issue Not Broad Enough. — On a motion for a new trial of an issue out of chancery, it cannot be objected that the issue was not broad enough, and that it ought to have embraced other inquiries. *Bassett v. Johnson*, 2 N. J. Eq. 154.

Objection to Depositions Taken. — The proper time and place for excepting to objectionable questions is before the chancery court, and at the time the order is made that depositions taken before a master ought to be read at the trial of the issue. Where objections to testimony are taken before the master they are to be settled by the chancery court, and if they are not renewed at the hearing or when depositions are acted upon by the court they are waived. It is the duty of the counsel, when the court makes an order in reference to depositions, to object to them, or such parts of them as they deem objectionable, and if they fail to do so, then they will not be heard to

object on a motion for a new trial. *Black v. Lamb*, 12 N. J. Eq. 108.

Issue Tried by Justice Before Whom Jury Struck. — On a motion for a new trial, the defendants cannot complain that the issue was tried by the justice before whom the jury was struck if they permitted the jury to be struck and the trial to be had without objection. *Bassett v. Johnson*, 2 N. J. Eq. 154.

Variance Between Title Claimed and Proved. — If there be no objection to the production of the evidence, or to the claim at the trial, and there is no allegation of surprise, there would seem to be no good reason for ordering a new trial merely because the title proved differed, though radically, from that set up in the answer. *Powell v. Mayo*, 26 N. J. Eq. 120.

Objection to Counsel's Question and Charge of Court. — When a case in equity was tried on special issues, and a question was propounded by plaintiff's counsel at the conclusion of the argument without notice to the respondent's counsel and was given by the court in his charge, if counsel for respondents desired an opportunity to be heard in argument in respect to such issue he should have asked it, and if he failed to do so a new trial will not be granted on that ground. *Macon v. Harris*, 75 Ga. 761.

Admission and Exclusion of Evidence — Giving and Refusing Instructions. — In *Hulett v. Stockwell*, 34 Mo. App. 601, the court said: "The motion for new trial appears to be one framed in general terms, without reference particularly to the cause in which it was filed. It calls attention to errors in admitting and excluding evidence, when no objection or exception of this sort was taken at the trial. It likewise calls attention to errors in giving and refusing instructions offered by plaintiffs and de-

from those applicable where the matter is of right with the parties. For the reason that the discretionary submission is the rule, while the submission of right is the exception, the principles controlling the former case have been taken as the basis in the treatment of this question. The differences in the principles and practice, where they exist in the latter case, will be shown in a separate subdivision.¹

b. EQUITABLE AND LEGAL PRINCIPLES. — The general principles regulating the granting or refusing of a new trial, on issues to a jury in an equity case the determination of which is advisory to and for the information of the conscience of the court, are considerably different from those which govern courts of law on the same question, courts of equity not being bound down to the same strict rules as are courts of law.²

fendants when none were in fact offered by either party. After the jury had made their findings on the issues, and before rendering judgment, the court gave an instruction of its own motion, but this is not a matter for reversal in an equity cause."

1. See *infra*, XIV. 15. *Where Issues of Right, and Verdict Conclusive.*

2. *Williams v. Bishop*, 15 Ill. 553; *Clayton v. Yarrington*, 33 Barb. (N. Y.) 145; *Gray v. Simon*, 2 Phila. (Pa.) 348; *Tompkins v. Stephens*, 10 W. Va. 156; *Stace v. Mabbot*, 2 Ves. 552; *Barker v. Ray*, 2 Russ. 76; *St. Paul's v. Morris*, 9 Ves. Jr. 155; *Browne v. McClintock*, L. R. 6 H. L. 456; *Swinfen v. Swinfen*, 27 Beav. 148; *Richards v. Symes*, 2 Atk. 319; *Faulconberg v. Peirce*, Ambl. 210.

Difference Where Issues Are Tried at Bar and at Nisi Prius. — In *England* it was said that a distinction was formerly taken between trials at bar and at nisi prius, because the latter was subordinate to the other, and not of so solemn a nature; but that this distinction has been done away with and a new trial may be granted after trial at bar as after trial at nisi prius. *Reg. v. Ballivos*, 1 P. Wms. 207; *Richards v. Symes*, 2 Atk. 319.

"This court [of chancery] directs issues to be tried at law to inform the conscience of the court as to facts doubtful before, and therefore expects in return such a verdict and on such a case as shall satisfy the conscience of the court to found a decree upon; if, therefore, upon any material and weighty reason the verdict is not such as to satisfy the court to found a decree upon, there are several cases in which

this court has directed a new trial for further satisfaction, notwithstanding it would not be granted if in a court of common law, because it is *diverso intuitu*, and because the court proceeds on different grounds." *Stace v. Mabbot*, 2 Ves. 552.

Where the Inheritance Is in Question. — In *England* courts of chancery have frequently granted new trials on issues to a jury merely because the inheritance was to be bound by it, for they were in many cases unwilling to bind the rights by a single trial. *Stace v. Mabbot*, 2 Ves. 552; *Cleeve v. Gascoigne*, Ambl. 323; *Darlington v. Bowes*, 1 Eden 270; *Locke v. Colman*, 2 Myl. & C. 42; *Baker v. Hart*, 3 Atk. 542. On an issue directed to be tried touching the question of manor, the cause being set down on the equity reserved, and it being alleged to be a cause of value and concerning the copyholds of a manor, a new trial was directed upon payment of costs. *Edwin v. Thomas*, 2 Vern. 75.

In *Illinois* it was also said that on a trial of a feigned issue touching the inheritance, courts of chancery frequently direct another trial in analogy to the rule of law allowing several trials in ejectment, though it be not a matter of right. And as these trials are to inform the conscience of the chancellor, and do not settle or bind the rights of the parties, the chancellor will order them until he is satisfied. *Williams v. Bishop*, 15 Ill. 553.

In *New York*, in analogy with the statute of that state which provides that at any time within three years after judgment rendered in an action of ejectment the court in which the same

c. COURT MUST BE SATISFIED — In General — On What Considerations. — The practice is to consider not merely whether there was evidence which would support the finding of the jury, and in that case to refuse a new trial, but to consider whether, having regard to the entire subject-matter, and to the whole of the evidence given at or before the trial, and what has since become known, the court is satisfied that full and complete justice has been done between the parties, and that no further investigation is necessary to attain that end.¹

Where the Court Is Not Satisfied. — Unless the court is so satisfied, it may require that the matter shall be again tested by an examination before a jury, with such directions and modifications as it may consider desirable for the fair, thorough, and impartial sifting of the whole matter.²

was rendered, on application of the defeated party and payment of costs and damages, shall vacate such judgment and grant a new trial, it is a recognized rule of courts of equity to grant a new trial in a case in which the verdict binds the heir at law as to the inheritance, or upon an issue as to the validity of a will of real estate, upon grounds which, in other cases, would be deemed altogether insufficient to sustain such an application. *Clayton v. Yarrington*, 33 Barb. (N. Y.) 144.

New Trial May Be Refused. — But though it is the most usual course to award a second trial on a feigned issue in cases touching the inheritance, where the verdict is in favor of the will and against the heir at law, yet it rests entirely in the discretion of the court to award a second trial or not, according to the circumstances and testimony in the case. *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148.

Even where the inheritance was concerned the court refused to grant a new trial where there had been two trials, one at bar and the other at nisi prius, the verdicts being contrary to each other, but the last verdict was had on evidence newly discovered which changed the weight of evidence. *Montgomery v. Atty.-Gen.*, 9 Mod. 388.

Personal Demand of Value — Forgery. — "This [the rule stated in the text] extends also to a personal demand where of considerable value, and where the court is not satisfied with the grounds on which the determination was made at law, and when an objection is made and supported by proof; and particularly in a case of forgery new trials have been granted and that by judges

who sat here who have been as reluctant as any, and who inclined to adhere to the rules of common law." *Stace v. Mabbot*, 2 Ves. 552.

1. *Swinfen v. Swinfen*, 27 Beav. 148; *Johnson v. Harmon*, 94 U. S. 371. See also *Barker v. Ray*, 2 Russ. 75; *St. Paul's v. Morris*, 9 Ves. Jr. 155; *Bootle v. Blundell*, 19 Ves. Jr. 500.

2. *Swinfen v. Swinfen*, 27 Beav. 148; *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27.

If the conscience of the judge is not satisfied, though no rule of law was violated on the trial and though a new trial would not be granted in a corresponding case at law, he may send it back again and again, until he is satisfied. *Patterson v. Ackerson*, 1 Edw. Ch. (N. Y.) 96.

Issue as to the Validity of Two Deeds — New Trial as to One. — Issues were awarded to try the question as to the genuineness of a grantor's signature to two deeds — one to his daughter and another to his son-in-law — and as to the competency of the grantor to execute such deeds; and the jury having found in favor of the validity of both deeds, a motion was made for a new trial, upon which motion it appeared that it was the grantor's intention to make the shares of all the children in his estate equal. The deed to his daughter professing to have been given with the view of putting her upon an equality with his other children, and the court being satisfied, from the evidence, that the grantor could not have understood the effect of that deed upon the division of his property, and the grantees having failed to prove that equality among the grantor's children would be produced by

Where the Court Is Satisfied. — If the court is satisfied, however, that full and complete justice has been done between the parties, the motion for a new trial will generally be denied.¹

Errors on Trial. — And though there were errors on the trial, yet if they were technical and unimportant to the general result, it is no abuse of the discretion with which the court is clothed to refuse the application to reopen the controversy. To call for a retrial the error must be of such a character as to have produced injustice in the general result.²

allowing both deeds to stand, a new trial of the issues was ordered, so far as they related to the deed to the grantor's daughter. *Lansing v. Russell*, 3 Barb. Ch. (N. Y.) 325, 13 Barb. (N. Y.) 510.

Issue in Habeas Corpus Cases. — In *Graham v. Graham*, 1 S. & R. (Pa.) 330, it was said to have been the practice of the Court of Common Pleas in habeas corpus cases to direct an issue for trial of facts in doubtful cases, and that, by analogy to equity practice, the Court of Common Pleas in such cases might grant a new trial if the verdict were unsatisfactory.

Verdict by Direction of Court. — Where the jury, on the trial of an issue relating to the title to land, in delivering their verdict declare that neither party has made out his title to their satisfaction, and that they find for the defendant in accordance with the judge's direction, which direction was that if, upon considering the evidence, their minds were equally balanced and they could not make them up they should find for the defendant, the court will not regard the verdict as establishing the right of the defendant and will direct a new trial. *Sunderland v. Durham*, 16 Jur. 370.

Presumption of Law Strong and Evidence Unsatisfactory. — After two trials of an issue as to the legitimacy of the plaintiff, the first resulting in favor of and the second against the plaintiff, the court, on his application, directed a third trial on the ground that the presumption of law was strong in his favor and the evidence to the contrary unsatisfactory, there being also an affidavit stating facts discovered since the trial tending to discredit the testimony of one of the principal witnesses for the defendant. The court said that upon the whole the matter had not been sufficiently investigated, and that it could not bind the parties by a decree without its going to a further trial at

law. *Hargrave v. Hargrave*, 13 Jur. 463.

1. *Johnson v. Harmon*, 94 U. S. 371; *Marvin v. Marvin*, 5 Thomp. & C. (N. Y.) 429, note, 3 Hun (N. Y.) 139, note; *Forrest v. Forrest*, 25 N. Y. 501.

Plaintiff Dead at Time of Trial. — The circumstance that the death of the plaintiff in an issue before the issue was tried was unknown at the time of trial, was held not to afford ground for a new trial. *Bird v. Kerr*, 4 Kay & J. 270.

2. **The Inquiry with the Chancellor** is not whether on the trial of the issue errors intervened in the admission or rejection of evidence, or in the instructions to the jury, but whether, notwithstanding such errors, the verdict relieves the mind of the court of the doubts compelling the issue. If it does, the verdict will stand. *Barnett v. Montgomery, etc.*, 1 R. Co., 51 Ala. 557.

Mistake as to Date of Document. — A new trial of an issue will not be granted upon the ground of a mistake at the trial as to the date of a document, if the court is satisfied that the correction of such mistake confirms the verdict. *Hughes v. Jones*, 1 N. R. 124.

In New York, under the former chancery practice, the rules which governed courts of law in granting new trials upon the ground of testimony improperly rejected or admitted were never adopted. And if from the whole case there was sufficient to show that the verdict was substantially right, a new trial would not be granted. *Mulock v. Mulock*, 1 Edw. Ch. (N. Y.) 14. The affidavits on both sides were to be taken together, to ascertain whether there was ground for disturbing the verdict within any principles governing the court; and if not, then the only consideration was whether the judge on the trial erred in admitting or rejecting the testimony, or in giving any directions, or in any law points,

7. For Incorrect or Improper Verdict — *a.* **VERDICT AGAINST EVIDENCE OR WEIGHT THEREOF** — **In General.** — Acting on the difference in principle prevailing in courts of equity and courts of law, the evidence given on the trial may be nicely balanced, and even if the court finds the verdict not to be against the evidence, yet if it be against the weight thereof a new trial may be granted.¹

whereby injustice had been done. *Van Cort v. Van Cort*, 4 Edw. Ch. (N. Y.) 621.

And when the Supreme Court succeeded to the powers of the chancery court the rules were the same. The court was not bound by the same rules that prevail on bills of exceptions. In those no more of the testimony is set forth than is sufficient to show the materiality of the decision complained of. But in a motion for a new trial on a case, or to set aside a verdict on a feigned issue, the whole evidence is set forth at large. If the court can see, from the whole case, that no error has been committed by the presiding judge prejudicial to the complaining party, and the verdict appears to be right, the court will not grant a new trial. *Lansing v. Russell*, 13 Barb. (N. Y.) 510. See also *Forrest v. Forrest*, 25 N. Y. 501. Under the Code Civ. Pro. the subject is a matter of statutory regulation, for by section 1003 it is provided that an error in the admission or exclusion of evidence, or in any other ruling or direction of the judge upon the trial, may, in the discretion of the court which reviews it, be disregarded if that court is of opinion that substantial justice does not require that a new trial should be granted. See *Post v. Mason*, 91 N. Y. 539.

Where the Court Is Satisfied with the Result. — Formerly in *England*, as in many of the states of the Union, the chancery and common-law courts were entirely distinct and unconnected, and in sending an issue from chancery to be tried by a jury the only thing that informed the chancellor as to the circumstances that attended the trial, the conduct of the jury, etc., was the report and notes of the judge before whom the trial took place. It is said that perhaps, where such practice obtains, the chancellor may direct a new trial for errors and misconduct of the jury, even though he is satisfied with the verdict. *Harrison v. Rowan*, 4 Wash. (U. S.) 32. However, in *England*, regard must be had to the new

rule introduced by the Judicature Act, namely, that it is not a matter of right on the part of the court to grant a new trial, even if there were a technical misdirection or if there were an improper reception of evidence, unless the court or judge thinks it might have materially affected the result. *Jenkins v. Morris*, 14 Ch. Div. 674.

In the Circuit Courts of the United States the judges who direct an issue at law superintend also the trial of it, and they hear all the evidence and are acquainted with all the circumstances of the trial. If, therefore, they are satisfied that the verdict is warranted by the evidence, there is no ground upon which they can direct a new trial. *Harrison v. Rowan*, 4 Wash. (U. S.) 32. See *infra*, XIV. 8. *For Errors Committed on the Trial.*

1. *Williams v. Bishop*, 15 Ill. 553; *Smith v. Newton*, 84 Ill. 14; *Powell v. Mayo*, 26 N. J. Eq. 120; *Lansing v. Russell*, 3 Barb. Ch. (N. Y.) 325; *Faulconberg v. Peirce*, Ambl. 210; *Head v. Head*, 1 T. & R. 138; *Cleeve v. Gascoigne*, Ambl. 323; *Browne v. McClinck*, L. R. 6 H. L. 456; *Casborne v. Barsham*, 2 Beav. 76.

New Hampshire. — In *Clark v. First Congregational Soc.*, 45 N. H. 331, upon a review of the English and American authorities, the conclusion was arrived at that whether the submission of issues to the jury be a matter of discretion or of right, in either case, upon a motion for a new trial upon the ground that the verdict is against evidence, the court will ordinarily be governed by the rules and principles applied to such motions in suits at law, and will not grant the new trial merely because on weighing the evidence the court would have reached a different result.

North Carolina. — In *Peebles v. Peebles*, 63 N. Car. 656, where it was held that the court of equity could not order a new trial of an issue sent to be tried at law upon the ground merely that the verdict was against the weight of evidence, the court said: "In an issue

On the other hand, if the court is satisfied with the verdict it need not set it aside and grant a new trial on this ground, and generally will not do so unless the preponderance of the evidence against the verdict be clear and strong.¹

Trial Court Satisfied or Dissatisfied. — Where the issues have been tried before a court other than the one ordering them, and the judge presiding at the trial stated or certified that he was not dissatisfied with the verdict, the court will not usually direct a new trial if the application therefor rests solely upon the ground that the verdict is against the weight of evidence.² Where, however, the judge expresses his dissatisfaction with the verdict and certifies that it is contrary to the evidence, it is usual for the chancery

directed by the court sitting in equity, the very reason for referring the matter to a jury is that because of the imperfect manner of taking depositions, and the impossibility of the court's deciding on the weight of evidence, when the statement of one witness looks as good on paper as that of another, the court feels its incompetency to decide between conflicting testimony, and chooses rather to rely on the common sense of a jury, who have the witnesses before them, and are supposed to be capable, by observing their looks, demeanor, and the effect of cross-examination, which can in that mode only be made to have its full force, to arrive at the truth."

Issue from Surrogate's Court — New Trial on All Issues. — Where a verdict on an issue from the surrogate's court of *New York* shows that the jury were prepared to find a verdict unsupported by evidence, a new trial should be granted as to all the issues submitted, though the verdict on some of them was not in fact contrary to the evidence. *In re Booth's Will*, (Supreme Ct.) 6 N. Y. Supp. 41.

1. In *Stephoe v. Flood*, 31 Gratt. (Va.) 323, it was held that if the evidence on the trial of issues out of chancery be greatly conflicting, the court of chancery need not set aside the verdict and grant a new trial on the ground that the verdict was contrary to the evidence. And in *Ringrose v. Todd*, 12 Price 650, the court refused to disturb the verdict on motion for a new trial made upon the ground that the evidence, chiefly documentary, was wholly with the plaintiff.

Strong and Clear Preponderance of Evidence. — Recollecting that the verdicts of juries are not to be set aside capriciously by courts of justice, the chan-

cellor will not usually say that the conclusion is wrong, and although he is not quite satisfied that he would have arrived at the same conclusion, yet he ought not only to be satisfied that they are wrong, but that they are so manifestly and clearly wrong that there has been a miscarriage of justice, before the parties are exposed to the risk, delay, and annoyance of a new trial. *Jenkins v. Morris*, 14 Ch. Div. 674; *Fellows v. Harrington*, 4 N. Y. Leg. Obs. 340.

Question of Science Not Fully Solved. — It is held, however, that the ordinary reasoning according to which the verdict of a jury on a question of fact ought not to be disturbed, unless the preponderance of evidence against the verdict be strong and clear, does not apply to cases in which the verdict depends upon a question of science which is not fully solved, but is still within the domain of *bona fide* controversy. The importance of the verdict to others besides the parties to the litigation, and also the novelty of the question at issue, are elements to be taken into consideration in deciding whether or not a new trial should be granted. *Metropolitan Dist. Asylum v. Hill*, 47 L. T. 29.

2. *Gibbs v. Hooper*, 2 Myl. & K. 353; *Stace v. Mabbot*, 2 Ves. 552; *Jenkins v. Morris*, 14 Ch. Div. 674.

Where, on an issue, the evidence is fairly before the jury, and the judge has expressed his satisfaction, there is great difficulty in supporting a motion for a new trial on the ground that the verdict is not supported by the evidence; but the court will nevertheless entertain the motion and attend to the course of the trial, the issue having been directed for its satisfaction. *Johnston v. Todd*, 5 Beav. 597.

court to set it aside and grant a new trial; but it seems that this need not be done in all cases if the chancellor is satisfied with the verdict.¹

1. *Faulconberg v. Peirce*, Ambl. 210.

But the Dissatisfaction, Weakly Expressed, of the judge who has tried an issue directed by the court of equity, is not ground for granting a new trial if the verdict be satisfactory to the chancellor. *Atkins v. Drake*, McClel. & Y. 213.

In *Virginia*, where the court which tries the issues out of chancery certifies that the verdict is against the weight of evidence, the chancery court should be governed thereby, and will set aside the verdict and grant a new trial. *Pryor v. Adams*, 1 Call (Va.) 382; *Pleasants v. Ross*, 1 Wash. (Va.) 156. Thus in *Southall v. M'Keand*, 1 Wash. (Va.) 336, the District Court, in which the trial of the issues out of chancery were had, certified that the weight of evidence was against the verdict. The chancellor declared the verdict satisfactory. An appeal was taken, and the court decided that the verdict in the District Court ought not to stand, upon the certificate of the judges that the weight of evidence was against it. The court remarked that it was unusual for the chancellor to be satisfied with such a verdict, and though the chancellor was to judge whether his conscience was satisfied, yet the appellate court, in exercising its legal discretion on the same subject, saw no reason to depart from the general rule. And in *Lavell v. Gold*, 25 Gratt. (Va.) 473, it was held that if the judge of a common-law court certified to the chancellor that the verdict was against the evidence, it was the duty of the chancellor, at least if there had not been more than one trial, to set aside the verdict and award a new trial. But in *Ross v. Pynes*, 3 Call (Va.) 568, it was held that the court of equity was not bound to grant a new trial on the judge's certificate that the weight of evidence was against the verdict, especially after two verdicts in favor of the same party. See also *M'Rae v. Woods*, 1 Hen. & M. (Va.) 548.

The rule deducible from the authorities is that where the judge before whom the issue is tried certifies to the chancellor against the verdict, it is the duty of the chancellor to set it aside, unless it appears from the evidence certified, or circumstances varying the

case, that the verdict was right. *Lavell v. Gold*, 25 Gratt. (Va.) 477. Where the judge before whom the issues were tried certifies that the verdict was contrary to the evidence, but also certifies the facts which were proven on the trial, and it is evident to the chancellor that the verdict was not contrary to the evidence, the chancellor is not bound, in deference to the certificate of the judge of the court, to set aside the verdict and grant a new trial. *Grigsby v. Weaver*, 5 Leigh (Va.) 197, holding that the verdict of the jury, which was supported by the evidence in the record, outweighed the certificate of the judge.

In *Alabama* it was held that the court of chancery has such implied discretion over the subject of issues that it will not, as matter of course, direct the issues to be tried anew, though the judge of the court of law certifies that he is dissatisfied with the verdict; but it is usual, under such circumstances, to award a new trial. *Alexander v. Alexander*, 5 Ala. 518.

In *New York*, where a feigned issue was awarded by the court of chancery to try the genuineness of a receipt involving a question of payment on a bond, it was held that a new trial ought not to be granted solely on the ground that the judge who presided at the trial doubted the correctness of the finding of the jury on a question of fact; and that to entitle a party to a new trial in such a case it should appear that the verdict was so clearly against the weight of evidence as to entitle him to a new trial in a court of law. *Fellows v. Harrington*, 4 N. Y. Leg. Obs. 340.

Dissatisfaction of One of Judges.—A new trial may be granted on a feigned issue on account of the dissatisfaction of one of the judges who tried the case. *Vanlear v. Vanlear*, 4 Yeates (Pa.) 3.

In the Circuit Court of the United States, composed of a district and circuit judge, the trial of issues directed from the chancery side thereof is presided over by the same judges who direct the issue, and though the circuit judge is satisfied that the verdict is warranted by the evidence, yet if the district judge does not concur in this view, a new trial on the issues should

b. VERDICT NOT RESPONSIVE OR DETERMINATIVE OF ISSUES. — Where the verdict is not responsive to the issues, or does not satisfactorily determine all the questions submitted, it may be set aside and a new trial granted.¹

c. VERDICT TOO BROAD. — If the verdict covers more than the issue made by the pleadings the court may set it aside and grant a new trial, though this course need not be pursued.²

d. VERDICT INSENSIBLE, CONTRADICTORY, OR UNCERTAIN. — Where the verdict is sensible and contradictory the court may

be awarded. *Harrison v. Rowan*, 4 Wash. (U. S.) 32.

1. Verdict Not Responsive to Issues. — In *West Virginia* it was held that where the evidence is so conflicting that it is the duty of the court to order an issue, and the verdict of the jury is not responsive thereto, the chancery court should set it aside and grant a new trial. The court said: "In *Nease v. Capehart*, 15 W. Va. 299, it was held that after a verdict is rendered upon an issue properly directed, the court cannot look at the record for the facts submitted in the issue, nor to the facts or evidence certified upon the trial of the issue, but must accept the verdict of the jury for such facts, unless under the rules governing courts of equity in such cases it should set aside the verdict and grant a new trial. This being true, the verdict must be responsive to the issue directed, otherwise the court has not before it the very facts to ascertain which the issues were directed. Where the issue is properly directed, and the verdict of the jury is not responsive thereto, the verdict ought to be set aside and a new trial granted." *Marshall v. Marshall*, 18 W. Va. 395.

Verdict Not Determinative of All Issues. — In an action to recover damages for alleged wrongful acts, and to restrain their continuance where all the issues are ordered to be tried by a jury, under the Code of *New York*, if the verdict does not determine all the issues it is irregular for the trial judge to find additional facts upon which, together with the verdict, judgment should be given. Such a finding would be proper where an order directed the trial of some specific question of fact, but where all the issues are submitted and the verdict does not determine them all so as to enable the court to give judgment upon the entire case and as to all the relief demanded, the verdict is defective and should be set aside as

such and a new trial ordered. *Parker v. Laney*, 58 N. Y. 469, *modifying* 1 *Thomp. & C.* (N. Y.) 590.

2. No Surprise or Disadvantage Shown. — The defendant having set up a farm modus in answer to a bill for tithes, issues were directed to try whether the ancient farm consisted of the lands mentioned in the answer, or whether a certain modus had been immemorably payable for the tithes arising upon it. The jury found that the farm consisted of these lands, and, together with four other closes, was covered by a modus. To this verdict it was objected that the jury had found a different modus from that which was in issue between the parties, extending its verdict further than was covered by the pleadings. The court held that if the plaintiff in equity could have shown that if he had been aware of that fact he could have adduced other evidence which might have altered the case, that would have afforded a ground for a new trial. But where there was no attempt to show that the proof of that fact was a surprise upon him, or exposed him to any disadvantage, the finding of the jury with respect to the lands not included among the parcels mentioned in issue furnished no ground for a new trial. *Bailey v. Sewell*, 1 Russ. 239.

Decree Directed on the Evidence. — In an action for specific performance, where the issues were submitted to a jury for special findings, and the issue of fraud submitted was general, and much broader than made by the pleadings, which were special, and the issue was found for the defendant, it was held on appeal that since the special finding was upon an issue broader than made, and the evidence did not establish the fraud as pleaded, or as found by the jury, the court would not simply set aside the verdict and remand for a new trial, but would decree a specific performance upon the evidence. *Brink v. Morton*, 2 Iowa 416.

well refuse to decree upon it, and direct the issue to be submitted to another jury.¹

8. For Errors Committed on the Trial — a. IN ADMISSION OR REJECTION OF EVIDENCE — Prejudicial Errors. — If there has been a serious error in the admission or rejection of evidence, which affects the justice and final determination of the case, the court may direct a new trial.²

Errors Not Prejudicial. — But a new trial will not be granted merely on the ground that the judge received improper testimony on the trial of an issue, or that he rejected that which was proper, if, on the whole facts and circumstances, the court is satisfied that justice has been done, or that the result ought not to have been different if such testimony had been rejected in the one case or received in the other.³

1. Kirby *v.* Newsance, 2 Hawks (N. Car.) 105.

A verdict on issues submitted to a jury which answered some of the questions specifically and replied to others by saying: "We do not know;" "Not known to us;" "Refer to the court," etc., is in fact no verdict, and the court should base no decree thereon. In such case the granting of a new trial is eminently proper. Cooper *v.* Branch, 86 Ga. 234.

2. White *v.* Lisle, 3 Swanst. 342; Woolfolk *v.* Graniteville Mfg. Co., 22 S. Car. 332.

Thus, in an action for divorce, a feigned issue was framed to try the question of adultery of the defendant with F. in Troy, on a certain day, and with divers persons unknown in New York. The verdict was founded on proof of adultery in Troy with a person other than F. The court held that evidence of adultery with other persons than those named in the issues framed was not admissible, and set the verdict aside and ordered a new trial, also granting leave to the plaintiff to amend the feigned issues. Germond *v.* Germond, 6 Johns. Ch. (N. Y.) 347.

Witness Not Examined. — Where an issue has been tried by direction of the court for the purpose of enabling the defendant to examine one of the plaintiff's witnesses, the omission to examine that witness at the trial will be a sufficient reason to grant a new trial. Barrett *v.* Howard, 5 L. J. N. S. Ch. 5.

3. Alabama. — Alexander *v.* Alexander, 5 Ala. 518; Barnett *v.* Montgomery, etc., R. Co., 51 Ala. 557.

Indiana. — Ketcham *v.* Brazil Block

Coal Co., 88 Ind. 515; Kimble *v.* Seal, 92 Ind. 276.

New Jersey. — Black *v.* Lamb, 12 N. J. Eq. 108; Black *v.* Shreve, 13 N. J. Eq. 456; Newark Plank Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 785; Bassett *v.* Johnson, 2 N. J. Eq. 154.

New York. — Apthorp *v.* Comstock, 2 Paige (N. Y.) 482; Mulock *v.* Mulock, 1 Edw. Ch. (N. Y.) 14; Van Cort *v.* Van Cort, 4 Edw. Ch. (N. Y.) 621; Clark *v.* Brooks, 2 Abb. Pr. N. S. (N. Y. C. Pl.) 385; Browne *v.* Murdock, 12 Abb. N. Cas. (N. Y. Supreme Ct.) 360; Lansing *v.* Russell, 13 Barb. (N. Y.) 510; Marvin *v.* Marvin, 5 Thomp. & C. (N. Y.) 429, note, 3 Hun (N. Y.) 139, note.

North Carolina. — Jones *v.* Zollicoffer, 2 Hawks (N. Car.) 492.

Pennsylvania. — Gray *v.* Simon, 2 Phila. (Pa.) 348.

South Carolina. — Lyles *v.* Lyles, 1 Hill Eq. (S. Car.) 76; Minton *v.* Pickens, 24 S. Car. 592; Frank *v.* Humphreys, 24 S. Car. 325.

Virginia. — Steptoe *v.* Pollard, 30 Gratt. (Va.) 689.

New Brunswick. — Bradshaw *v.* Foreign Mission Board, etc., 1 New Bruns. Eq. 346.

England. — Hampson *v.* Hampson, 3 Ves. & B. 41; St. Paul's *v.* Morris, 9 Ves. Jr. 169; Pemberton *v.* Pemberton, 11 Ves. Jr. 52; Bootle *v.* Blundell, 19 Ves. Jr. 494; Lorton *v.* Kingston, 5 Cl. & F. 269; Head *v.* Head, 1 T. & R. 141; Slaney *v.* Wade, 7 Sim. 595.

The Principle Is that upon the motion for a new trial the judge in equity may look, not only at the report, but at the record in the suit in equity; and may collect from the whole what may satisfy

b. IN INSTRUCTIONS OR DIRECTIONS — Where None Are Given. — Since the court in an equity case is not in general obliged to give any instructions or directions to the jury trying the issue, it is held that nondirection is a ground for granting a new trial only when it produces a verdict against the evidence.¹

Errors Not Prejudicial. — A new trial may be granted for misdirection where the court is not satisfied that the jury may not have been thereby influenced.²

Errors Not Prejudicial. — But if, on the whole, the court is satisfied that the verdict is right, it will disregard any misdirection of the judge, and not grant a new trial on this ground.³

9. For Misconduct or Irregularity of Jury. — Where the jury has

his conscience; and if upon the whole he is satisfied that justice has been done, though he may think some evidence was improperly rejected at law, he is at liberty to refuse a new trial. *Pemberton v. Pemberton*, 11 Ves. Jr. 53.

Refusal to Permit Re-examination of Witness. — Refusal of the judge presiding at the trial of a feigned issue in divorce to permit a witness to be re-examined, is not ground for a new trial unless material injury is shown. *V. Chan. Ct. 1814; Van Cort v. Van Cort*, 4 Edw. Ch. (N. Y.) 621.

Examination of Witness on Matter Foreign to Issue. — Although witnesses on a feigned issue have been examined on matter foreign to the issue, and their evidence excepted to, yet if no use is afterwards made of their testimony it is to be presumed that it has not influenced the jury, and will not be ground for disturbing the verdict. *V. Chan. Ct. 1814; Van Cort v. Van Cort*, 4 Edw. Ch. (N. Y.) 621.

1. *Great Western R. Co. v. Braid*, 1 N. R. 527.

Nondirection Not Misdirection. — The mere refusal of a judge to direct a jury to find for a plaintiff or defendant does not constitute misdirection; there is no misdirection unless there is something wrong or erroneous in what he lays before the jury, or unless he improperly withholds a direction when the grounds for it were distinctly and clearly stated by the counsel who asked for it. *Greene v. Bateman*, L. R. 5 H. L. 591.

2. *Cleeve v. Gascoigne*, Ambl. 323; *Bearblock v. Tyler*, Jac. 560; *White v. Lisle*, 3 Swanst. 342.

3. *Alabama.* — *Barnett v. Montgomery*, etc., R. Co., 51 Ala. 555.

California. — *Sweetser v. Dobbins*, 65 Cal. 529.

Indiana. — *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; *Kimble v. Seal*, 92 Ind. 276.

New Jersey. — *Black v. Lamb*, 12 N. J. Eq. 108; *Black v. Shreve*, 13 N. J. Eq. 456; *Trenton Banking Co. v. Rosell*, 2 N. J. Eq. 511; *Bassett v. Johnson*, 2 N. J. Eq. 154; *Newark Plank Road, etc., Co. v. Elmer*, 9 N. J. Eq. 785.

New York. — *Clark v. Brooks*, 2 Abb. Pr. N. S. (N. Y. C. Pl.) 385; *Post v. Mason*, 91 N. Y. 539, affirming 26 Hun (N. Y.) 187.

South Carolina. — *Lyles v. Lyles*, 1 Hill Eq. (S. Car.) 76; *Frank v. Humphreys*, 24 S. Car. 326.

New Brunswick. — *Bradshaw v. Fofeign Mission Board, etc.*, 1 New Bruns. Eq. 346.

England. — *Head v. Head*, 1 T. & R. 141; *Ringrose v. Todd*, 12 Price 650; *Jenkins v. Morris*, 14 Ch. Div. 674; *Lorton v. Kingston*, 5 Cl. & F. 269; *Tatham v. Wright*, 2 Russ. & M. 1.

Opinion Formed Without Regard to Directions. — In *Tatham v. Wright*, 2 Russ. & M. 1, the master of the rolls said: "I have carefully read every word of the report of the learned judge, but have purposely abstained from reading the shorthand-writer's notes of the summing up, in order that my judgment might be formed upon the evidence alone. * * * As this opinion is formed without any reference to the summing up of the learned judge, and as I should have considered it my duty to direct a new trial upon the evidence alone, whatever the summing up had been, if the jury had come to a different conclusion, it is not necessary to take any notice of the observations which have been made in that respect." The chancellor was clearly of opinion

been guilty of misconduct, or the court is not satisfied with the verdict in view of the circumstances under which the jury returned it, a new trial may be granted.¹ But though irregularities may have occurred, yet if the court is satisfied with the verdict it is not error to refuse a retrial.²

10. For Surprise at Trial — Unexpected Evidence. — Where, on the trial of the issues, a party has been surprised by the evidence produced, which he had no reason to expect would be given, the court may direct a new trial on this ground.³ But even though new evidence has been introduced at the trial, yet if it appears that there was no reason for the party to be surprised thereby, a new trial will not be granted.⁴

that the weight of evidence was in accord with the finding of the jury, and a new trial was refused.

1. 2 Daniell Ch. Pr. (1st Am. ed.) 752; East India Co. v. Bazett, Jac. 91, holding that no certificate from the judge as to such misconduct is necessary; Pleasants v. Ross, 1 Wash. (Va.) 156.

For misconduct of jury generally, see article JURY.

2. Thus in an action for partition of land in which the court submitted certain questions of fact for its information, it appeared from the record on appeal that one of the jurors called was related by marriage to one of the appellees, and it was insisted that the court below for that reason should have granted a new trial. The appellate court said: "Did it appear that the judgment in this cause was based upon the verdict of a jury one of whom was related to one of the parties within the sixth degree, there would be ground for the complaint here made. But in a case like this the finding of facts submitted to the jury is only advisory to the court, and the court may wholly ignore the facts as found by the jury, and doubtless would do so if not satisfied that such facts were found correctly. It does not appear in any legitimate form that the court adopted the facts as found by the jury, and, as the finding is general, we must presume, in favor of the action of the court, that it acted on the evidence in the cause, and made such finding as it thought the evidence required." Sheets v. Bray, 125 Ind. 36.

3. Exton v. Turner, 2 Ch. Cas. 80; M'Gregor v. Bainbrigge, 7 Hare 166, note; Willis v. Farrer, 3 Y. & J. 264; Ex p. Christie, 2 Dea. & Ch. 461; Germond v. Germond, 6 Johns. Ch. (N. Y.) 347.

Surprise by Introduction of New Witness. — On the trial of an issue on a question of legitimacy, a witness was called to prove a fact showing that there might have been access between a husband and wife at a particular place and time. This witness had not been examined in a suit in the ecclesiastical court, to which the mother of the child whose legitimacy was disputed was a party, and in which his evidence would have been material to her; nor was an attempt made by her in that suit to establish the fact of access, which his testimony went to make out. The testimony of this witness was held to be a surprise upon the party against whom it was produced, and, its accuracy being impeached by affidavits, the court directed a new trial of the issue. Gibbs v. Hooper, 2 Myl. & K. 353.

New Trial for Plaintiff Where Evidence Surprised Defendant. — The court will not direct a new trial of issues for the plaintiff on the ground of evidence adduced on the former trial, where that evidence was a surprise on the defendant, and tended to defeat the intention of the court in directing the former issue. Carrington v. Jones, 2 Sim. & S. 135, 3 L. J. Ch. 56.

4. Thus where evidence is discovered after the answer of the defendant has been put in and has been used at the trial of the issues, the court will not direct a new trial on the ground of surprise to the party applying, if before the trial he had opposed a motion by the other party for the express purpose of having the trial postponed, in order that the issues might be rectified. Legard v. Daly, 1 Ves. 192.

Sufficient Notice as to Evidence. — A notice to the defendant before the trial of the issues that the plaintiff will prove

By Claim Made. — It is also cause for a new trial if the complainant is surprised, on the trial of the issue, by the claim of the defendant to title under an instrument or from a source not stated or referred to in the answer.¹

11. For New Evidence. — If, after a verdict has been rendered on issues submitted out of chancery, there be new and important evidence produced which was not before the jury at the trial, the chancery court may set aside the verdict and grant a new trial, under the rules applicable in such cases.² But where the evidence could not have been used at the trial,³ or, either through negligence or design, was not there presented, a new trial will not be granted on the production of such new evidence.⁴

a person to be abroad, though it does not point out his whereabouts particularly, is sufficient to prepare the defendant to encounter this evidence, and affords no ground for a new trial by reason of surprise. *Richards v. Symes*, 2 Atk. 319.

1. *Powell v. Mayo*, 26 N. J. Eq. 120.

Claim Under Other Title than Set Up in Answer. — In the trial of an issue directed under a bill filed to quiet title to inquire and determine whether the defendant had any such estate or interest in the property as was claimed by him, the defendant is bound by the title set up in his answer; and where, on the trial, he claims under a title substantially different, and objection is made, a new trial will be granted as a matter of course if the verdict be in his favor. *Powell v. Mayo*, 26 N. J. Eq. 120.

Necessity of Objections and Allegation of Surprise. — But if in such cases there be no objection to the verdict or the evidence, or to the claim at the trial, and there is no allegation of surprise, there would seem to be no good reason for ordering a new trial merely because the title proved differs, though radically, from that set up in the answer. *Powell v. Mayo*, 26 N. J. Eq. 120.

Amendment of Answer to Conform to Finding. — In the absence of such objections and allegations as above shown to be necessary, if it appears that justice will be done by establishing the title proved at the trial, different though it be from the one set up in the answer, it is competent for the court to direct an amendment of the answer, if necessary, to conform to the finding of the jury. The court is not restricted to a decree in favor of or against the title set up in the answer. *Powell v. Mayo*, 26 N. J. Eq. 120.

2. *Williams v. Bishop*, 15 Ill. 553; *Doe v. Roe*, 1 Johns. Cas. (N. Y.) 402; *Nease v. Capehart*, 15 W. Va. 299; *Stace v. Mabbot*, 2 Ves. 552; *Ansdell v. Ansdell*, 4 Myl. & C. 449; *Sewel v. Preston*, 1 Ch. Cas. 65; *Montgomery v. Atty.-Gen.*, 9 Mod. 388.

Production of New Witness. — In *Cleeve v. Gascoigne*, Amb. 323, a motion for a new trial was made on the ground that the verdict was in favor of the plaintiff when the weight of evidence was on the side of the defendant, and that a material witness could not attend the trial by reason of illness, but had now recovered and was able to give evidence at another and future trial. On this ground a new trial was granted.

Evidence to Corroborate Discredited Evidence. — Where, upon the trial of an issue, the evidence of a material witness had been discredited by the judge, and a verdict rendered against the party producing that witness, the court, upon being satisfied by affidavits filed since the trial that the evidence of the witness might be corroborated, granted a new trial. *Shields v. Boucher*, 1 De G. & Sm. 40.

3. New Trial on Evidence Properly Rejected. — Where, on a bill for tithes, a verdict is found for the modus, the court will not grant a new trial because of evidence which was incompetent and properly rejected by the trial judge. *Colegrave v. Juson*, 3 Atk. 197.

4. *Hughes v. Jones*, 1 N. R. 124; *Shedden v. Patrick*, 22 L. T. N. S. 631, L. R. 1 H. L. Sc. App. 470.

Evidence Kept Back by Party. — A new trial will not be granted on account of a party having further evidence to produce, though the court is dissatisfied with the verdict, if the evidence has been kept back in order to bring it for-

12. Granting New Trial Without Setting Aside Verdict. — In granting a new trial of an issue, it is not necessary formally to set aside the verdict on the previous trial, as it ceases to be a ground for any subsequent proceedings.¹ Indeed, in *England* it is said that the usual practice is not to set the verdict aside;² but it is believed that the general practice in the *United States* is to the contrary.

13. Terms and Conditions on Granting. — The court, on granting a new trial, may impose such terms and conditions as it deems advisable to secure justice in the case.³

On Payment of Costs. — Thus, the condition of paying the costs of the previous trial may be imposed on the applicant.⁴

14. New Trials Subsequent to Second Trial — Generally. — Since the verdict is not binding, new trials of the issue may be ordered again and again, as many times as shall be necessary to satisfy the conscience of the court.⁵

ward afterwards, and try the cause again with more advantage. *Standen v. Edwards*, 1 Ves. Jr. 133.

Evidence Which Might Have Been Found and Produced. — A paper which, with due diligence, might have been found at first, is not, in legal meaning, *noviter repertum*, and a new trial will not be granted upon the discovery, after the trial of the issues, of a letter which might have been found before. *Browne v. McClintock*, L. R. 6 H. L. 456.

New Evidence to Make Forged Documents Immaterial. — Where, on the trial of an issue, a party has resorted to fraud and set up forged documents, he will not be permitted to say that, regardless of the question of the truth or falsity of the documents, there is other evidence which makes them immaterial, and no new trial will be granted on such ground. *Kemp v. Mackrell*, 2 Ves. 580.

1. *O'Connor v. Malone*, 6 Cl. & F. 572, reversing 2 Dr. & Wal. 491, reviewing and disapproving *Baker v. Hart*, 3 Atk. 542, 1 Ves. 28. See *supra*, XIII. 6. b. *With or Without New Trial*.

2. *O'Connor v. Malone*, 6 Cl. & F. 572, reversing 2 Dr. & Wal. 491, reviewing and disapproving *Baker v. Hart*, 3 Atk. 546, 1 Ves. 28.

3. **Commission for Examination of Witness and Stay of Trial.** — On granting a new trial of an issue the court directed a commission for the examination of a witness abroad and ordered that the trial be stayed until the return of the commission. The parties having improperly delayed the execution and

return of the commission, upon application to the court the whole of the original order was discharged. On appeal, however, it was held that the laches as to the commission ought not to affect the right to proceed to a new trial of the issue, and this part of the case was reversed, with special directions. *Colvin v. Campion*, 8 Bligh. N. S. 523.

4. *Cleeve v. Gascoigne*, Ambl. 323; *Standen v. Edwards*, 1 Ves. Jr. 133; *Edwin v. Thomas*, 2 Vern. 75; *Baker v. Hart*, 3 Atk. 542. See *infra*, XV. *Costs*.

New Trial on Unsatisfactory Verdict. — Where a new trial is granted on the ground of the unsatisfactory nature of the evidence, a condition should not be imposed that the party applying for the new trial should pay the costs of the previous trial. *Metropolitan Dist. Asylum v. Hill*, 47 L. T. 29.

New Trial Not Proceeded With. — If an order be made that upon the defendant's paying the plaintiff's costs a new trial should be had, the defendants are not compellable to pay the costs under the order unless they think fit to proceed to a new trial. *Lambert v. Fisher*, 7 Sim. 525.

5. *U. S. v. Samperyac*, Hempst. (U. S.) 118; *Williams v. Bishop*, 15 Ill. 553; *Moore v. Payne*, 7 Dana (Ky.) 380.

There Were Three Trials before the jury in *Cleeve v. Gascoigne*, Ambl. 323; *Hargrave v. Hargrave*, 13 Jur. 463; *Pemberton v. Pemberton*, 13 Ves. Jr. 290; *Stannard v. Graves*, 2 Call (Va.) 369; *Ferguson v. Ferguson*, Seld. Notes (N. Y.) 249, 3 Sandf. (N. Y.) 307.

First and Second Verdicts Contrary. — If the verdict on the first trial has gone one way, and on the second trial another way, the court will usually grant a third trial; which it is said is commonly conclusive.¹

Third Trial After Two Concurring Verdicts. — After two concurring verdicts, a third trial will usually be denied.²

Fourth Trial. — Where there have been three trials, it is seldom that a fourth will be granted, unless upon some special ground.³

Right of Court to Determine Issue After Several Trials. — After any number of trials and verdicts, however, it seems that the court has the right to decide the case according to its own view of the evidence.⁴

15. Where Issues of Right, and Verdict Conclusive — In General. — Where, by statutory enactments in some of the states, issues are a matter of right with the parties and the verdict is conclusive, the rules of law, and not of equity, prevail on determining the motion for a new trial; it may be granted for the same reasons and on the same grounds as would a new trial in an action at law.⁵

Verdict Contrary to Evidence or Against Weight Thereof. — Hence, if the verdict is contrary to the evidence, it is a proper ground for a retrial.⁶ But where there is conflicting evidence a verdict should

There Were Five Trials in Harder v. Syse, cited in *Garth v. Egerton*, 2 Vern. 285.

1. *Hargrave v. Hargrave*, 13 Jur. 463. See *M'Rae v. Woods*, 1 Hen. & M. (Va.) 548.

In *Atty.-Gen. v. Montgomery*, 2 Atk. 378, a third trial was denied when the second one was at bar. Lord Ch. Hardwicke said that the last trial, being at bar, should prevail, and that to lay down a rule that there must be three trials would be attended with great expense.

2. *Locke v. Colman*, 2 Myl. & C. 635; *Bates v. Graves*, 2 Ves. Jr. 287; *Leighton v. Leighton*, 1 P. Wms. 671; *St. Paul's v. Morris*, 9 Ves. Jr. 155.

Verdicts in Opposition to Trial Judges and Contrary to Former Verdict. — After two concurring verdicts for the same party on an issue out of chancery, the chancellor is not bound to direct a new trial, notwithstanding both verdicts were in opposition to the judges before whom the issues were tried, and a verdict had originally been rendered in favor of the other party. *M'Rae v. Woods*, 1 Hen. & M. (Va.) 548. But it may be granted if the court is still not satisfied with two verdicts. *Pemberton v. Pemberton*, 13 Ves. Jr. 290.

3. *Pemberton v. Pemberton*, 13 Ves. Jr. 290; *Stannard v. Graves*, 2 Call (Va.) 369, holding that after three verdicts on issue to the jury, the court of chancery did right in decreeing according to the opinions of the juries. *Ferguson v. Ferguson*, Seld. Notes (N. Y.) 249, 3 Sandf. (N. Y.) 307, holding that after three verdicts of guilty in an action for divorce the court would not again interfere, although the evidence was purely circumstantial and not entirely conclusive.

4. *Moore v. Payne*, 7 Dana (Ky.) 380. See *U. S. v. Sampereyac*, Hempst. (U. S.) 118.

In *O'Sullivan v. M'Sweeny*, 2 Con. & L. 486, the plaintiff was held entitled to a decree without an issue at law, after three trials, and an admission in the last of the principal fact in dispute.

5. *Meeker v. Meeker*, 75 Ill. 260; *Ferguson v. Ferguson*, 3 Sandf. (N. Y.) 307; *James v. Brooks*, 6 Heisk. (Tenn.) 153; *Morris v. Swaney*, 7 Heisk. (Tenn.) 591; *Richmond v. Richmond*, 10 Verg. (Tenn.) 343; *Gass v. Mason*, 4 Sneed (Tenn.) 508.

6. *James v. Brooks*, 6 Heisk. (Tenn.) 153; *Richmond v. Richmond*, 10 Verg. (Tenn.) 343.

Entire Absence of Evidence. — By statute.

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not be set aside and a new trial granted simply because the court may think it against the weight of evidence, or would have decided differently from the jury.¹

Errors on Trial. — Whether, in cases where issues are of right, a new trial must be granted for errors occurring on the trial, such as the improper admission or rejection of evidence or misdirection of the judge, is a matter upon which the practice in the different states is not entirely uniform.²

16. Proceedings on the New Trial. — The proceedings on the new trial will in general be similar to those had on the original trial, with such modifications, directions, or terms as the court may consider advisable.³

ute in *New York* the issue of adultery in an action for divorce is triable by jury as of right, and, in analogy to the practice in an action at law, if there is an entire absence of evidence, direct, presumptive, or circumstantial, the verdict of the jury will be set aside and a new trial granted. *Ferguson v. Ferguson*, 3 Sandf. (N. Y.) 307.

1. Divorce Cases. — In *New York* an issue of adultery in an action for divorce is a matter of statutory right, and the rule stated in the text is applicable in such cases. *Ferguson v. Ferguson*, 3 Sandf. (N. Y.) 307; *Whitney v. Whitney*, 76 Hun (N. Y.) 585.

In *Tennessee* similar statutory provisions exist. *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343.

2. In Tennessee it seems that a new trial must be granted on this ground. Errors must be corrected in the same mode as in actions at law. *James v. Brooks*, 6 Heisk. (Tenn.) 153.

In New York — Action for Divorce. — The old code, § 242, provided that the trial of the issue of adultery should be by jury, but it was held that the application for a new trial was addressed to the discretion of the equity judge; and that, upon principles well settled before the code, and not altered thereby, a new trial would not be awarded in such cases unless for substantial errors showing that a fair trial was not had, and affording reasonable doubt as to the justice of the result. If the court were satisfied, upon the whole case, that justice had been done, though there were errors, technical and unimportant to the general result, it was no abuse of the discretion with which it was clothed to refuse to reopen the controversy. *Forrest v. Forrest*, 25 N. Y. 501.

Under the Code Civ. Pro., § 1757, in an action for divorce for adultery

that issue is triable by jury as of right. By section 970 the proceedings subsequent to stating the issue are the same as where questions arising upon the issues are stated for trial by a jury, in a case where neither party can, as of right, require such a trial, except that the finding of the jury upon each issue or question so stated is conclusive in the action, unless the verdict is set aside or a new trial granted. Therefore, these cases are within section 1003, which provides that an error in the admission or exclusion of evidence, or in any other ruling or direction of the judge, upon the trial, may, in the discretion of the court which reviews it, be disregarded if that court is of opinion that substantial justice does not require that a new trial should be granted. *Lowenthal v. Lowenthal*, 92 Hun (N. Y.) 385; *Whitney v. Whitney*, 76 Hun (N. Y.) 585.

In Wisconsin — Divorce Cases. — Where, by Wis. Rev. Stat., § 2843, the issue of adultery in a divorce case is required to be tried by a jury unless a jury trial be waived, if material error be committed on the trial of the issue the verdict should be set aside and a new trial granted; otherwise the injured party is without remedy. If, however, upon the whole case, it appears that although errors have intervened the verdict is manifestly right, and that in all reasonable probability a new trial would result in the same verdict, then the court may well say that the errors alleged are immaterial, because not prejudicial to the rights of the complaining party. *Poertner v. Poertner*, 66 Wis. 644.

3. Swinfen v. Swinfen, 27 Beav. 148. **Change of Place of Trial.** — After two trials of an issue at assizes a third trial, being directed, was ordered, upon the

The Form of the Issue should not be changed.¹

Verdict Not Given in Evidence. — The verdict on the first trial should not be given in evidence on the new trial, and the order therefor should contain no such direction.²

XV. Costs — 1. Of Withdrawn or Untried Issues. — Where the issues have been withdrawn or not proceeded with to trial, it is usual to give the costs against the party who procures the withdrawal, or is in fault for the failure of the trial.³

2. Of Tried Issues — a. WHEN AWARDED — In General. — The costs of an issue are generally disposed of at the further hearing of the cause.⁴

Issue Directed on Interlocutory Application. — But if the issue was directed on an interlocutory application, the costs may be disposed of after the decision of the issue without waiting for the further hearing.⁵

Of Former Trial Where New One Applied For. — Where, as in England, the application for a new trial is to be made before the cause

application of the plaintiff, to be tried at the bar of the King's Bench instead of the assizes; the party who applied for the trial at bar agreeing to accept nisi prius costs in the event of the verdict being in his favor. *Baker v. Hart*, 3 Atk. 546; *Hite v. Salter*, 2 Dick. 495.

1. White v. Lisle, 3 Swanst. 342, where the lord chancellor was of opinion that no order changing the form of the issue could be made on a motion for a new trial; and that the propriety of the form of the issue could be questioned only on an appeal from the decree by which it was directed.

Objection that Issue Not Broad Enough. — On a motion for a new trial it cannot be objected that the issue was not broad enough, and that it ought to have embraced other inquiries. *Bassett v. Johnson*, 2 N. J. Eq. 154.

Case Not Different on Second Trial. — Equity will not assist a party to make out a different case upon a second trial at law from that which he made upon the first. *Cockburn v. Hussey*, 2 Ridgw. P. C. 504.

2. O'Connor v. Malone, 6 Cl. & F. 572, reversing 2 Dr. & Wal. 491, and overruling *Baker v. Hart*, 3 Atk. 542, 1 Ves. 28.

3. Withdrawal of Issues. — Thus, where the plaintiff withdraws the issues he pays the costs. *Brookland v. Golding*, Wightw. 100.

The withdrawal of the cause upon the trial of an issue between an adult and infant was accomplished through

a compromise signed by the counsel. The agreement, not binding on the infant, was repudiated by the adult. On the direction of a new trial the adult party was ordered to pay so much of the costs of the issue as had been rendered fruitless, and could not be made available on the subsequent trial. *Hargrave v. Hargrave*, 12 Beav. 408, 14 Jur. 212.

Failure to Go to Trial of Issue. — It is held that on an issue out of chancery it is proper to move that court for costs for not going on to trial, or to move there for a special jury. *Anonymous*, 2 P. Wms. 68.

But it is also decided that equity will give cost for not going to trials on an issue directed only where a court of law would have done so, and therefore where notice of trial was countermanded in time costs were refused. *Moore v. Bevis*, Hanmer 73.

4. Standen v. Edwards, 1 Ves. Jr. 133; *Daniell Ch. Pr.* (1st Am. ed.) 760.

Consideration of Nisi Prius Costs on Direction of Issue. — Issues being directed to be tried at bar, the court refused to make it part of the order that the defendant should pay only nisi prius costs if the issues were found against him. *Falmouth v. Innys*, Moss. 87. But where a party has prayed an issue the court has directed it on the terms that he would be contented with nisi prius costs. *Baker v. Hart*, 3 Atk. 542, 1 Ves. 28.

5. Duncan v. Varty, 2 Phil. 696, overruling *Malins v. Price*, 2 Colly. 190.

comes on for further hearing,¹ the costs of the former trial will not in general be taxed upon the application for the new trial, but will be reserved for the further hearing.²

b. HOW AWARDED — Discretionary with Court. — The awarding of costs of an issue is a matter within the discretion of the court, and does not follow the verdict as of course.³

Generally Follow Event and for Successful Party. — The practice of the court, however, is generally to allow them to follow the event, and give them to the successful party.⁴

Where Neither Party Is Completely Successful on the issues, no costs need be given.⁵

Each Party Successful on Some Issues. — Where there are several issues, and some are found for the plaintiff and some for the defendant, the parties will be allowed costs on the issues found in their favor, and must pay costs on those found against them.⁶

Where a New Trial Is Granted for misdirection of the judge, or where the question raised by the motion was a doubtful one, the usual practice is to award no costs of the first trial of the issue.⁷ But where a new trial is ordered, the costs to abide the event, such

See *Rigby v. Great Western R. Co.*, 14 Jur. 710.

1. See *supra*, XIV. 3. *c. When Made.*

2. This practice was followed in *O'Connor v. Malone*, 6 Cl. & F. 572; *White v. Lisle*, 3 Swanst. 342; *Bearblock v. Tyler*, Jac. 560; *Duncan v. Varty*, 2 Phil. 696; *Rochester v. Lee*, 2 De G. M. & G. 427.

New Trial on Condition. — It has been seen, however, that the court may make the payment of these costs a condition to granting the new trial. See *supra*, XIV. 13. *Terms and Conditions on Granting.*

3. *Rochester v. Lee*, 2 De G. M. & G. 427; *Stacey v. Spratley*, 4 De G. & J. 199; *Decker v. Caskey*, 3 N. J. Eq. 446; *Carpenter v. Easton*, etc., R. Co., 28 N. J. Eq. 390; *Peters v. Shanner*, 1 Del. Co. Rep. (Pa.) 252; *Parker v. Laney*, 58 N. Y. 469.

Issue on Bill to Redeem Mortgage when Heir-at-law Dead. — On a reference to a master on a bill by a mortgagee to redeem, the master reported the heir-at-law to be dead. Exceptions were taken and the mortgagee insisted that the heir was living. Issues were then directed, upon which also he was found to be dead. It was held that the mortgagee would not have to pay the costs of the issue, as it was not vexatious so long as the court saw fit to direct an issue. *Wilson v. Metcalfe*, 3 Madd. 45.

Plaintiff's Title Being Probable, Though

the Verdict Was Against It, the court refused costs against him. *Trethewy v. Hoblin*, 2 Ch. Ca. 9.

Issue on Matter on Common-law Side of Court. — In a feigned issue directed by the court in a matter arising on the common-law side the costs always follow the verdict, and the court has no discretion to change the rule. *Jarrard v. Zook*, 1 Woodw. (Pa.) 406.

4. *Parkes v. Stevens*, W. N. (1869) 269; *Metcalfe v. Beckwith*, 2 P. Wms. 376; *Blackburn v. Gregson*, 1 Bro. C. C. 420; *Carpenter v. Easton*, etc., R. Co., 28 N. J. Eq. 390.

5. *Weatherley v. Ross*, 1 N. R. 228.

6. *Prevost v. Bennett*, 2 Price 272.

7. **New Trial for Misdirection.** — *White v. Lisle*, 3 Swanst. 342. Thus, where the verdict on the first trial of the issue was for the defendant, in consequence of a misdirection of the judge, and on the second trial was for the plaintiff, the costs of the suit, of the motion for a new trial, and of the second trial were given against the defendant, but no costs were given for the first trial. *Bearblock v. Tyler*, Jac. 571.

Doubtful Question on Motion for New Trial. — Where two trials resulted in favor of the defendant, the court dismissed the bill with all costs at law and in equity except the costs of the first trial of the issue, as to which it was ordered that each party pay his own costs, the question raised by the motion

event means the ultimate event of the cause, and therefore, if the verdict on the second trial be set aside, and on a third trial the result is the same as at the first trial, the successful party will be entitled to the costs of the first trial.¹

3. Of the Application for New Trial. — The costs of the application for the new trial will usually be governed by the result of the new trial.²

4. Of the New Trial. — The rules pertaining to the costs of the new trial are, it seems, similar to those governing the costs of issues in general. They usually abide the event of the suit and are given to the successful party.³

5. Of the Entire Case. — Not only, then, may costs be allowed for the first and new trials of the issues, but the costs of all the trials at law and of the suit in equity may be included and given in the final award.⁴

for a new trial having been doubtful. *Stuart v. Greenall*, 13 Price 755.

As to Costs of New Trial, see *infra*, XV. 4. *Of the New Trial*.

1. *Meule v. Goddard*, 5 B. & Ald. 766, 7 E. C. L. 253.

2. See *Duncan v. Varty*, 2 Phil. 696; *White v. Lisle*, 3 Swanst. 356; *Locke v. Colman*, 2 Myl. & C. 42.

Costs of Refusal of Application as Costs in Cause. — If the application for a new trial is refused, the costs of resisting it are costs in the cause, unless the application is made after decree, in which case the costs are not costs in the cause, but the application may be expressed to be dismissed with costs. *White v. Lisle*, 4 Madd. 214; *Devie v. Brownlow*, 2 Dick. 796; *Daniell Ch. Pr.* (1st Am. ed.) 761.

Costs of Rule for New Trial Where Rule Drops. — Where a rule for a new trial drops in consequence of the court being equally divided in opinion, the party who obtained the verdict is not entitled to the costs of the rule. *Dansey v. Richardson*, 18 Jur. 957, 23 L. J. Q. B. 361.

3. *Meule v. Goddard*, 5 B. & Ald. 766, 7 E. C. L. 253; *White v. Lisle*, 3 Swanst. 342; *Bearblock v. Tyler*, Jac. 560; *Stuart v. Greenall*, 13 Price 755. See also *supra*, XV. 2. *b. How Awarded*, and as to costs of the first trial where a new trial is ordered, see *supra*, XV. 2. *b. How Awarded*.

4. On a bill filed in behalf of an infant, with the sanction of the master, to set aside deeds executed by a lunatic at a time subsequent to which he had been found a lunatic by inquisition, an issue was directed and found

in favor of the deeds. The bill was dismissed with costs of the suit and of the issue. *Frank v. Mainwaring*, 4 Beav. 37.

Issue in Bankruptcy. — Where, on an issue at law to try the bankruptcy of a party, he is found not to be a bankrupt, and costs are given against the petitioning creditors at law, costs of the proceedings in equity will follow of course. *Ex p. Gulston*, 1 Atk. 139.

On Reversal with Costs in Court Below. — When a case has been sent to a court of law and the chancery court gives a decree with costs, including the costs at law, and the decree is reversed "with costs of the suit in the court below," the defendant is entitled, of course, to the costs at law. *Smith v. Clarke*, 2 Con. & L. 160, 5 Ir. Eq. R. 423.

Where New Trials Were Granted. — An issue on a bill to settle boundaries, being tried, was found for the defendant on three successive trials, and the defendant was not only allowed the costs of all the trials at law, but also the costs in equity. The defendant had no bill, and the plaintiff might have tried it at law without coming into equity. *Metcalf v. Beckwith*, 2 P. Wms. 376.

Where two trials of an issue resulted in favor of the defendant, the bill was dismissed with all costs at law and in equity except the costs of the first trial. *Stuart v. Greenall*, 13 Price 755.

So where the first verdict was for the defendant, in consequence of a misdirection, and the second was for the plaintiff, the costs of the suit, of the motion for a new trial, and of the second trial were given against the defendant, but no costs were given

XVI. APPELLATE REVIEW — 1. Of Allowance or Refusal of Issue

— *a.* POWER TO REVIEW IN GENERAL — *By Appeal.* — According to the weight of authority in *England*, an order granting or denying an issue to the jury in an equity case is appealable.¹ In the *United States* the subject is involved in a considerable conflict of opinion. In some of the states the doctrine is maintained that the discretion of the court in submitting or refusing issues is not reviewable on appeal,² or at least that the appellate court will not attempt to interfere with that discretion unless it has been palpably abused.³ In other states it is considered that the discretion of the court must be exercised upon sound principles of reason and justice; that a mistake in its exercise is a just ground of appeal; and that the appellate court will judge whether such discretion has been soundly exercised in a given case.⁴

of the first trial. *Bearblock v. Tyler*, Jac. 571.

As to Costs of First Trial, where a new trial was granted, see *supra*, XV. 2. *b.* *How Awarded.*

1. See *Williams v. Guest*, L. R. 10 Ch. 467, 33 L. T. 201; *Hampson v. Hampson*, 3 Ves. & B. 41; *Butlin v. Masters*, 2 Phil. 290; *White v. Lisle*, 3 Swanst. 351; *Schneider v. Shrubsole*, 4 De G. J. & S. 52; *Parker v. Morrell*, 2 Phil. 453; *Browne v. McClintock*, L. R. 6 H. L. 456.

2. *Alabama.* — Anonymous, 35 Ala. 226; *Marshall v. Croom*, 60 Ala. 121. See *Kennedy v. Kennedy*, 2 Ala. 571; *Atwood v. Smith*, 11 Ala. 894.

California. — *Lorenz v. Jacobs*, 59 Cal. 262; *Cleghorn v. Cleghorn*, 66 Cal. 309; *Graham v. Stewart*, 68 Cal. 374; *Duff v. Duff*, 71 Cal. 513, *affirmed* in 87 Cal. 104.

Illinois. — *South Park Com'rs v. Phillips*, 27 Ill. App. 380.

Indiana. — *Reddick v. Keesling*, 129 Ind. 136; *Farmers' Bank v. Butterfield*, 100 Ind. 229.

Kentucky. — *Kennedy v. Ten Broeck*, 11 Bush (Ky.) 241; *Blakey v. Johnson*, 13 Bush (Ky.) 197.

Mississippi. — *Pittman v. Lamb*, 53 Miss. 594; *Iler v. Routh*, 3 How. (Miss.) 276.

New York. — In this state, though there is a variance in the decisions, yet the general doctrine is believed to be as stated in the text. See *Brinkley v. Brinkley*, 56 N. Y. 192; *Mackellar v. Rogers*, 109 N. Y. 468; *Paul v. Parshall*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 138; *Farmers', etc., Bank v. Joslyn*, 37 N. Y. 353; *Colman v. Dixon*, 50 N. Y. 572; *Townsend v. Graves*, 3

Paige (N. Y.) 453; *Ellensohn v. Keyes*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 353; *Eggers v. Manhattan R. Co.*, 27 Abb. N. Cas. (N. Y. Super. Ct.) 463.

Issue from Orphans' Court in Pennsylvania. — Under the Pa. Act of June 16, 1836, it was held that no appeal would lie from the action of the Orphans' Court on its refusal of a motion for an issue. *Thompson's Appeal*, 103 Pa. St. 606.

3. *Graham v. Stewart*, 68 Cal. 374; *Blakey v. Johnson*, 13 Bush (Ky.) 197; *Burt v. Rynex*, 48 Mo. 311.

4. *Massachusetts.* — *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 47, *distinguishing* *Ward v. Hill*, 4 Gray (Mass.) 593; *Crittenden v. Field*, 8 Gray (Mass.) 621, *approving* *Wright v. Wright*, 13 Allen (Mass.) 207. To the same effect, see *Ross v. New England Mut. Ins. Co.*, 120 Mass. 116; *Merchants' Nat. Bank v. Moulton*, 143 Mass. 543; *Harris v. Mackintosh*, 133 Mass. 228.

New Jersey. — *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266; *Newark, etc., R. Co. v. Newark*, 23 N. J. Eq. 516, *disapproving* the dictum in *Black v. Lamb*, 12 N. J. Eq. 113.

South Carolina. — *Drayton v. Logan*, Harp. Eq. (S. Car.) 67; *Jaggers v. Estes*, 3 Strobb. Eq. (S. Car.) 34.

Virginia. — *Wise v. Lamb*, 9 Gratt. (Va.) 294; *Reed v. Cline*, 9 Gratt. (Va.) 136; *Beverley v. Walden*, 20 Gratt. (Va.) 154; *Isler v. Grove*, 8 Gratt. (Va.) 257; *Smith v. Betty*, 11 Gratt. (Va.) 752; *Stannard v. Graves*, 2 Call (Va.) 369; *Knibb v. Dixon*, 1 Rand. (Va.) 249; *Douglass v. McChesney*, 2 Rand. (Va.) 109; *Bullock v. Gordon*, 4 Munf. (Va.) 450; *Robinson v. Allen*, 85 Va. 721; *Almond v. Wilson*, 75 Va. 626; *Wil-*

By Writ of Error. — The granting or refusal of an issue is so much a matter of discretion with the court that its exercise is not usually subject to review by writ of error.¹

Bill of Exceptions. — The discretion in submitting or refusing issues is generally not the subject of a bill of exceptions.²

b. REVIEW OF METHOD OF SUBMISSION. — Ordinarily, the appellate court will not interfere with the method by which issues have been submitted, though the one selected be not in accordance with the approved practice, if no prejudicial error has been occasioned.³

c. REVIEW OF FORM, MANNER OF FRAMING, SETTLEMENT, ETC. — As a general rule, the form of the issues submitted or the manner of framing and settlement thereof will not constitute ground for reversal if they are presented in a way appropriate to the securing of a fair and thorough trial, and the court can see that the parties could not have been prejudiced.⁴ Sometimes, however,

Hiams v. Blakey, 76 Va. 259; *Carter v. Carter*, 82 Va. 624; *Reed v. Axtell*, 84 Va. 231; *Jones v. Christian*, 86 Va. 1031; *Loftus v. Maloney*, 89 Va. 605.

West Virginia. — *Powell v. Batson*, 4 W. Va. 610; *Anderson v. Cranmer*, 11 W. Va. 582; *Jarrett v. Jarrett*, 11 W. Va. 585; *Sands v. Beardsley*, 32 W. Va. 598; *Setzer v. Beale*, 19 W. Va. 289; *Mahnke v. Neale*, 23 W. Va. 57.

Issue from Probate Court in California. — In *Keller v. De Franklin*, 5 Cal. 433, it was considered that the discretion of the probate judge in sending or refusing to send issues of fact to the District Court for trial was subject to review by the Supreme Court.

1. *Abbott v. Monti*, 3 Colo. 563; *Johns v. Erb*, 5 Pa. St. 232; *Baker v. Williamson*, 2 Pa. St. 116; *Scheetz's Appeal*, 35 Pa. St. 94; *Neff v. Barr*, 14 S. & R. (Pa.) 166; *Cake v. Cake*, 106 Pa. St. 472; *Kellogg v. Krauser*, 14 S. & R. (Pa.) 137. See *Atwood v. Smith*, 11 Ala. 894; *Kennedy v. Kennedy*, 2 Ala. 571; *Anonymous*, 35 Ala. 226.

2. **In Massachusetts.** — Whether any or what issues in equity shall be submitted to a jury, is a subject of appeal under Gen. Stat. Mass., c. 113, § 10, and not of a bill of exceptions, because it involves a question of discretion, and not merely of law. *Dorr v. Tremont Nat. Bank*, 128 Mass. 349; *Ward v. Hill*, 4 Gray (Mass.) 593; *Crittenden v. Field*, 8 Gray (Mass.) 621; *Brooks v. Tarbell*, 103 Mass. 496. See also *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Ross v. New England Mut. Ins. Co.*, 120 Mass. 113; *Davis v.*

Davis, 123 Mass. 590; *Wright v. Wright*, 13 Allen (Mass.) 207.

In Tennessee. — Where the objection was to the changing of issues as presented to the court by the complainant, who simply tendered a long list of issues, and the bill of exceptions only recited: "The court allowed only such issues as appear in the decree showing the verdict of the jury; and plaintiff excepted to the ruling refusing or modifying the issues submitted in his behalf," it was held that no error was pointed out. The objection to the action of the court was general, and might have applied as well to the change of phraseology as to the substance, and besides, had the attention of the court been called to the particular changes objected to, they might have been corrected. *Pearce v. Suggs*, 85 Tenn. 724.

For General Use of Bills of Exceptions, see *infra*, XVI. 2. a. (2) *Bills of Exceptions*.

3. *Koons v. Blanton*, 129 Ind. 392; *Ikerd v. Beavers*, 106 Ind. 483 [*distinguishing Farmers' Bank v. Butterfield*, 100 Ind. 229]; *Lake Erie, etc., R. Co. v. Griffin*, 92 Ind. 487; *Soenksen v. Weyhausen*, 32 Wis. 523.

4. *Smith v. Smith*, 21 Ala. 761; *Hoobler v. Hoobler*, 128 Ill. 645; *Koons v. Blanton*, 129 Ind. 393. See *Farmers' Bank v. Butterfield*, 100 Ind. 229; *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266; *Zimmerman v. Schoenfelt*, 3 Hun (N. Y.) 692; *Moore v. Albright*, 4 S. & R. (Pa.) 231; *Ogle v. Adams*, 12 W. Va. 213.

where there has been a palpable error in the form or manner of framing, the appellate court will reverse the order directing the issues.¹

d. DECREE OF APPELLATE COURT — Improper Direction of Issue. —

Where the grant or refusal of issues is reviewable, and it appears to the appellate court that the discretion of the equity court was erroneously exercised and an issue improperly directed, the error will be corrected either by rendering a decree on the merits, or by reversing and remanding the case, as occasion may require.²

Improper Refusal of Issue. — So where a decree has been rendered in an equity cause without the aid of a jury, and the appellate court can see from all the facts, circumstances, and evidence that issues should have been submitted, it will sometimes, without a reversal, try the case on the facts and render a verdict on the merits,³ but more frequently it will reverse the decree and remand the cause to be proceeded with in the proper manner,⁴ often specifically directing the submission by the court below of the proper and necessary issues.⁵

1. *Rutty v. Person*, 49 N. Y. Super. Ct. 55.

Where the Issue Did Not Embrace Object Contemplated, the appellate court directed a new issue. *Braxton v. Willing*, 4 Call (Va.) 288.

Where the Terms of the Issue Were Too Restricted and Narrow, the decree was reversed and the cause remanded for proper proceedings. *Galt v. Carter*, 6 Munf. (Va.) 245.

Where the Issue Was Not Framed Between Proper Parties, in an attachment case, the judgment was reversed and cause remanded for proper issue. *Fish v. Keeney*, 91 Pa. St. 138.

2. *Alabama*. — *Atwood v. Smith*, 11 Ala. 894. See *Kennedy v. Kennedy*, 2 Ala. 571; *Anonymous*, 35 Ala. 226.

Iowa. — *Hall v. Doran*, 6 Iowa 433.

South Carolina. — *Brownlee v. Martin*, 21 S. Car. 402.

Virginia. — *Smith v. Betty*, 11 Gratt. (Va.) 752; *Wise v. Lamb*, 9 Gratt. (Va.) 294.

West Virginia. — *Jarrett v. Jarrett*, 11 W. Va. 585; *Vangilder v. Hoffman*, 22 W. Va. 1; *Mahnke v. Neale*, 23 W. Va. 57; *Sands v. Beardsley*, 32 W. Va. 598.

Issues Being Minute and Numerous, the order submitting them was reversed. *Rutty v. Person*, 49 N. Y. Super. Ct. 55.

The Immateriality of issues submitted may be ground for reversal and remand of cause for further action. *Hall v. Doran*, 6 Iowa 433. But where the submission and determination of one

issue in the case renders the trial of another issue immaterial, its regularity will not be looked into on error. *Dabbs v. Dabbs*, 27 Ala. 646.

Issue Directed at Improper Time. — On a prayer for an accounting, where the answer contains a counterclaim, an order requiring that special issues be framed and submitted to a jury will be reversed, where the motion was noticed before the plaintiff's time to reply or demur to the counterclaim set up in the answer had expired. *Rutty v. Person*, 49 N. Y. Super. Ct. 55.

3. *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67.

4. *Knibb v. Dixon*, 1 Rand. (Va.) 249; *Bullock v. Gordon*, 4 Munf. (Va.) 450; *Beale v. Digges*, 6 Gratt. (Va.) 583; *Nelson v. Armstrong*, 5 Gratt. (Va.) 354; *Marshall v. Marshall*, 18 W. Va. 395.

5. *Illinois*. — *Russell v. Paine*, 45 Ill. 350.

New York. — *Patchen v. Devin*, 37 Barb. (N. Y.) 430.

South Carolina. — *Jaggers v. Estes*, 3 Strobb. Eq. (S. Car.) 34.

Virginia. — *Douglass v. McChesney*, 2 Rand. (Va.) 109; *Hooe v. Marquess*, 4 Call (Va.) 416; *Isler v. Grove*, 8 Gratt. (Va.) 257; *Mettert v. Hagan*, 18 Gratt. (Va.) 231; *Williams v. Blakey*, 76 Va. 254.

West Virginia. — *Nease v. Capehart*, 8 W. Va. 95; *Marshall v. Marshall*, 18 W. Va. 395.

Wisconsin. — *McDonald v. Falvey*, 18 Wis. 571.

2. Of Proceedings at Trial, Verdict, Action of Court, etc. — a. METHODS OF SECURING APPELLATE REVIEW — (1) Motion for New Trial and Appeal. — In most of the courts of chancery the verdict of the jury on issues submitted is, as has been seen, merely advisory, and the proper method of presenting a question arising on the trial thereof to the consideration of a reviewing court is by motion for a new trial in the court ordering the issue, and an appeal if the decision be unsatisfactory.¹ By this method, if the proper course has been pursued on the motion for a new trial, the evidence and proceedings become a part of the record, and go up to the appellate court if an appeal is taken.²

(2) *Bills of Exceptions.* — Therefore, bills of exceptions as such cannot usually be taken on the trial of issues in equity, or if taken can only be used on a motion for a new trial. They do not lie, according to their proper functions, for the presentation of errors to an appellate court.³ Though this is the general rule, yet its

1. The Findings of Facts will not be reviewed on appeal unless a motion for a new trial was properly made in the court below. *Deputy v. Stapleford*, 19 Cal. 302; *Gagliardo v. Hoberlin*, 18 Cal. 396; *Duff v. Fisher*, 15 Cal. 379, *distinguishing* *Dewey v. Bowman*, 8 Cal. 145; *Still v. Saunders*, 8 Cal. 281, *disapproving* *Gray v. Eaton*, 5 Cal. 448. To the same effect, see *Beck v. Beck*, 6 Mont. 318; *Ward v. Warren*, 15 Hun (N. Y.) 600; *Fanning v. Russell*, 94 Ill. 386, *reversing* 2 Ill. App. 632.

Errors Occurring on the Trial will likewise not be reviewed by an appellate court if a new trial was not moved for. *Chapin v. Thompson*, 23 Hun (N. Y.) 12; *Whitney v. Whitney*, 76 Hun (N. Y.) 591. See *Armstrong v. Armstrong*, 3 Myl. & K. 45.

Evidence Not Before Appellate Court. — It is held in *Montana* that where there is no motion for new trial the evidence is not before the appellate court, and the decree will be presumed to be supported by the evidence until the contrary appears. *Beck v. Beck*, 6 Mont. 318.

2. See supra, XIV. New Trial; infra, XVI. 2. c. Transmission of Exceptions and Evidence; and further as to the proper practice, *Armstrong v. Armstrong*, 3 Myl. & K. 45.

3. Alabama. — In an early case it was stated that although it was not competent to revise on error a question of law reserved by bill of exceptions upon the trial of an issue out of chancery, yet as the question was a novel one in the courts of Alabama, it was regarded as suffi-

ciently substantial to authorize the appellate court to look into and vary a decree as to costs, if incorrect. *Alexander v. Alexander*, 5 Ala. 517. In the later cases it is expressly held that the submission of issues being discretionary, and the verdict thereon advisory, a bill of exceptions, being unknown to chancery practice, could not reserve questions of erroneous rulings of the judge on the trial for revision of an appellate court, and that the only remedy for such erroneous rulings, whether the issue was tried at law or before the chancellor, was an application to the chancery court for a new trial. *Barnett v. Montgomery, etc.*, R. Co., 51 Ala. 555; *Matthews v. Forniss*, 91 Ala. 157.

Maryland. — Upon the trial of issues by a jury ordered by the Circuit Court of Baltimore City, by virtue of art. 29, § 58 of the code, bills of exception to the rulings of the court will not lie. *Barth v. Rosenfeld*, 36 Md. 604.

In the Federal Courts a bill of exceptions as such has no part in proceedings to review the findings of fact on issues to the jury in an equity case; or, if taken, can only be used on a motion for a new trial. The verdict is to be presented for reconsideration and re-examination only on a motion for a new trial, based not on mere errors of the judge, but upon a review of the whole case as submitted to the jury. *Harrison v. Rowan*, 3 Wash. (U. S.) 590; *Brockett v. Brockett*, 3 How. (U. S.) 692; *Johnson v. Harmon*, 94 U. S. 371; *Watt v. Starke*, 101 U. S. 247.

application is not universal, for by practice and statutes in some of the states, or where the verdict is taken as conclusive and not merely advisory, bills of exceptions may be resorted to.¹

1. In **Massachusetts**, though the ruling is recognized that in the practice of most courts of chancery a bill of exceptions is unknown, and the rulings of a judge presiding at the trial by jury of issues out of chancery can be revised only upon motion for a new trial in the court which ordered the issues, yet bills of exceptions have long been allowable in cases in equity as well as in actions at law, and the authority to revise, upon bills of exceptions, rulings in matters of law at the trial of issues in equity before a jury, is established. *Dorr v. Tremont Nat. Bank*, 128 Mass. 349. See *Crittenden v. Field*, 8 Gray (Mass.) 621; *Brooks v. Tarbell*, 103 Mass. 496; *Cobb v. Boston*, 112 Mass. 181; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290. In the latter case exceptions were allowed; and it was said in *Dorr v. Tremont Nat. Bank*, 128 Mass. 349, referring to this case, that they were not allowed in the form of a bill of exceptions, merely because other questions in the cause, which could be more appropriately presented in the form of a report, were reserved for the determination of the full court, and the exceptions were therefore incorporated in the report.

Virginia — *Bill of Exceptions for Dissatisfaction of Judge at Trial.* — In *Stannard v. Graves*, 2 Call (Va.) 369, it was held that if the court before which the chancery issues were tried was dissatisfied with the verdict, the dissatisfaction must be certified on the record by the court; or if refused, it should be put upon the record by bill of exceptions.

Truth of Allegations in Bill. — In *Ford v. Gardner*, 1 Hen. & M. (Va.) 72, the decision was that when the verdict on the issues is certified to the court sitting in chancery and a new trial refused, allegations as to what passed at the trial, stated in a bill of exceptions to the opinion of the court in refusing a new trial, are not to be taken as admitted to be the truth by the court's signature and seal if no proof of the truth of these allegations appears on the record.

Case Considered as on Motion for New Trial. — In *Watkins v. Carlton*, 10 Leigh (Va.) 586, a bill of exceptions

was taken, but it appears that the case was considered as upon a motion for a new trial. This is in accordance with the usual practice.

Issue of Usury of Right and Verdict Conclusive. — By statute in this state, the issue of usury, on a bill not requiring discovery, is triable by jury as of right, and the verdict is conclusive. A bill of exceptions was properly taken, in which all the evidence given on the trial was set forth. *Brockenbrough v. Spindle*, 17 Gratt. (Va.) 22.

West Virginia — *Duty of Court to Issue Bills of Exceptions.* — In this state, in the trial of an issue out of chancery, it is the duty of the judge presiding to issue and send bills of exceptions to its opinion, as in trials of law issues before a jury. *Henry v. Davis*, 13 W. Va. 230.

Compelling Signature by Mandamus. — And the judge, in such case, may be compelled by mandamus from the Supreme Court of Appeals to sign the bill of exceptions, if it states fairly the truth of the case involved therein. *Henry v. Davis*, 13 W. Va. 230.

Failure to Apply for Mandamus. — If, however, the judge refuses to sign the bill, and the defendant appeals from the decree and fails to apply for a mandamus to compel the signature, but proceeds to have the cause heard and determined by the appellate court on the record without such bill of exceptions, and the decree is affirmed, the defendant has waived the benefit of such exceptions, and will not be heard to complain of the action of the judge in refusing to sign the bill. *Henry v. Davis*, 13 W. Va. 230.

Georgia — *Record and Not Bill of Exceptions Governs.* — Where, in the bill of exceptions, the judge certifies that he granted a new trial upon a special ground, while the order directing it is general and specifies no particular ground as it appears in the transcript of the record, the appellate court will be governed by the latter. *Poullain v. Poullain*, 72 Ga. 418.

Mississippi — *Verdict on Same Footing as if Rendered at Law.* — In this state a verdict upon an issue sent to a jury is, by statute, placed on the same footing with verdicts rendered in courts of law,

(3) *Writs of Error*. — According to the weight of authority, it is believed that a writ of error does not lie to review a verdict or judgment on issues in an equity case, or proceedings at the trial thereof.¹

(4) *Where No Steps Are Taken to Avoid Verdict or Decree*. — If the party dissatisfied with the verdict of the jury or the findings of the court makes no objection thereto, and takes no steps in the lower court to get rid of the decisions, the matter will not be reopened by the appellate court.²

b. REVIEW OF GRANT OR REFUSAL OF NEW TRIAL. — In some of the courts it has been held that the grant or refusal of a new trial of the issues is so much a matter of discretion in the court below as to render its action neither appealable nor reviewable.³ On the other hand, there are authorities holding that such action is reviewable on appeal.⁴

and if a motion for a new trial be made, there must be made a bill of exceptions embodying the evidence to enable the appellate court to determine as to the propriety of the action of the chancellor's court on that motion. *State v. Farish*, 23 Miss. 483.

1. In England it was held, in an early case, that the courts, on the waiver of the parties, might allow the verdict on the issues to be made the subject of a proceeding in error, as if a bill of exceptions had been regularly taken. *Clayton v. Nugent*, 8 Jur. 867.

In Pennsylvania, though the decisions are in a deplorably uncertain and conflicting condition, yet it seems that the general rule is that a writ of error does not lie to a judgment on issues submitted in an equity proceeding; but that where the proceeding is an action at law, or in the nature of a common-law proceeding, a writ of error is applicable. See *Baker v. Williamson*, 2 Pa. St. 116; *Ingraham v. Caricabura*, 5 Pa. St. 177; *Com. v. Judges*, 4 Pa. St. 301; *Brown v. Parkinson*, 56 Pa. St. 347; *Vansant v. Boileau*, 1 Binn. (Pa.) 444; *Kellogg v. Krauser*, 14 S. & R. (Pa.) 137; *Neff v. Barr*, 14 S. & R. (Pa.) 166; *Moore v. Albright*, 4 S. & R. (Pa.) 231; *Hallowell's Appeal*, 20 Pa. St. 215; *Ringwalt v. Ahl*, 36 Pa. St. 336; *Christophers v. Selden*, 28 Pa. St. 165; *Cake v. Cake*, 106 Pa. St. 472; *Reed's Appeal*, 71 Pa. St. 378; *Green v. Mills*, 103 Pa. St. 22; *Moore v. Dunn*, 147 Pa. St. 367.

2. *Norton v. Coley*, 45 Miss. 125; *Fanning v. Russell*, 94 Ill. 386, *reversing* 2 Ill. App. 632. See also *Reading v. Ford*, 1 Bibb (Ky.) 338.

3. *Pence v. Garrison*, 93 Ind. 345; *Black v. Shreve*, 13 N. J. Eq. 455. See also *Lansing v. Russell*, 2 N. Y. 563; *Clark v. Brooks*, 26 How. Pr. (N. Y. C. Pl.) 285; *Hatch v. Peugnet*, 64 Barb. (N. Y.) 189; *Colie v. Tift*, 47 N. Y. 119; *Randall v. Randall*, 114 N. Y. 499.

4. *Tompkins v. Stevens*, 10 W. Va. 157; *Reed v. Axtell*, 84 Va. 231. See *Jennings v. Durham*, 101 Ind. 391; *Deputy v. Stapleford*, 19 Cal. 302; *Duff v. Fisher*, 15 Cal. 379; *Gagliardo v. Hoberlin*, 18 Cal. 396; *Gray v. Eaton*, 5 Cal. 448; *Still v. Saunders*, 8 Cal. 287; *Nease v. Capehart*, 15 W. Va. 299; *Henry v. Davis*, 7 W. Va. 715; *Lamberts v. Cooper*, 29 Gratt. (Va.) 61.

Issues from Probate Court in California. — In *Matter of Bowen*, 34 Cal. 687, it was said that an appeal must lie from the order of the District Court granting or refusing a new trial of issues sent from the Probate Court, since, otherwise, any error therein would be beyond the reach of correction.

Affirmance of Order Granting New Trial.

— In the bill of exceptions, the judge of the lower court certified that he granted a new trial of the issues upon a special ground, while the order directing it was general and specified no particular ground, as it appeared in the transcript of the record. The appellate court was governed by the latter, and there being much conflicting evidence, a considerable degree of irregularity in the proceedings on the trial, and no small amount of confusion in the jury's findings, the action of the court in ordering another hearing was held to be without error. *Poullain v. Poullain*, 72 Ga. 418.

c. TRANSMISSION OF EXCEPTIONS AND EVIDENCE. — As a general rule, the exceptions and objections taken and the evidence used on the trial of the issues should be certified to the appellate court.¹ If this be not done the appellate court, in some cases, will presume that the proper proceedings were had and the correct decisions made,² while in other cases it will consider itself incompetent to declare that entire justice was done and no injury caused.³

Abandonment of Appeal. — On appeal from the order of the judge denying a motion for a new trial on his minutes, in a case in *New York*, where issues had been submitted, it appeared that an order had been made at special term declaring the appeal to have been abandoned. It was held that, although no notice of the settlement of this order had been given the appellant, yet it was nevertheless in force, and that therefore, as the appeal had been declared to be abandoned, and the appellant's right to make a case gone, a motion to dismiss the appeal must be granted. *Keck v. Werder*, 37 N. Y. Super. Ct. 219.

1. *Johnson v. Johnson*, 4 Wis. 140; *Adams v. Munter*, 74 Ala. 339; *Sibert v. McAvoy*, 15 Ill. 108; *George v. Pilcher*, 28 Gratt. (Va.) 299; *Chamberlain v. Juppiers*, 11 Iowa 513.

In *Jennings v. Durham*, 101 Ind. 391, where issues in an equity case were submitted to a jury, and the court overruled a motion for a new trial, from which an appeal was taken, the appellate court held that since the question as to whether the decision was right or wrong depended upon the evidence, the ruling denying the motion could not be reviewed in the absence of the evidence.

Proper Judge to Certify Statement of Facts. — Where a suit is begun before a judge having charge of the equity cases arising in a county, and during its progress is transferred by him to another judge having charge of the jury cases, for the purpose of submitting certain questions of fact to a jury, the second judge acquires no jurisdiction of the suit, and, on appeal, the only judge authorized to certify a statement of the facts is the one who originally assumed jurisdiction. *Hill v. Young*, 7 Wash. 33.

2. *Reading v. Ford*, 1 Bibb (Ky.) 339.

Presumption as to Proper Issue and Evidence. — Thus, the record not containing all of the evidence submitted to the

jury, the Supreme Court of *Iowa* presumed that the issue was properly made under the direction of the chancellor, and that none but the proper evidence was permitted to go to the jury. *Chamberlain v. Juppiers*, 11 Iowa 513.

Presumption as to the Decree Non Obstante Verdicto. — So, where no certified exceptions were brought before the chancellor in *Alabama*, and the record did not show what evidence was adduced on the trial before the jury, the appellate court could not declare that the plaintiff was entitled to a decree *non obstante verdicto* because the findings of the jury were not sustained by the depositions on file in the cause. *Adams v. Munter*, 74 Ala. 339.

Certification of Evidence but Not Facts Proved. — In *Virginia* and *West Virginia*, where a motion is made to set aside a verdict or grant a new trial of the issue out of chancery, and the motion is overruled by the court, and the bill of exceptions certifies the evidence but not the facts proved on the trial, the appellate court will not reverse the judgment and grant a new trial of the issues, unless, by rejecting the parol evidence of the exceptor and giving full force and credit to that of the adverse party, the decision of the court in overruling the motion for a new trial still appears to be wrong. *Lamberts v. Cooper*, 29 Gratt. (Va.) 61; *Henry v. Davis*, 7 W. Va. 715; *Nease v. Capehart*, 15 W. Va. 299.

3. See *Sibert v. McAvoy*, 15 Ill. 108; *Johnson v. Johnson*, 4 Wis. 140.

In *George v. Pilcher*, 28 Gratt. (Va.) 299, the appellate court reversed the decree of the court below, on the ground that the latter erred in not ordering a new trial of the issue, because of the improper exclusion of evidence offered at the trial. In the cases cited, the evidence introduced was not certified in the record, but some of the evidence was shown by bills of exceptions, from which it appeared that

d. SCOPE OF REVIEW. — On appeal, in an equity case where issues have been submitted to a jury, the correctness of the court's final decision, rather than the verdict, is the question for consideration.¹ The case, being an equitable one, comes before the appellate court as a rule upon the facts as well as the law.² Oftentimes the whole case will be reviewed, the record and evidence carefully examined, and the proper disposition of the case arrived at in this way.³

e. GENERAL EFFECT OF VERDICT AND ACTION OF COURT. — In an appellate court, as in the lower court, the verdict of the jury on the issues submitted is as a rule not conclusive, but merely advisory, and may be adopted, disregarded, or set aside, and the facts found differently or a new trial granted.⁴ The

other evidence was given, though it did not appear what that evidence was. The appellate court considered it impossible to say that the party complaining was not injured by the exclusion of the aforesaid evidence. See *Stephoe v. Pollard*, 30 Gratt. (Va.) 705.

1. *Still v. Saunders*, 8 Cal. 287; *Johnson v. Harmon*, 94 U. S. 371; *Dunn v. Dunn*, 11 Mich. 284.

Review of Findings by the Court and Jury. — Under the practice in *New York*, the interlocutory and final decrees rest upon the court's findings without regard to those made by the jury, which latter are merely advisory, and are not matters of review except so far as included in the court's findings. *Schneider v. Quosbarth*, 19 N. Y. Wkly. Dig. 527; *Wallace v. American Linen Thread Co.*, 16 Hun (N. Y.) 404.

Case Reviewed as Though No Issues Submitted. — And so, in *New York*, when the case comes up on appeal, it is to be reviewed on the findings and decisions of the court, as if there had been no submission of any facts to the jury. *Carroll v. Deimel*, 95 N. Y. 252; *Wallace v. American Linen Thread Co.*, 16 Hun (N. Y.) 404.

2. *Whittemore v. Stout*, 3 Dana (Ky.) 427; *Gill v. Rice*, 13 Wis. 549; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67.

In *New York* this point is involved in some doubt. In *Miaghan v. Hartford F. Ins. Co.*, 12 Hun (N. Y.) 321, it was held that the case, when appealed, comes before the appellate court as an equity case on the facts. And in *Matter of Smith*, 19 N. Y. Wkly. Dig. 252, it was held that if the Code of Civ. Pro., § 2588, as to framing issues for a jury trial after reversal of a decree in pro-

bate proceedings, applied to the Court of Appeals, it had no application to a reversal on questions of law, but only to a reversal upon a question of fact. In *Vermilyea v. Palmer*, 52 N. Y. 473, the court of appeals, after referring to the difference of opinion among judges and lawyers on this point, held that it possessed no power to review the facts. In *Bradley v. Aldrich*, 40 N. Y. 504, it was held that, under the laws of 1859, amended by the laws of 1860, the Court of Appeals could not deem the judgment of the special term of the Supreme Court to have been reversed by the general term of the Supreme Court upon questions of fact, unless it was so stated in the judgment of reversal; that, if the judgment of the Supreme Court did not show the reversal to have been on matters of fact, the Court of Appeals was compelled to treat it as having been ordered for errors in law, and would have to review the case upon that assumption. The court considered that, as a question of law, the appellate court might review the question as to whether or not the case should have been tried by the court, or on issues submitted to a jury.

3. *Still v. Saunders*, 8 Cal. 287; *Peabody v. Kendall*, 145 Ill. 519; *Whittemore v. Stout*, 3 Dana (Ky.) 427; *Luce v. Barnum*, 19 Mo. App. 359; *Burt v. Rynex*, 48 Mo. 311; *Estes v. Fry*, 94 Mo. 267; *Johnson v. Johnson*, 4 Wis. 140; *Law v. Grant*, 37 Wis. 548; *Garsed v. Beall*, 92 U. S. 684; *Johnson v. Harmon*, 94 U. S. 371.

4. *Marshall v. Croom*, 60 Ala. 121; *Garrett v. Stevenson*, 8 Ill. 278; *Sibert v. McAvoy*, 15 Ill. 108; *Hambright v. Brockman*, 59 Mo. 52; *Black v. Shreve*, 13 N. J. Eq. 455; *Taylor v. Mayrant*, 4

verdict or decree is, however, entitled to much influence, and generally will not be set aside or disregarded unless clearly wrong.¹ And neither the verdict of the jury nor the decision of the lower court thereon will be disturbed when they concur in their findings, and are right upon the whole.²

f. WHERE VERDICT SHOULD HAVE BEEN DISREGARDED OR SET ASIDE. — Where it is apparent that the court below should have disregarded or set aside the verdict, but has not done so, the appellate court will grant relief and do what the lower court should have done, either decreeing on the facts or granting a new trial.³

Desaus. (S. Car.) 505; *Pleasants v. Ross*, 1 Wash. (Va.) 156; *Garsed v. Beall*, 92 U. S. 684. But see, for variations of this doctrine, *Rucker v. Howard*, 2 Bibb (Ky.) 166; *O'Bryan v. O'Bryan*, 13 Mo. 15; *Setzer v. Beale*, 19 W. Va. 289.

Equitable Case Treated as Action at Law. — Where the case, though an equitable one, has been treated as an action at law, the verdict is not merely advisory and it is not within the power or duty of the appellate court to disregard such a verdict and endeavor to find the facts from the evidence, and to render its decree in accordance with such facts. *Carr v. Haskett*, 110 Ind. 152.

The Effect of a Finding by the Court will be given to the verdict of the jury. *Law v. Grant*, 37 Wis. 548.

The Control of the Appellate Court over the Decree, in an equity case, is not taken away or limited by the submission of an issue and the rendition of a verdict upon which the decree of the chancellor was based. *Freeman v. Staats*, 9 N. J. Eq. 816.

1. *Cox v. Cox*, 91 Mo. 78; *Swegle v. Wells*, 7 Oregon 223; *Morris v. Swaney*, 7 Heisk. (Tenn.) 591; *Garsed v. Beall*, 92 U. S. 684.

In Illinois the rule is adopted, that where the court trying the issues saw and heard the witnesses, having the opportunity of observing them while they were testifying, the appellate court will attach much weight to the finding of the court, and will not reverse upon mere questions of fact, unless such finding is palpably erroneous. *Hoobler v. Hoobler*, 128 Ill. 645; *Baker v. Rockabrand*, 118 Ill. 370. But, where the evidence is in the form of depositions, the reason of the rule fails; the appellate court in such case, having the same facility of determining the truth

or falsity of the testimony, should determine from the record the questions of fact as shall appear just and right. *Baker v. Rockabrand*, 118 Ill. 370; *Farin v. Cox*, 47 Ill. App. 273.

Disturbing Verdict on Affidavit of Jurors. — It is the general rule in ordinary trials that a verdict of the jury will not be disturbed by an appellate court upon the affidavits of jurors, and this rule is applied in the case of an issue out of chancery. *Steptoe v. Flood*, 31 Gratt. (Va.) 323.

2. *Page v. Dixon*, 59 Mo. 43; *Gadsden v. Whaley*, 14 S. Car. 217; *Prestley v. Kemp*, 16 S. Car. 342; *Timmons v. Garrison*, 4 Humph. (Tenn.) 148; *Almond v. Wilson*, 75 Va. 626; *McCully v. McCully*, 78 Va. 159; *Snouffer v. Hansbrough*, 79 Va. 177; *Prout v. Roby*, 15 Wall. (U. S.) 471; *Garsed v. Beall*, 92 U. S. 684.

3. *Arnold v. Sinclair*, 12 Mont. 248; *Will's Appeal*, 22 Pa. St. 325.

Where Issue Improperly Awarded. — In *Virginia* and *West Virginia* where an issue has been improperly awarded, according to the proofs as they appear at the time of the submission, the chancery court, at the final hearing, should disregard the verdict and enter the appropriate decree on the facts; and if it does not do this the appellate court will correct the error. *Wise v. Lamb*, 9 Gratt. (Va.) 294; *Vangilder v. Hoffman*, 22 W. Va. 1; *Mahnke v. Neale*, 23 W. Va. 57.

Verdict Unresponsive. — So, in *West Virginia*, where the evidence is so conflicting that it is the duty of the chancery court to order an issue, and the verdict of the jury is not responsive thereto, the chancery court should set it aside and order a new trial. If instead of doing this it enters a decree on the verdict, the appellate court will reverse the decree, set aside the verdict,

g. VERDICT GENERAL INSTEAD OF SPECIAL. — Where a general verdict has been rendered in a case in which special issues were or should have been submitted, instead of distinct findings on each issue, and the judgment or decree of the lower court was based on this general verdict, the appellate court may reverse and remand the cause for this error.¹ If, however, the general verdict was taken and received without objection, or the court, after the coming in thereof, treated it as merely advisory and made its own findings on the facts, the error will not usually be regarded as sufficiently material to call for a reversal.²

h. VERDICT OR DECREE AGAINST EVIDENCE OR WEIGHT THEREOF. — In some cases it has been held that where the verdict or findings are unsupported by the evidence, or are against the weight thereof, the appellate court, considering that the conscience of the court below should not have been satisfied, may set aside the verdict and reverse the decree, either rendering its own decree on the facts as they appear, or remanding the cause for a new trial, as the case may be.³ In other cases it is held that, where there was a substantial conflict in the evidence on which the verdict of the jury and the action of the court were founded, the appellate court will not set aside the verdict or reverse the decree, unless the evidence clearly preponderated against the findings.⁴ Therefore, according to this doctrine, if the findings of

and direct a new trial upon the issues. *Marshall v. Marshall*, 18 W. Va. 395.

Setting Aside Prior Verdict. — In *Kerr v. South Park Com'rs*, 117 U. S. 379, the Supreme Court was asked to disregard the verdict recited in the decree, and to reverse the decree itself, because, as alleged, there was a prior verdict rendered on the same issues, which had never been regularly or lawfully set aside. No such verdict appeared in the record otherwise than by a recital in an order of the court by which it was set aside and a new trial awarded. It was objected that this proceeding was on the law side of the court, and that the verdict was never certified to the chancery side, where alone proceedings to set it aside could have been properly taken. The Supreme Court remarked that it was difficult to keep entirely separate proceedings in the same case, taking place part on the law side and part on the chancery side of the court, all conducted by the same judge; but held that no confusion resulted in the case under consideration, because whatever was done on the law side was approved and adopted by the chancellor, who in framing his decree on the basis of the

last verdict necessarily confirmed the action of the circuit judge in setting aside the previous verdict. The decree was affirmed.

1. *Hulley v. Chedie*, 22 Nev. 127. See also *Dunn v. Dunn*, 11 Mich. 290; *Hall v. Doran*, 6 Iowa 433; *Brink v. Morton*, 2 Iowa 411.

2. *Lestrade v. Barth*, 19 Cal. 660; *Reddick v. Keesling*, 129 Ind. 136; *Ikerd v. Beavers*, 106 Ind. 483, *distinguishing Lake Erie, etc.*, *R. Co. v. Griffin*, 92 Ind. 487.

3. *Lowe v. Traynor*, 6 Coldw. (Tenn.) 633; *Waddams v. Humphrey*, 22 Ill. 661; *Farmers' Bank v. Butterfield*, 100 Ind. 230. See *Marshall v. Croom*, 60 Ala. 121; *Brink v. Morton*, 2 Iowa 416.

Where the Issues Are of Right, the verdict is not merely advisory, and the question whether it should be set aside as contrary to the evidence must be determined by the appellate court upon the same principles as are applicable to trials at law. *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343.

4. *Wakefield v. Bouton*, 55 Cal. 109; *Stockman v. Riverside Land, etc., Co.*, 64 Cal. 57; *Sweetser v. Dobbins*, 65 Cal. 529; *Macon v. Harris*, 75 Ga. 761; *Hoobler v. Hoobler*, 128 Ill. 651;

the jury, or the action of the court thereon, are not contrary to the weight of evidence, or are sufficiently sustained thereby, the court, on appeal, will not disturb them, but will enter an affirmance.¹ Indeed, some cases have gone so far as to hold that the appellate court will not review the testimony, or disturb the findings and judgment if any proof at all sustains them.²

2. WHERE ERRORS OR IRREGULARITIES OCCURRED AT THE TRIAL — *In General.* — Neither the lower court which, in its discretion, has submitted issues to a jury, nor the appellate court, is bound by the verdict. They may adopt it, but it is equally within their power to set it aside, or disregard it and revert to the cause as it was before the issues were considered. Therefore, if it appears to the appellate court that substantial justice has been done, and that on the whole the verdict and decree thereon is right, it may overlook and disregard any errors, irregularities, or illegalities which may have occurred at the trial.³

In Instructions or Directions. — Since ordinarily the court is not bound to instruct the jury trying issues in an equity case, its

Blakey *v.* Johnson, 13 Bush (Ky.) 197; Estes *v.* Fry, 94 Mo. 267; Swegle *v.* Wells, 7 Oregon 223; Morris *v.* Swaney, 7 Heisk. (Tenn.) 591; Carter *v.* Campbell, Gilmer. (Va.) 159; Steptoe *v.* Flood, 31 Gratt. (Va.) 342.

In Reed *v.* Axtell, 84 Va. 231, the evidence, though brief, fully sustained, in the opinion of the appellate court, the action of the lower court in setting aside or disregarding the verdict, and refusing a new trial.

In Virginia the rule is well settled that where, because of a conflict of testimony, an issue is directed, the solution of which depends on the weight of evidence, and the verdict is sanctioned by the trial court, the appellate court will consider not merely whether the evidence warrants the verdict, but also whether, upon the whole, further investigation is necessary to attain the ends of justice; and, if not, no new trial will be granted. Snouffer *v.* Hansbrough, 79 Va. 166; Barnum *v.* Barnum, 83 Va. 365; Powell *v.* Manson, 22 Gratt. (Va.) 191; Steptoe *v.* Pollard, 30 Gratt. (Va.) 689.

1. Browne *v.* McClintock, L. R. 6 H. L. 456; Wallace *v.* Maples, 79 Cal. 434; Coleman *v.* Slade, 75 Ga. 61; Asbill *v.* Asbill, 24 S. Car. 359; Minton *v.* Pickens, 24 S. Car. 592; Frank *v.* Humphreys, 24 S. Car. 326.

2. Pfeiffer *v.* Riehn, 13 Cal. 644. See Kimble *v.* Seal, 92 Ind. 276.

3. Black *v.* Shreve, 13 N. J. Eq. 455; American Dock, etc., Co. *v.* Public

School, 37 N. J. Eq. 266; Dabbs *v.* Dabbs, 27 Ala. 646; Estes *v.* Fry, 94 Mo. 267; Burt *v.* Rynex, 48 Mo. 311; Peabody *v.* Kendall, 145 Ill. 519.

In Virginia the settled rule is that where the evidence is conflicting and the verdict is approved by the court submitting the issues, the appellate court will consider not merely whether the verdict is warranted by the evidence, but also whether further investigation is necessary for the purposes of justice; and will not grant a new trial if the verdict and decision appear to be right, though errors occurred at the trial, in the rulings or directions of the judge. Powell *v.* Manson, 22 Gratt. (Va.) 191; Steptoe *v.* Pollard, 30 Gratt. (Va.) 689; Barnum *v.* Barnum, 83 Va. 365; Snouffer *v.* Hansbrough, 79 Va. 166.

Appellate Decision on Decree and Whole Case. — In the federal courts a decree in equity, when appealed from, does not stand or fall according to the legality or illegality of the proceedings on the trial of an issue in the cause; for the verdict may or may not have been the basis of the decree. It is the duty of the court in the first instance to decide upon the whole case, pleadings, evidence, and verdict, giving to the latter so much effect as it is worth. An appeal from the decree must be decided in the same way, namely, upon the whole case, and cannot be made to turn upon the correctness or incorrectness of the judge's rulings upon the trial of

refusal to instruct or charge them does not constitute reversible error, the appellate court considering no injury to have been caused.¹ The correctness of the final decision of the court upon the advisory verdict of a jury upon the issues submitted is the question for the consideration of an appellate court, and if that decision is right and just on the whole, any errors in the instructions or directions of the trial court become immaterial, and on appeal need not be reviewed nor noticed, and afford no cause for reversal.²

the issue. *Johnson v. Harmon*, 94 U. S. 371. See *Wilson v. Riddle*, 123 U. S. 615.

Inquiry as to Summoning or Impaneling Jury. — A jury having been ordered by the Circuit Court of Baltimore City, in virtue of statutory provisions, and the sheriff having made return that he had summoned twenty lawful jurors, the Court of Appeals held that it could not inquire whether they were a part of the panel summoned, nor whether or not they were in attendance on some other court. *Barth v. Rosenfeld*, 36 Md. 605.

Verdict Annulled by Law Side of Court — No Certification to Chancery Side. — The setting aside of a prior verdict or issues by the law side of a court, with no certification thereof to the chancery side for the proper proceedings, is confirmed by the chancery side, when it accepts a subsequent verdict on the same issues, and bases its decree on it. For such informalities or irregularity the decree will not be reversed. *Kerr v. South Park Com'rs*, 117 U. S. 379.

Certification that Verdict Is Against Evidence. — Where the judge submitting an issue on the chancery side of the court is the one who tries it on the law side, his order setting aside the verdict as contrary to the evidence will not be reversed because of the failure of the judge on the law side to certify to himself on the chancery side that the verdict was against the evidence, though it might have been more formal to do so. *Lavell v. Gold*, 25 Gratt. (Va.) 473.

If Judgment Be Entered by the Trial Court, on a verdict on issues sent from another court, this is error usually sufficient to cause a reversal and setting aside of such judgment. *Finney v. Moore*, 8 S. & R. (Pa.) 345.

If Any Error of Law is committed on the trial of issues, it has been held that the objection that the verdict is against evidence cannot be made available for a new trial in an appellate court. *McKinley v. Lamb*, 64 Barb. (N. Y.) 199.

If the Court Below Is Satisfied with the Verdict, it has been decided that the verdict will stand and no appeal lies, though errors may have intervened at the trial. *Barnett v. Montgomery, etc.*, R. Co., 51 Ala. 557; *South Carolina R. Co. v. Turner*, 9 Rich. Eq. (S. Car.) 270.

1. *Greene v. Bateman*, L. R. 5 H. L. 591; *Dominguez v. Dominguez*, 7 Cal. 426; *Branger v. Chevalier*, 9 Cal. 353; *Hewlett v. Pilcher*, 85 Cal. 542; *Riley v. Martinelli*, 97 Cal. 575; *Asbill v. Asbill*, 24 S. Car. 359; *Snouffer v. Hansbrough*, 79 Va. 177.

2. *Alabama.* — *Barnett v. Montgomery, etc.*, R. Co., 51 Ala. 557; *Marshall v. Croom*, 60 Ala. 121.

California. — *Richardson v. Eureka*, 110 Cal. 441; *Still v. Saunders*, 8 Cal. 287; *Schneider v. Brown*, 85 Cal. 205; *Sweetser v. Dobbins*, 65 Cal. 529; *Sullivan v. Royer*, 72 Cal. 248.

Indiana. — *Brundage v. Deschler*, 131 Ind. 174; *Koons v. Blanton*, 129 Ind. 393; *Reddick v. Keesling*, 129 Ind. 136.

Missouri. — *Conran v. Sellew*, 28 Mo. 320; *Philips v. Samuel*, 76 Mo. 657.

New York. — *Post v. Mason*, 91 N. Y. 539; *Gleason v. Hamilton*, 64 Hun (N. Y.) 96.

South Carolina. — *Frank v. Humphreys*, 24 S. Car. 326; *South Carolina R. Co. v. Turner*, 9 Rich. Eq. (S. Car.) 270.

Virginia. — *Snouffer v. Hansbrough*, 79 Va. 177; *Powell v. Manson*, 22 Gratt. (Va.) 191; *Meek v. Spracher*, 87 Va. 162; *Fishburne v. Ferguson*, 84 Va. 87.

Wisconsin. — *Gill v. Rice*, 13 Wis. 549; *Law v. Grant*, 37 Wis. 548; *Huse v. Washburn*, 59 Wis. 474.

United States. — *Johnson v. Harmon*, 94 U. S. 371; *Wilson v. Riddle*, 123 U. S. 615.

No Appeal Lies from Instructions given or refused on the trial of chancery issues in the federal courts, the rule being that the appellate court can only

In Admission or Rejection of Evidence. — On the foregoing principles, error in the admission of improper or in the rejection of proper evidence, on the trial of equitable issues, will not be regarded as material on appeal, unless the verdict of the jury or the court's decision thereon be unduly affected. Notwithstanding any such errors, if it can be seen that the verdict or the decision of the court on it is right, no cause for reversal is shown, and the appellate court will not hesitate to enter an affirmance.¹

3. Exceptions and Objections Not Taken Below. — If the proper exceptions and objections have not been taken or raised below, it will be too late to urge them in the appellate court, or have them there considered.²

examine the final decree of the equity court. *Johnson v. Harmon*, 94 U. S. 371. See *Wilson v. Riddle*, 123 U. S. 615.

1. *Alabama.* — *Barnett v. Montgomery*, etc., R. Co., 51 Ala. 557; *Marshall v. Croom*, 60 Ala. 121.

California. — *Still v. Saunders*, 8 Cal. 287.

Illinois. — *Peabody v. Kendall*, 145 Ill. 519.

Missouri. — *Hambricht v. Brocknan*, 59 Mo. 52.

South Carolina. — *Frank v. Humphreys*, 24 S. Car. 325; *South Carolina R. Co. v. Turner*, 9 Rich. Eq. (S. Car.) 270.

Virginia. — *Meek v. Spracher*, 87 Va. 162; *Snouffer v. Hambrough*, 79 Va. 166; *Powell v. Manson*, 22 Gratt. (Va.) 191; *Steptoe v. Pollard*, 30 Gratt. (Va.) 705. See *George v. Pilcher*, 28 Gratt. (Va.) 319.

West Virginia. — *Nease v. Capehart*, 15 W. Va. 299; *Tompkins v. Stephens*, 10 W. Va. 156.

Wisconsin. — *Taylor v. Collins*, 51 Wis. 123; *Huse v. Washburn*, 59 Wis. 414.

United States. — *Wilson v. Riddle*, 123 U. S. 615.

The Omission to Read Papers filed in the cause will not be ground for reversing the proceedings where no directions were given respecting them and the court of chancery refuses a new trial. *Ford v. Gardner*, 1 Hen. & M. (Va.) 72.

If a Serious Error as to the Admission or Rejection of Evidence is committed by a judge on the trial of the equitable issues, and the verdict is incorporated into a final decree, a party considering himself aggrieved may except to that decree on the ground of error in the trial of the issues, since, if such error were committed, it would attach to all

the subsequent proceedings and affect the final result. *Woolfolk v. Graniteville Mfg. Co.*, 22 S. Car. 332.

Where the Excluded Evidence Has Not Been Certified to the appellate court, it may not be able to say that no injury has been caused, and may reverse and remand the case on the ground of exclusion of corroborating evidence. *George v. Pilcher*, 28 Gratt. (Va.) 319.

Where Issues Are of Right and are not dependent for their submission on the discretion of the court, the verdict is not advisory but conclusive, and exceptions taken at the trial to the admissibility of the evidence may be considered on appeal. *Jones v. Jones*, 120 N. Y. 589.

But even where a party is given a right to demand a jury in an equity case this does not preclude the court, on its own motion, from ordering a jury to try issues of fact; and the verdict in such case is advisory, and error cannot be urged in the appellate court in respect to the evidence received or rejected in the court below. *Huse v. Washburn*, 59 Wis. 414.

2. Objections to Form, Settlement, Methods of Submission, etc. — If no objections are made in the court below to the form of the issues, their settlement and framing, or the method of their submission, such objection cannot be taken and will not be considered in the appellate court. *Barth v. Rosenfeld*, 36 Md. 605; *Chamberlain v. Juppiers*, 11 Iowa 513; *Smith v. Smith*, 21 Ala. 761; *Madison University v. White*, 25 Hun (N. Y.) 490.

Objections to Testimony. — The testimony given on the trial of the issues which is not objected to at the time is competent, and will not be considered on appeal. *Minton v. Pickens*, 24 S. Car. 592.

4. Direction of Issue by Appellate Court. — As previously seen, the appellate court in reversing and remanding a cause to the lower court frequently directs the latter to make up and submit to a jury appropriate issues.¹ So where an appellate court is investigating a cause on its merits, and questions of fact arise which render a jury trial desirable, the court may send issues therefrom or direct a lower court to submit them.²

5. Decree on Merits or Remand of Case. — Whether the appeal be from an interlocutory order directing the issues,³ or from a verdict and decree thereon, the appellate court may, in many cases, have a retrial and enter a proper decree on the merits without remanding the cause.⁴ Frequently, however, the case will

If No Objection Is Made to the Verdict or Findings thereon in the court below, the objection cannot be made to them in the appellate court, and they will be regarded as established facts of the case. *Paul v. Paul*, 2 Hen. & M. (Va.) 525; *Lee v. Boak*, 11 Gratt. (Va.) 182; *Fitzhugh v. Fitzhugh*, 11 Gratt. (Va.) 210; *Birdsall v. Patterson*, 51 N. Y. 47.

Objections to General Verdict. — If a general verdict, instead of a special, is rendered on the issues, yet if no objection was raised to this course of proceedings, the irregularity will not be considered in the determination of the appeal. *Lestrade v. Barth*, 19 Cal. 660.

Exceptions and Objections Brought to Notice of Court Ordering Issues. — According to approved chancery practice, exceptions taken or objections made to the verdict or proceedings on the trial at law of issues from chancery must be brought to the notice of the court of chancery, else they cannot be urged in an appellate court. *Brockett v. Brockett*, 3 How. (U. S.) 691.

1. See *supra*, XVI. 1. *d. Decree of Appellate Court.* *Moore v. Martin*, 1 B. Mon. (Ky.) 97; *Com. v. Mister*, 79 Va. 5; *Hoitt v. Burleigh*, 18 N. H. 389; *Braxton v. Willing*, 4 Call (Va.) 288.

2. *Nease v. Capehart*, 8 W. Va. 95; *Griffith v. Griffith*, 9 Paige (N. Y.) 315; *Ravenscroft v. Shelby*, 1 Mo. 533.

Conflict in Depositions Transmitted to Supreme Court. — In *North Carolina*, under the early practice, when the depositions of witnesses in an equity suit transmitted to the Supreme Court for hearing were in such direct conflict with each other that it was evident that perjury had been committed, but

the court, could not tell on which side the guilt lay, it would direct feigned issues to be made up and tried in the superior court, where the witnesses might be personally examined in open court, instead of impaneling a jury before the Supreme Court, under the special authority conferred upon it for that purpose, where such personal examination could not be had. *Witherspoon v. Dula*, 2 Dev. & B. Eq (N. Car.) 279.

Issues on Appeal from Probate Judges. — In *New Hampshire*, by virtue of statutory authority, the appellate court may, in its discretion, send any questions of fact to a jury that it deems proper on appeals from judges of probate. *Patrick v. Cowles*, 45 N. H. 553.

3. *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436. See *Newark, etc., R. Co. v. Newark*, 23 N. J. Eq. 516.

4. *Frank v. Hollands*, 81 Iowa 164; *Brink v. Morton*, 2 Iowa 416; *Baker v. Williamson*, 4 Pa. St. 456; *Taylor v. Mayrant*, 4 Desaus. Eq. (S. Car.) 505; *Moseley v. Brown*, 76 Va. 419; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67; *Mills v. Faris*, 12 Heisk. (Tenn.) 451. See also *Gass v. Mason*, 4 Sneed (Tenn.) 497.

Improper Direction of Issue. — In reviewing a decree founded on the verdict of a jury on issues, if the appellate court is satisfied that the chancellor improperly exercised his discretion in directing an issue, it will, in many cases, render a decree notwithstanding the verdict, according to the merits as disclosed by the proofs at the time the issue was ordered. *Jarrett v. Jarrett*, 11 W. Va. 585; *Smith v. Betty*, 11 Gratt. (Va.) 752. See *Atwood v. Smith*, 11 Ala. 894.

be remanded for proper proceedings or a new trial,¹ and in some instances such a course must be pursued.²

XVII. ACTION DIRECTED INSTEAD OF ISSUE — 1. In General. — Instead of directing an issue a court of equity may retain the bill and direct an action at law to be brought and prosecuted.³ But

1. *Williams v. Bishop*, 15 Ill. 553.

2. **Where Issues Are Set Aside for Being Improperly Ordered**, in the actual state of the case, but there was evidence which, if regularly taken, would have rendered the order for the issue proper, it was held in *Virginia* that the appellate court so setting aside the order for the issue should, under the circumstances, remand the cause to the court of chancery, where the evidence may be regularly taken and thereupon the issues ordered anew. *Watkins v. Carlton*, 10 Leigh (Va.) 586.

Where Issues Are of Right. — In *Tennessee* the submission of issues is a matter of right with the parties, and by the code any errors in the proceedings on such issues can only be corrected as errors are corrected in actions at law; therefore, if a material issue has been submitted and the findings thereon are unsatisfactory to the appellate court, the decree of judgment must be reversed and the case remanded for a new trial. *James v. Brooks*, 6 Heisk. (Tenn.) 150; *Memphis First Nat. Bank v. Oldham*, 6 Lea (Tenn.) 729. Where, however, the issue decided was not a material issue in the cause, and the appellate court is satisfied that if the proper issue had been submitted it should have been differently found, it will regard the cause upon its facts as if the chancellor had determined them for himself, and will reverse the decree and grant full relief without remanding the cause for a proper issue. *Gass v. Mason*, 4 Sneed (Tenn.) 497.

Equitable Cause Tried as Action at Law. — Although the case is one of exclusive equitable jurisdiction, yet where the court did not exercise its equitable powers in this regard, but had the entire cause tried by a jury and rendered judgment in accordance with the verdict, the Supreme Court, on appeal, has no power to disregard the verdict, and, looking to the evidence, render such a judgment as the facts may warrant. If in such case the verdict is against the evidence, the Supreme Court will reverse the judgment and remand the cause for a new trial. *Carr v. Haskett*, 110 Ind. 152.

3. *Decker v. Caskey*, 1 N. J. Eq. 427; *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266; *Farnsworth v. Arnold*, 3 Sneed (Tenn.) 256; *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27. See also *Gorray v. Ustwick*, 2 Vern. 192; *Leeds v. New Radnor*, 2 Bro. C. C. 338; *Colman v. Sarrel*, 1 Ves. Jr. 50; *Stevens v. Praed*, 2 Cox 374, 2 Ves. Jr. 519; *Sweetapple v. Kingston*, Bunb. 238; *Snell v. Silcock*, 5 Ves. Jr. 469; *Harmood v. Oglander*, 6 Ves. Jr. 199; *Walton v. Law*, 6 Ves. Jr. 150; *Seagrave v. Seagrave*, 13 Ves. Jr. 439; *Perry v. Truefit*, 6 Beav. 418; *Blair v. Ormond*, 1 De G. & Sm. 428; *Fisher v. Taylor*, 2 Hare 218; *Rodgers v. Nowill*, 6 Hare 325; *Swallow v. Wallingford*, 12 Jur. 403; *Rochester v. Lee*, 1 Macn. & G. 467; *Waterford v. Knight*, 11 Cl. & F. 653, reversing *Knight v. Waterford*, 4 Y. & Coll. 283; *Penney v. Goode*, 2 W. R. 49.

The power of the court of chancery to order an issue instead of allowing an action at law to be brought, is indisputable where an issue is applied for or assented to by the parties. The general rule is that the court of equity has no jurisdiction to establish by its decree the title to lands, its jurisdiction being limited to an interposition to quiet the possession of a party after his title has been determined by a court of law. *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266.

General Principles Pertaining to Action and Order Therefor — *New Jersey.* — Questions of law and fact (as to the existence or validity of deeds, etc.) may be investigated and tried under the direction of the court of chancery either by feigned issue or by action at law brought and prosecuted under an order of the court to which resort is frequently had on proper occasions. The proceeding by action in the case cited below being, in the opinion of the chancellor, more convenient and eligible than a feigned issue, it was directed by an interlocutory order "that an action at law in ejectment be brought and prosecuted in the Supreme Court by the complainant, in the name of John Den, as his lessee; that in this action the

the court is in general under no obligation to pursue this course, and may decline to direct an action.¹ The principles and procedure pertaining to issues are oftentimes applicable where an action is directed, but there are in many cases radical differences.²

2. Object and Grounds. — In directing an action the court does not, as in directing an issue, seek the aid of a court of law for its own satisfaction; but it directs an action to be brought upon the ground that the matter in controversy, being a legal right, ought to be determined by the judgment of a court of law.³

plaintiff declare for nine undivided tenth parts of the premises in question; that the defendants in this cause, excepting the administrators and heirs of William Caskey, do appear thereto, and be made defendants therein upon the exchange of the consent rules; that the issue to be joined be tried in the circuit court in and for the county of Sussex; and upon the trial, besides the ordinary confession of lease, entry and ouster, the defendants do admit themselves to have been in possession of the premises demanded at the commencement of the action of ejectment; and also that on and before the first day of November, in the year of our Lord one thousand eight hundred and sixteen, the said John Caskey was seized in his demesnes as of fee and possessed of the premises in question; that upon the return of the *posse* in the said action into the Supreme Court, the same be duly certified into this court; that either party be at liberty pending the said action to apply to this court for directions therein if need be; and that all further equity and the matter of costs be reserved for a further hearing, and for the final decree of the court of chancery in this cause." *Decker v. Caskey*, 1 N. J. Eq. 427.

Determining Whether Order Is for Issue or Action. — Whether an order is for an action at law or an issue out of chancery, does not depend upon the form in which the issue is framed, but the order of the chancellor directing the issue must be looked to in order to decide whether the issue is one out of chancery or an ordinary action at law. *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266.

1. *Newman v. Milner*, 2 Ves. Jr. 483; *Bacon v. Jones*, 4 Myl. & C. 433; *Kay v. Marshall*, 1 Myl. & C. 373; *Strickland v. Strickland*, 6 Beav. 77.

2. The differences between an action and an issue will be shown in this section. For questions where the princi-

ple and procedure in the two cases are the same, the preceding sections of this article are to be consulted.

3. *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27.

Action Directed with View to New Trial. — In *Farnsworth v. Arnold*, 3 Sneed (Tenn.) 255, it was said that it may be laid down as a general rule, that whenever the foundation of a claim is a legal demand, and the question whether a new trial should or should not be had can be discussed with more satisfaction in a court of law, the court of equity will adopt the course of directing an action.

Where Defendant's Rights May Be Embarrassed by Statute of Limitations. — Where litigation is pending in the chancery court, and the defendant apprehends that his rights may be embarrassed if not defeated by the running of the statute of limitations, if the bill should ultimately be dismissed, he may be allowed for his protection to try the title to the lands in controversy by an action of ejectment at law. *American Dock, etc., Co. v. Public Schools*, 36 N. J. Eq. 16.

Case Proper for Action at Law. — Where equity is based on a disputed legal right, but the trial of such right at law is prevented by some impediment, *e. g.*, where ejectment cannot be brought because of an outstanding term; or where a defense set up in equity involved a legal right, *e. g.*, a bill for partition between tenants in common, the defendant setting up a claim in severalty; a court of equity instead of deciding upon the legal right may direct an action at law and retain the cause for further directions, contenting itself with merely removing the impediments and requiring the parties to make all necessary admissions, for the purpose of having the right determined according to the course of the courts at law, by directing that the outstanding term in the first case shall not be insisted upon,

3. The Trial. — Where a cause is allowed to stand over with leave to bring an action, or directing an action at law, the action is prosecuted and the trial had in compliance with the practice and proceedings in ordinary actions at law.¹

4. New Trial. — Where a new trial of an action is desired, the motion therefor is to be made, not as in the case of an issue in the equity court which directed it, but in the court of law in which the action was tried; the latter court alone having the authority to grant the motion, as a rule.² Consequently the question whether or not a new trial of the action is to be granted is regulated by the rules pertaining to new trials of ordinary actions at law.³

5. Proceedings on Verdict and Judgment in Court Directing Action — *a.* **BRINGING ON FOR FURTHER DIRECTIONS.** — After judgment is rendered in the action no further proceedings are to be had at law, but the cause is to be brought on for further directions in the court of equity.⁴

and in the other that the defendant shall admit an actual ouster. *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27.

1. *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266; *Farnsworth v. Arnold*, 3 Sneed (Tenn.) 256.

Time of Bringing Action and Going to Trial. — Where a plaintiff's bill is retained with liberty to prosecute an action at law, it is held that he is bound to proceed with all reasonable diligence and is not entitled to wait till the forms of common-law procedure compel him to go on. *Arnold v. Thompson*, 32 L. J. Ch. 40.

Usually the order directing the action should limit the time within which it is to be brought, or the trial had, and further direct that the bill will be dismissed if the proceedings be not had within the time limited. *Wood v. Rowcliffe*, 2 Phil. 382, 11 Jur. 915; *O'Grady v. Kinsale*, 5 Bro. P. C. 456; *Farina v. Silverlock*, 1 De G. & J. 434; *Swanger v. Gardner*, 3 De G. & Sm. 696; *Stevens v. Praed*, 2 Cox 374, 2 Ves. Jr. 519.

If the plaintiff does not try the action within the time limited by the order, it has been decided that the bill is not *ipso facto* out of court, but the defendant must either set down the cause for further directions, or move to dismiss the bill. *Stevens v. Praed*, 2 Cox 374, 2 Ves. Jr. 519. The court may thereupon dismiss the bill with costs. *O'Grady v. Kinsale*, 5 Bro. P. C. 456. Or upon the plaintiff's application it may enlarge the time. *Swanger v.*

Gardner, 3 De G. & Sm. 696; *Farina v. Silverlock*, 1 De G. & J. 434.

Judgment at Law is to be entered as in ordinary actions. *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266. And if there is no judgment of the law court, an appeal will be dismissed and the proceedings certified back, to the end that the action may be proceeded with and tried as instituted. *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27.

2. *Exp. Barker*, 1 Cox 418; *Re Horner*, 2 Moll. 442; *Fowkes v. Chadd*, Dick. 576; *Carstairs v. Stein*, 2 Rose 178; *Exp. Kensington*, Cooper 96; *Hope v. Hope*, 10 Beav. 581; *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27; *Hill v. Jefferson*, 1 Am. L. J. 256; *Farnsworth v. Arnold*, 3 Sneed (Tenn.) 257; *Trenton Banking Co. v. Rossell*, 2 N. J. Eq. 492.

Power of Chancery Court to Order New Trial. — In *Farnsworth v. Arnold*, 3 Sneed (Tenn.) 257, the rule as announced in the text was recognized and adopted, but it was said that sometimes, upon a proper application and on a proper case made, the court of chancery might set aside the verdict, and grant a new trial at law.

3. See generally article NEW TRIALS.

4. *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27; *Farnsworth v. Arnold*, 3 Sneed (Tenn.) 256.

The proper course is not to set down the cause on the *postea*, or as on the equity reserved, but to set it down for further directions, and give the verdict

b. EFFECT OF VERDICT AND JUDGMENT. — The verdict and judgment rendered on an action are not merely advisory, but are, in general, conclusive, and will be accepted in the equity court as finalities.¹

6. Costs. — The principles and proceedings relative to the question of costs in case of an issue are in the main applicable where the substitute of an action is adopted, with such changes and modifications as may be called for by reason of the difference between the natures of the two proceedings.²

7. Appellate Review. — The proceedings on the action are reviewable by rule to show cause, and writ of error in the usual manner, by certiorari and appeal, according to the applicability of these remedies, and bills of exceptions may present error for the consideration of the appellate court. In short, the review may be had in the same manner as if the suit were an independent one instituted without the intervention of a court of equity.³

and judgment at law in evidence. *Wing v. Murrell*, McClel. & Y. 620.

Errors and Mistakes at Law cannot usually be corrected by the equity court after the cause has come on for further directions. *Farnsworth v. Arnold*, 3 Sneed (Tenn.) 256. See *Luscombe v. Callaghan*, 1 Moll. 204; *Hope v. Hope*, 10 Beav. 581.

1. *Luscombe v. Callaghan*, 1 Moll. 204; *M'Rea v. Holdsworth*, 18 W. R. 489; *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27; *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266.

The Action Will Be Directed in Such Form that the result will be regarded as conclusive. *Farnsworth v. Arnold*, 3 Sneed (Tenn.) 255.

The Judgment in the Action Is Final and Conclusive, the equity court reserving no equity and exercising no discretion as in ordinary suits; and a party complaining that by the rules of pleading and the form of the trial at law his equitable case was excluded, can only have the benefit of it in the suit by having a rehearing, to show that the case was not fit to be sent to law, but exclusively for the consideration of a court of equity; or he may file a bill which, although it does not stay the payment out of money to the defendant who has succeeded in the action, yet is not prejudiced by it. *Luscombe v. Callaghan*, 1 Moll. 204.

Rendering a Decree Contrary to the Verdict is a power applicable in case of issues, but not where leave is granted to bring an action, and relief is made dependent on its success. At the same time, the court of equity is not bound

by the amount of damages awarded by the jury, but will give the full relief to which the plaintiff is entitled in equity. *M'Rea v. Holdsworth*, 18 W. R. 489.

2. See *supra*, XV. *Costs*.

Costs Paid by Losing Defendant. — Where, on a bill of interpleader, an action at law has been directed, the costs of all parties to the bill must be paid by the defendant who fails, even although the failure was owing to his adopting or submitting to a course of trial in which he could not have the benefit of his equity; the rule that the losing defendant pays all costs being general, though not universal. *Luscombe v. Callaghan*, 1 Moll. 204.

Costs of Petition and Action. — Where a party petitions against the decision of commissioners, and an action is directed to be brought, the result of which is in his favor, he is not entitled to the costs of the petition, but only to the costs of the action. *Ex p. Millington*, 3 Dea. & Ch. 307. 1 Mont. & A. 114.

Motion for Security for Costs Where Plaintiff Is Nonresident. — Where an action is directed to be brought in a court of law, and the plaintiff resides abroad, the motion for security for costs is to be made in the court of equity. *Desprez v. Mitchell*, 5 Madd. 87.

3. *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27; *American Dock, etc., Co. v. Public Schools*, 37 N. J. Eq. 266.

It was said in *Fisher v. Carroll*, 1 Jones L. (N. Car.) 27, that where an action is directed out of chancery, the transcript should be returned to the law side of the appellate court, and be considered as a distinct case in that court.

JEOFAILS.

Origin of the Term.—Certain English statutes of amendment and jeofails were so called because when a pleader perceived any slip in the form of his proceedings, and acknowledged such error (*jéo faile*, I have failed), he was at liberty by those statutes to amend it.¹

Distinction Between Amendment and Jeofails.—In practice, where any distinction is made, the term "amendment" is usually confined to such corrections as are actually made in the process pleadings or other proceedings,² and the term "jeofails" is used to denote those statutory provisions under which certain imperfections or omissions are cured by the mere force of the statute.³

Scope of Statutes, and Treatment of Subject in This Work.—At common law certain defects in pleadings in civil and in criminal cases⁴ are cured by verdict.⁵ The English statutes of jeofails did not extend to criminal cases.⁶ In the United States there have been enacted in every jurisdiction statutes providing either that judgments in civil cases shall not be reversed or impaired by reason of certain enumerated imperfections or defects in the pleadings and proceedings, or that the court may in every stage of the action disregard errors or defects not affecting the substantial rights of the parties. Statutes of a similar nature applicable to the pleadings in criminal proceedings have been enacted in most of the states. In accordance with the universal custom in modern treatises and compilations the subject of jeofails in this work is merged in the titles treating of the various pleadings and proceedings which may be affected by the operation of the statutes.⁷

1. 3 Black. Com. 407. See also Stephen Pl. (3d Am. ed.), app. xxx., where the several Acts of Parliament are enumerated.

2. See generally article AMENDMENTS, vol. I, p. 608.

3. "The amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exception." 3 Black. Com. 407; *Rex v. Landaff*, 2 Stra. 1011. See also article AMENDMENTS, vol. I, p. 611.

4. "Where there is a question of pleading at common law there is no distinction between the pleadings in

civil cases and criminal cases," as to defects cured by verdict. *Heymann v. Reg.*, L. R. 8 Q. B. 105.

5. The older authorities and the principles on which they proceed may be found in *Stennel v. Hogg*, 1 Saund. 228, note 1. See also the article VERDICTS, and the cross-references from that article.

6. Tidd's Pr. 928.

7. See generally articles AMENDMENTS, vol. I, p. 608; ARREST OF JUDGMENT, vol. 2, p. 793; EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153; JUDGMENTS, *post*; RECORDS; VARIANCES; VERDICTS.

JEOPARDY.

See article *FORMER CONVICTION OR ACQUITTAL*, vol. 9, p. 630.

JOINDER.

As to *Joinder of Parties*, see article *PARTIES*.

Joinder of Counts, Actions, or Causes of Action, see article *ACTIONS*, vol. 1, p. 108, and the particular articles as indicated in the General Index of this work.

Joinder in Demurrer, see article *DEMURRERS AT COMMON LAW AND UNDER THE CODES*, vol. 6, p. 296; *DEMURRERS IN CHANCERY*, vol. 6, p. 393; *DEMURRERS TO EVIDENCE*, vol. 6, p. 438.

Joinder of Offenses, see article *INDICTMENTS, INFORMATIONS, AND COMPLAINTS*, vol. 10, p. 540, and the particular criminal titles in this work.

JOINT PARTIES.

See article *PARTIES*, and references there given.

JOINT-STOCK ASSOCIATIONS.

See articles *CORPORATIONS*, vol. 5, p. 52; *UNINCORPORATED ASSOCIATIONS*.

JOINT TENANTS AND TENANTS IN COMMON.

BY JOHN LEHMAN.

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I. ACTIONS AND SUITS INTER SESE — 1. Account at Common Law.

— By the Ancient Common Law no action *ex contractu* would lie by one tenant in common against his companion for profits or income of the common property unless he had been appointed bailiff by his cotenant, this condition of the law following from the nature of the tenant's title.¹ But this old doctrine of the common law

1. *Hudson v. Coe*, 79 Me. 83; *Edsall v. Merrill*, 37 N. J. Eq. 115; *Blanton v. Vanzant*, 2 Swan (Tenn.) 276; *Bulger v. Woods*, 3 Pin. (Wis.) 463; *Wheeler v. Horne*, Willes 208; *Sturton v. Richardson*, 13 M. & W. 17; *Henderson v. Eason*, 17 Q. B. 701, 79 E. C. L. 701; *Co. Litt.* 199-206.

"If one joint tenant, or tenant in common of land," says Coke, "maketh his companion his bailiff of his part, he shall have an action of account against him, as hath been said. But although one tenant in common, or joint tenant, without being made bailiff, take the whole profits, no action of account lieth against him; for in an action of account he must charge either as a guardian, bailiff, or receiver, as hath

been said before; which he cannot do in this case, unless his companion constitute him his bailiff. And therefore, all those books which affirm that an action of account lieth by one tenant in common or joint tenant against another must be intended, when the one maketh the other his bailiff, for otherwise never his bailiff to render an account is a good plea." 1 Tho. Coke, 787 marg., quoted in *Early v. Friend*, 16 Gratt. (Va.) 42.

Destruction of Tenancy by Sale. — But if a personal chattel were sold by a joint tenant an action of account would lie against the other for his share of the money, or an action on the case for money had and received, because the sale destroyed the joint interest and

was changed by a statute which made the tenant who received more than his just share *ipso facto* bailiff of his cotenant for such excess.¹ The liability thus created has become the law of this country or the foundation for other statutory provisions changing the original right or creating a remedy.²

Account Only for Actual Receipts. — But the action of account given by the statute of Anne is for actual receipts of profits, and not for a mere use or occupation by the cotenant who offers no hindrance to a like enjoyment by his companion, and in the absence of contract between them.³

Necessary Allegations. — In order to entitle the plaintiff to the benefit of the statute, where the liability is regulated thereby, he must allege specifically in his declaration the facts necessary to bring the case within the statute, viz., the joint tenancy or

each had a separate interest in the money. *Chambers v. Chambers*, 3 Hawks (N. Car.) 233; *Blanton v. Vanzant*, 2 Swan (Tenn.) 276; *Miller v. Miller*, 9 Pick. (Mass.) 34; *Sherman v. Ballou*, 8 Cow. (N. Y.) 304; *Martyn v. Knowllys*, 8 T. R. 145; *Wheeler v. Horne*, Willes 209.

1. 4 & 5 Anne, c. 16, § 27; *Henderson v. Eason*, 17 Q. B. 718, 79 E. C. L. 718, 12 Q. B. 993, 64 E. C. L. 993; *Sturton v. Richardson*, 13 M. & W. 17. And see *Hudson v. Coe*, 79 Me. 83.

2. *Maine*. — *Gowen v. Shaw*, 40 Me. 58; *Hudson v. Coe*, 79 Me. 83; *Moses v. Ross*, 41 Me. 360.

Massachusetts. — *Brigham v. Eveleth*, 9 Mass. 538; *Munroe v. Luke*, 1 Met. (Mass.) 459.

Michigan. — *Everts v. Beach*, 31 Mich. 136.

Missouri. — *Ragan v. McCoy*, 29 Mo. 356.

New Jersey. — *Edsall v. Merrill*, 37 N. J. Eq. 115.

New York. — *Coles v. Coles*, 15 Johns. (N. Y.) 159; *Wright v. Wright*, 59 How. Pr. (N. Y. Supreme Ct.) 176; *Sherman v. Ballou*, 8 Cow. (N. Y.) 304.

Pennsylvania. — *McCreary v. Ross*, 7 Watts (Pa.) 485; *Irvine v. Hanlin*, 10 S. & R. (Pa.) 219.

Vermont. — *Hayden v. Merrill*, 44 Vt. 336.

Virginia. — *Early v. Friend*, 16 Gratt. (Va.) 42; *Graham v. Pierce*, 19 Gratt. (Va.) 38.

Wisconsin. — *Stewart v. Stewart*, 90 Wis. 516.

In North Carolina it was said: "In this state the law remains as it was when Lord Coke wrote: 'Albeit one tenant in common take the whole

profits, the other has no remedy by law against him, for the taking of the whole profits is no ejectment.' Co. Litt. 199 b." *Chambers v. Chambers*, 3 Hawks (N. Car.) 233.

3. *Wheeler v. Horne*, Willes 208; *Sturton v. Richardson*, 13 M. & W. 17; *Henderson v. Eason*, 17 Q. B. 718, 79 E. C. L. 718.

As to Liability of Joint Tenants and Tenants in Common generally, see article *Joint Tenants and Tenants in Common*, Am. and Eng. Encyc. of Law.

Profits from Distinct Shares. — Where one tenant in common rents a distinct share, and the other is not prevented from using his proportionate share of the property, the latter cannot maintain an action for any part of the rent received by the former. *Scantlin v. Allison*, 32 Kan. 376.

Rent Under Contract. — Tenants in common of real estate may contract with each other for the exclusive right to the use and occupancy of the same, and those acquiring rights by renting from the others are liable to an action for the rent due upon such contract. *Cahoon v. Kinen*, 42 Ohio St. 190, wherein it is said that the right to maintain such an action grows out of the contract relations of the parties, and not out of their relations as tenants in common. See also article LANDLORD AND TENANT.

Abandoning Contract for Case. — Where the law, from a given statement of facts, raises an obligation to do a particular act, and there is a breach of that obligation, and consequent damage, an action on the case, founded on the tort, is the proper action. *Bond v. Hilton*, Busb. L. (N. Car.) 308.

tenancy in common of the plaintiff and defendant, the proportions in which they severally hold, and that the defendant has received more than his just share or proportion.¹

2. Assumpsit. — The early cases held that a tenant in common cannot in general sue his cotenant in assumpsit when the latter has received the rents, etc., but that he must proceed by action of account, or bill in equity.² But assumpsit was soon regarded the more appropriate form of action, avoiding the prolixity of the old action of account, and the latter has been very generally superseded by assumpsit, or by a civil action for money in the nature thereof under the statutory or code practice prevailing.³

1. Action on Statute. — It is said that under the statute of Anne it is not the action of account, but an action upon the statute, or upon the particular circumstances which give the action, that ought to be brought, and that this was determined in the case of *Wheeler v. Horne, Willes* 208. *Hayden v. Merrill*, 44 Vt. 336; *Sargent v. Parsons*, 12 Mass. 152.

If the Liability as Bailiff at Common Law is sought to be enforced, a complaint is fatally defective in not averring that the defendant occupied the premises upon any agreement with the plaintiff as receiver or bailiff of his share of the rents and profits. It is not only essential to a recovery that this circumstance exist, but the complaint must allege it. *Pico v. Columbet*, 12 Cal. 414.

To charge a cotenant as bailiff it is not necessary to allege a receipt of more than his share, as this is not material to the common-law liability to account. *Barnum v. Landon*, 25 Conn. 137.

Venue of Action of Account. — An action of account need not be brought in the county where the land is. *Lewis v. Martin*, 1 Day (Conn.) 263.

2. Sherman v. Ballou, 8 Cow. (N. Y.) 304; *Crow v. Mark*, 52 Ill. 332; *Terrell v. Murray*, 2 Yerg. (Tenn.) 384; *Wheeler v. Horne, Willes* 208.

3. California. — *Abel v. Love*, 17 Cal. 233.

Maine. — *Hudson v. Coe*, 79 Me. 83; *Cutler v. Currier*, 54 Me. 91; *Richardson v. Richardson*, 72 Me. 403; *Gowen v. Shaw*, 40 Me. 58.

Massachusetts. — *Munroe v. Luke*, 1 Met. (Mass.) 464; *Badger v. Holmes*, 6 Gray (Mass.) 119; *Jones v. Harraden*, 9 Mass. 540; *Miller v. Miller*, 7 Pick. (Mass.) 133, 9 Pick. (Mass.) 34; *Sargent v. Parsons*, 12 Mass. 149; *Shepard v.*

Richards, 2 Gray (Mass.) 424; *Brigham v. Eveleth*, 9 Mass. 538; *Fanning v. Chadwick*, 3 Pick. (Mass.) 420; *Holmes v. Hunt*, 122 Mass. 505; *Dewing v. Dewing*, 165 Mass. 230.

Minnesota. — *Kean v. Connolly*, 25 Minn. 222.

Missouri. — *Rogers v. Penniston*, 16 Mo. 432.

New York. — *Coles v. Coles*, 15 Johns. (N. Y.) 160; *Cochran v. Carrington*, 25 Wend. (N. Y.) 409; *Brinckerhoff v. Wemple*, 1 Wend. (N. Y.) 470; *Wright v. Wright*, 59 How. Pr. (N. Y. Supreme Ct.) 176.

Pennsylvania. — *Winton Coal Co. v. Pancoast Coal Co.*, 170 Pa. St. 437; *Borrell v. Borrell*, 33 Pa. St. 492 (wherein the court casts some pleasant ridicule upon the old action of account for its "cumbrous machinery and want of speed," and announces the determination "to allow common sense another triumph" by holding the action of assumpsit maintainable in such cases); *Gillis v. M'Kinney*, 6 W. & S. (Pa.) 78.

Tennessee. — *Blanton v. Vanzant*, 2 Swan (Tenn.) 276.

In *Williams v. Chadbourne*, 6 Cal. 559, it was held that where one tenant in common appropriates the proceeds of the property to his own use, the remedy is by an action in trover or for money had and received, and a declaration for goods sold and delivered will not support a judgment in such a cause.

Under Express Statutes this form of action is often appropriate, *Dyer v. Wilbur*, 48 Me. 287; *Hudson v. Coe*, 79 Me. 83; *Richardson v. Richardson*, 72 Me. 406; *Kean v. Connolly*, 25 Minn. 222; though, independently of the provisions of such statutes, the right of one tenant in common to maintain an action of assumpsit against a cotenant who had received in money more than his share of the income of the estate is

On the other hand, *assumpsit* has been held to be inappropriate unless there has been a final balance of all accounts between the tenants and a particular sum found due from one to the other.¹

3. Action for Repairs and Improvements. — At common law there was a writ to compel cotenants to join in making necessary repairs.² But it seems there was no action by which one tenant could recover from the other a share of expense incurred for repairs already made.³ This view has been adopted in the United States in the absence of any change in the common law,⁴ though the authorities are not uniform, it being also held that *assumpsit* will lie to recover a share of necessary expense for repairs.⁵ And while there is some disagreement in the cases upon such question, it seems to be well settled that a recovery for such repairs can be had in equity in a suit for partition,⁶ as well as in other cases wherein the question has been rather upon the liability than

recognized, *Richardson v. Richardson*, 72 Me. 406.

In *New Hampshire*, construing a statute providing that "if any cotenant of any real estate shall hold the exclusive possession and income thereof against the will and without the consent of his cotenant, the cotenant so excluded may, in action of *assumpsit*, recover of the person holding such possession the full amount of all damages he may have sustained thereby," it was held that by this provision it was intended to provide a more simple and direct remedy for the cotenant who had been excluded or ousted of the possession of the common land; that it could not have been intended to change the whole common law in regard to the nature of tenancies in common, but rather that this new remedy should be confined to the case stated in the statute where the holding by one tenant was without the consent and against the will of the cotenant. *Webster v. Calef*, 47 N. H. 294.

1. *Hamilton v. Conine*, 28 Md. 635, wherein it is said that the rules of law governing actions between partners apply with equal force to tenants in common.

2. Writ De Reparationes. — At common law, where one of the tenants in common was willing to repair, but the other was not, he that was willing might have had a writ *de reparatione facienda*, which writ ran *ad reparationem et sustentationem ejusdem domus tenetur*, whereby it appeared that owners were bound *pro bono publico* to maintain houses and mills which were for the habitation and use of man. Co. Litt. 200b, 54b, cited in *Dech's Appeal*, 57

Pa. St. 467; *Calvert v. Aldrich*, 99 Mass. 74.

3. *Calvert v. Aldrich*, 99 Mass. 74.

This old writ was not for the purpose of requiring contribution for repairs already made, but to force a cotenant to join in making such repairs as were proper. *McDearman v. McClure*, 31 Ark. 562; *Calvert v. Aldrich*, 99 Mass. 74, *disapproving* what is said *obiter* to the contrary in *Mumford v. Brown*, 6 Cow. (N. Y.) 475, and *Coffin v. Heath*, 6 Met. (Mass.) 80, as well as *Doane v. Badger*, 12 Mass. 65, upon which they were founded.

4. *Calvert v. Aldrich*, 99 Mass. 74; *Converse v. Ferre*, 11 Mass. 325; *Stackable v. Stackable*, 65 Mich. 515; *Wiggin v. Wiggin*, 43 N. H. 561; *Stevens v. Thompson*, 17 N. H. 103; *Kidder v. Rixford*, 16 Vt. 169; *Ballou v. Ballou*, (Va. 1897) 26 S. E. Rep. 840. See also *Davis v. Chapman*, 36 Fed. Rep. 48.

5. *Haven v. Mehlgarten*, 19 Ill. 91; *Fowler v. Fowler*, 50 Conn. 256. See also *Russell v. Russell*, 62 Ala. 51; *Denman v. Prince*, 40 Barb. (N. Y.) 213. See in general, as to the substantive liability of joint tenants and tenants in common in such cases, Am. and Eng. Encyc. of Law, tit. *Joint Tenants and Tenants in Common*.

6. See generally article PARTITION, and the following cases: *Drennen v. Walker*, 21 Ark. 557; *Jones v. Jones*, 23 Ark. 213; *McDearman v. McClure*, 31 Ark. 562 [citing *Haven v. Mehlgarten*, 19 Ill. 92; *Calvert v. Aldrich*, 99 Mass. 74; *Converse v. Ferre*, 11 Mass. 325; *Denman v. Prince*, 40 Barb. (N. Y.) 215; *Mumford v. Brown*, 6 Cow. (N. Y.) 475; *Kidder v. Rixford*, 16 Vt. 169];

upon the form of action in which the liability should be fixed;¹ but, of course, persons who stand in such relations to each other may modify their relative common-law rights by express agreement, under which an action will lie independently of their other relations.²

4. Replevin and Detinue. — One tenant in common or joint tenant having an equal right to the possession with his companion, no action can be brought by the one to disturb the other in such possession;³ and, it being the rule that in order to maintain replevin the plaintiff must have the right of possession, a tenant in common or joint tenant cannot maintain such action against his cotenant, each having an equal right of possession,⁴ but must

Carver v. Coffman, 109 Ind. 547; *Van Ormer v. Harley*, (Iowa 1897) 71 N. W. Rep. 241; *Scantlin v. Allison*, 32 Kan. 376; *Ford v. Knapp*, 102 N. Y. 135; *Robinson v. McDonald*, 11 Tex. 385; *Ballou v. Ballou*, (Va. 1897) 26 S. E. Rep. 840.

1. Contribution in Equity. — *Alexander v. Ellison*, 79 Ky. 148; *Hannan v. Osborn*, 4 Paige (N. Y.) 343.

Reimbursement in Ejectment. — In ejectment by one tenant in common against his cotenant, who had been in possession of the entire premises, holding adversely and in good faith on a deed which was adjudged to be void, the defendant was allowed to be reimbursed for one-half the values of repairs and improvements made by him. *Stewart v. Stewart*, 90 Wis. 516.

But in an action of ejectment by one tenant in common against another for the possession of an equal undivided part of the estate, such a claim cannot be set up to defeat the right of possession. *Young v. Gammel*, 4 Greene (Iowa) 211, wherein it is said. "Whatever may be the equitable rights and remedy of the defendant, they cannot be maintained as set up here, in set-off of the claim of the plaintiffs to possession of the land as tenants in common. To permit it would be to furnish an easy mode for one tenant in common to encumber the estate of his cotenants who are minors, and hold them dispossessed, and work at his own option a privation of their right."

Defalked Against Mesne Profits. — Improvements may be had by defalk against a claim for mesne profits. *Walker v. Humbert*, 55 Pa. St. 408; *Ewalt v. Gray*, 6 Watts (Pa.) 428; *Morrison v. Robinson*, 31 Pa. St. 456; *Davis v. Louk*, 30 Wis. 308.

Accounting. — Where one tenant is called upon in an action or suit for an accounting, he may have credit for repairs. *Dech's Appeal*, 57 Pa. St. 467; *Anderson v. Greble*, 1 Ashm. (Pa.) 136; *Pickering v. Pickering*, 63 N. H. 468.

2. Wheeler v. Wheeler, 111 Mass. 249 [*citing* *Gwinneth v. Thompson*, 9 Pick. (Mass.) 31; *Converse v. Ferre*, 11 Mass. 325]. See also *Clark v. Plummer*, 31 Wis. 449; *Jordan v. Soule*, 79 Me. 590.

3. Littleton says: "If two be possessed of chattels personal in common, by divers titles, as of a horse, or ox, or cow, if one takes the whole to himself out of the possession of the other, the other hath no other remedie but to take this from him who hath done him the wrong to occupy in common, * * * when he can see his time," etc. Litt., § 323. And Lord Coke, commenting thereon, says: "If one tenant in common take all the chattels personal, the other hath no remedie by action, but he may take them again." Co. Litt. 200a; *Prentice v. Ladd*, 12 Conn. 333; *Moses v. Ross*, 41 Me. 360; *Hinds v. Terry*, Walk. (Miss.) 80.

Detinue. — One tenant in common cannot maintain detinue against his cotenant. *Lewis v. Night*, 3 Litt. (Ky.) 225; *Carlyle v. Patterson*, 3 Bibb (Ky.) 93.

4. California. — *Hewlett v. Owens*, 50 Cal. 474; *Balch v. Jones*, 61 Cal. 234.

Connecticut. — *Prentice v. Ladd*, 12 Conn. 331.

Delaware. — *Ellis v. Culver*, 2 Harr. (Del.) 129.

Indiana. — *Bowen v. Roach*, 78 Ind. 361.

Kentucky. — *Chinn v. Respass*, 1 T. B. Mon. (Ky.) 29.

resort to his remedy for a partition.¹

5. Trespass and Trespass on the Case. — It has been said in general terms that trespass will not lie by one tenant in common against another,² but, more particularly, the liability often determines the form of action. Thus, whether trespass will lie

Maine. — *Witham v. Witham*, 57 Me. 448.

Maryland. — *M'Elderry v. Flannagan*, 1 Har. & G. (Md.) 322.

Massachusetts. — *Barnes v. Bartlett*, 15 Pick. (Mass.) 75; *Wills v. Noyes*, 12 Pick. (Mass.) 324; *Silloway v. Brown*, 12 Allen (Mass.) 30; *Ladd v. Billings*, 15 Mass. 17.

Michigan. — *Wetherell v. Spencer*, 3 Mich. 127.

Missouri. — *Gossett v. Drydale*, 48 Mo. App. 434; *Pulliam v. Burlingame*, 81 Mo. 111; *Lisenby v. Phelps*, 71 Mo. 522; *Cross v. Hulett*, 53 Mo. 397; *Sharp v. Benoist*, 7 Mo. App. 535.

New York. — *Rogers v. Arnold*, 12 Wend. (N. Y.) 37; *Davis v. Lottich*, 46 N. Y. 393; *Russell v. Allen*, 13 N. Y. 173; *Robinson v. Gilfillan*, 15 Hun (N. Y.) 267.

North Carolina. — *Strauss v. Crawford*, 89 N. Car. 149.

Pennsylvania. — *Wilson v. Gray*, 8 Watts (Pa.) 35; *Walworth v. Abel*, 52 Pa. St. 370.

Utah. — *Hill v. Seager*, 3 Utah 379.

United States. — *Bohlen v. Arthurs*, 115 U. S. 482.

Divisible Property. — It is held that one tenant in common of grain, as under a contract to farm on shares, may maintain an action of replevin against his cotenant who unlawfully withholds his share. *Freese v. Arnold*, 99 Mich. 13 [citing *Crapo v. Seybold*, 36 Mich. 444; *Sutherland v. Carter*, 52 Mich. 471; *Wattles v. Dubois*, 67 Mich. 313]. But see *infra*, I. 6. b. *Property of Divisible Nature*.

In *Schwartz v. Skinner*, 47 Cal. 6, which was under a statute providing that tenants in common "may jointly or severally bring or defend any civil action for the enforcement or protection of the rights of such party," the action was replevin for seventeen-thirtieths of the furniture used in a hotel. The complaint contained all the allegations essential in trover, which were sustained by the findings, and the findings expressed all the facts in the case. The Supreme Court reversed the judgment of the District Court, which was for the defendant, "with directions to

render judgment for the plaintiff on the findings." This case is said to be distinguishable from the line of authorities which hold that an action of replevin cannot be brought by tenants in common against each other, but is unsatisfactory in any view, especially if read in the light of *Hewlett v. Owens*, 50 Cal. 474, wherein it was said: "Being tenants in common, neither could, under the circumstances appearing in this case, maintain replevin against the other." This is said to be in harmony with the almost unbroken current of authority and not inconsistent with the California statute. *Hill v. Seager*, 3 Utah 379.

1. *Hewlett v. Owens*, 50 Cal. 474.

2. *Roberts v. McGraw*, 11 Bush (Ky.) 26; *McPherson v. Seguire*, 3 Dev. L. (N. Car.) 153.

Trespass Quare Clausum Fregit. — In *Anders v. Meredith*, 4 Dev. & B. L. (N. Car.) 199, it was said that one tenant in common might have an action on the case against his cotenant for an act done on the land amounting to waste or destruction, but that in no event could he have an action of trespass *quare clausum fregit* against him.

In *Vermont* it was held that trespass *quare clausum fregit* could not be maintained by one tenant in common against another who entered upon the common property claiming the exclusive ownership thereof and cut all the timber there standing. Reviewing the language of the judge in *Kirby v. Mayo*, 13 Vt. 103, the court said: "He announced in general terms a very old and well established doctrine, that 'the possession of a tenant in common, as well as that of a tenant at will, may become adverse, so that his cotenant or the landlord may treat him as a trespasser, and maintain an action against him as such.' And in consequence of such adverse possession by the defendant in that case, the court held that the plaintiff had lost his right in common to the property in question. We think it clear that the learned judge did not intend, by using the term 'trespasser,' to convey the idea that the party might be pursued by a

by one joint tenant or tenant in common against his cotenant depends upon the determination whether there has been an ouster or a complete destruction of the subject of the tenancy,¹ and when there has been such destruction or actual ouster trespass is the appropriate remedy.²

technical action of trespass; and that he did not so mean in saying that an action might be maintained against him as such trespasser. In our opinion, all that he meant was that a tenant in common might be transcending his right as such tenant, by the character of the possession he was holding, and therein, in the generic and untechnical sense of the term, be trespassing upon the right of his cotenant, as would be true in the case of an ouster. In such case the party whose right was thus trespassed upon might maintain an action against his cotenant, on account of such transcending of legal right. But we think it was not designed to indicate the form of action which would be proper, under the rules of the law, in such case." Wait v. Richardson, 33 Vt. 190.

1. **Rule Stated by Lord Kenyon.** — "As applicable to remedies of this character between tenants in common, the true principle is stated by Kenyon, C. J., in *Martyn v. Knowllys*, 8 T. R. 145, that 'if one tenant in common misuse that which is in common with another, he is answerable to the other in an action as for misfeasance.' That was an action on the case by one tenant in common against his cotenant for cutting certain trees upon the common land. The right to maintain the action was fully recognized if the facts showed that the trees were not proper to be cut; but the plaintiff failed to recover solely on the ground that it appeared that the trees in question were of proper age, and in other respects fit and proper to be cut. Whether one tenant in common is to be regarded as a wrongdoer so that an action of tort lies against him by his cotenant, depends on the kind of property, the implied authority of tenants in common as between each other, the nature, tendency, and effect of the act done." *McLellan v. Jenness*, 43 Vt. 188.

Appropriation of Products of Common Land. — It is said that one tenant is not liable in trespass for appropriating to his own use the products of the common land. *Van Orman v. Phelps*, 9 Barb. (N. Y.) 500; *King v. Phillips*, 1

Lans. (N. Y.) 434; *Symonds v. Harris*, 51 Me. 19.

2. *Bishop v. Blair*, 36 Ala. 80; *Symonds v. Harris*, 51 Me. 19; *Monfort v. Stevens*, 68 Mich. 61; *Clow v. Plummer*, 85 Mich. 550; *Wells v. Hollenbeck*, 37 Mich. 505; *Filbert v. Hoff*, 42 Pa. St. 97; *Trauger v. Sassaman*, 14 Pa. St. 514; *Dubois v. Beaver*, 25 N. Y. 123; *Booth v. Adams*, 11 Vt. 156; *Cubitt v. Porter*, 8 B. & C. 257, 15 E. C. L. 211.

Without a Destruction or Ouster, trespass will not lie. *Erwin v. Olmsted*, 7 Cow. (N. Y.) 230; *Booth v. Adams*, 11 Vt. 156; *Wait v. Richardson*, 33 Vt. 190; *Kenniston v. Leighton*, 43 N. H. 312; *Wright v. Chandler*, 4 Bibb (Ky.) 422.

Occupation of a Particular Part by One Tenant. — When one tenant in common occupies a particular part of the property by the consent of his cotenants, he may maintain trespass against them equally as against a stranger, and for the same acts. *O'Hear v. De Goesbriand*, 33 Vt. 612.

Quare Clausum Fregit. — One tenant in common has no right to enter upon his cotenant and oust him from possession. If he do so, trespass *quare clausum fregit* will lie for the injury. *Erwin v. Olmsted*, 7 Cow. (N. Y.) 229; *King v. Phillips*, 1 *Lans.* (N. Y.) 434; *Dubois v. Beaver*, 25 N. Y. 123; *Silloyway v. Brown*, 12 Allen (Mass.) 30; *Maddox v. Goddard*, 15 Me. 218; *McGill v. Ash*, 7 Pa. St. 397.

If one of two tenants in common permits an animal to run at large so as to damage crops in the joint possession of the tenants, trespass *quare clausum fregit* will not lie, but the remedy is by an action on the case. *McGehee v. Peterson*, 57 Ala. 333 [citing *Bennet v. Bullock*, 35 Pa. St. 364; *Booth v. Adams*, 11 Vt. 156; *Duncan v. Sylvester*, 13 Me. 417]. Such an injury is neither an ouster nor a destruction of the entirety, and it is said that to permit an action of trespass by one tenant against another for a partial damage to the common property would be an attempt to sue a man for trespass committed against himself. *Wells v. Hollenbeck*, 37 Mich. 505.

An Action on the Case seems to be the proper remedy by one tenant against his cotenant for any misuse of the common property resulting in an injury to his rights which does not amount to a destruction of the subject of the tenancy or an ouster of the plaintiff.¹

6. Action for Conversion — *a. GENERAL RULES.* — When, and for what cause, one of two or more tenants in common of personal property may maintain trover against those retaining its possession, seems to be sufficiently clear on principle, but not always of easy application to confused and varying facts.²

Mere Detention. — One tenant in common of a chattel cannot maintain trover against his cotenant for the mere detention of the article. The reason for this rule is that the right of possession lies at the foundation of the action, and where two are equally entitled to possession he who has it cannot be guilty of a conversion by retaining it.³

1. Total and Partial Destruction. — In *Cubitt v. Porter*, 8 B. & C. 257, 15 E. C. L. 211, Littledale, J., says that if two persons are tenants in common of a tract of land on which there is a wall, and one refuses to repair, and the other pulls it down and sells the materials and builds a better wall, it may be said that there is a total destruction of the old wall, and an action of trespass will lie. But if he sold the old materials for the purpose of building a new one, an action of trespass will not lie. "Such an act is more properly the subject-matter of an action on the case, because it is in the nature of a partial injury, and not of a total destruction of the subject-matter of the tenancy in common." And in the same opinion it was said that when there has not been a total destruction of the subject-matter of the tenancy in common, "but only a partial injury to it, an action on the case will lie by one tenant against the other." *Bond v. Hilton*, Busb. L. (N. Car.) 308. See also *Blanchard v. Baker*, 8 Me. 253; *Duncan v. Sylvester*, 13 Me. 417; *Pillsbury v. Moore*, 44 Me. 154; *Booth v. Sherwood*, 12 Minn. 429; *Chesle v. Thompson*, 3 N. H. 10; *Beach v. Child*, 13 Wend. (N. Y.) 343; *King v. Phillips*, 1 Lans. (N. Y.) 434; *McLellan v. Jenness*, 43 Vt. 183; *Booth v. Adams*, 11 Vt. 160.

2. Osborn v. Schenck, 83 N. Y. 203.

Any act less than the destruction of the interest of the cotenant has been held not sufficient to justify trover. *Hurd v. Darling*, 14 Vt. 214; *Jones v. Childs*, 8 Dana (K.) 163.

Destruction or Removal Out of State. —

In *North Carolina* it is held that a tenant cannot support the action unless the property has been destroyed or carried beyond the limits of the state. *Grim v. Wicker*, 80 N. Car. 343; *Strauss v. Crawford*, 89 N. Car. 150.

Consumption by Use. — A tenant in common can maintain trover against his cotenant for using hay owned jointly by both, but not for selling it. *Lewis v. Clark*, 59 Vt. 363.

3. Alabama. — *Williams v. Nolen*, 34 Ala. 167; *Allen v. Harper*, 26 Ala. 686; *Permyer v. Kelly*, 18 Ala. 716.

Kentucky. — *Bell v. Layman*, 1 T. B. Mon. (Ky.) 40; *Fightmaster v. Beasley*, 7 J. J. Marsh. (Ky.) 415.

Maryland. — *Winner v. Penniman*, 35 Md. 165.

Michigan. — *Ripley v. Davis*, 15 Mich. 75.

Minnesota. — *Strong v. Colter*, 13 Minn. 82.

New York. — *Stafford v. Azbell*, 8 Misc. Rep. (N. Y. C. Pl.) 316.

North Carolina. — *Newby v. Harrell*, 99 N. Car. 149; *Bonner v. Latham*, 1 Ired. L. (N. Car.) 271; *Pitt v. Petway*, 12 Ired. L. (N. Car.) 69; *Lucas v. Wasson*, 3 Dev. L. (N. Car.) 398.

Pennsylvania. — *Heller v. Hufsmith*, 102 Pa. St. 533.

Tennessee. — *Cowan v. Buyers*, Cooke (Tenn.) 53.

Waste. — An action for conversion is sometimes appropriate where the facts constitute waste, as for cutting standing trees. *Shepard v. Pettit*, 30 Minn. 119; *Duff v. Bindley*, 16 Fed. Rep. 178.

If a Tenant Convert the Chattels by Actual Destruction, or so appropriate them to his own use as to render any future enjoyment of them by his cotenant impossible, the latter may maintain an action of trover or tort in the nature of trover against him.¹

Conversion by Sale. — As above shown, neither cotenant, both having a right to the possession, can be sued by the other part owner, unless there has been a conversion of the property; and the old authorities, as well as some later ones, hold that a sale by one cotenant of the entire property does not amount to a conversion; but upon this question the authorities are not uniform.²

b. PROPERTY OF DIVISIBLE NATURE. — There is sometimes an exception to the rule that trover will not lie for a mere detention, where the property is separable in respect to quantity and quality by weight or measure, in which event it is held that each tenant may demand his share of the cotenant having possession, and upon refusal to deliver may bring suit therefor.³ And some-

Assumpsit. — And assumpsit has also been held to be the proper form of action for cutting timber. *Blake v. Milliken*, 14 N. H. 215; *Mooers v. Bunker*, 29 N. H. 420.

1. *Alabama.* — *Russell v. Russell*, 62 Ala. 50; *Marlowe v. Rogers*, 102 Ala. 510; *Sullivan v. Lawler*, 72 Ala. 74.

Maine. — *Herrin v. Eaton*, 13 Me. 193.

Maryland. — *Winner v. Penniman*, 35 Md. 165.

Massachusetts. — *Weld v. Oliver*, 21 Pick. (Mass.) 559; *Delaney v. Root*, 99 Mass. 547, 97 Am. Dec. 52; *Needham v. Hill*, 127 Mass. 133; *Daniels v. Daniels*, 7 Mass. 135; *Burbank v. Crooker*, 7 Gray (Mass.) 158.

Michigan. — *Bray v. Bray*, 30 Mich. 479; *Sutherland v. Carter*, 52 Mich. 471; *Webb v. Mann*, 3 Mich. 139; *Grove v. Wise*, 39 Mich. 161; *McClure v. Thorpe*, 68 Mich. 35.

Minnesota. — *Person v. Wilson*, 25 Minn. 189.

New York. — *Tyler v. Taylor*, 8 Barb. (N. Y.) 585; *Wilson v. Reed*, 3 Johns. (N. Y.) 175; *Hyde v. Stone*, 7 Wend. (N. Y.) 354.

Oregon. — *Rosenau v. Syring*, 25 Oregon 386; *Yamhill Bridge Co. v. Newby*, 1 Oregon 175.

Pennsylvania. — *Coursin's Appeal*, 79 Pa. St. 220.

South Dakota. — *Wood v. Steinau*, (S. Dak. 1896) 68 N. W. Rep. 162.

Tennessee. — *Cowan v. Buyers*, *Cooke* (Tenn.) 53.

Vermont. — *Tubbs v. Richardson*, 6 Vt. 442; *Lewis v. Clark*, 59 Vt. 363.

Virginia. — *Lowe v. Miller*, 3 Gratt. (Va.) 196.

Wisconsin. — *Bulger v. Woods*, 3 Pin. (Wis.) 463.

England. — *Heath v. Hubbard*, 4 East 110; *Brown v. Hedges*, 1 Salk. 290.

Where the tenant in possession of personal chattels withholds the common property from his cotenant, or wrests it from him and exercises a dominion over it, either in direct denial of or inconsistently with the rights of the latter, an action will lie for conversion. *Benjamin v. Strempel*, 13 Ill. 469; *Hall v. Page*, 4 Ga. 428; *Waller v. Bowling*, 108 N. Car. 294 [citing *Shearin v. Riggsbee*, 97 N. Car. 221; *State University v. State Nat. Bank*, 96 N. Car. 284; *Grove v. Wise*, 39 Mich. 161]. But in *Gilbert v. Dickerson*, 7 Wend. (N. Y.) 449, it was held that the act of one tenant in locking up the property and claiming exclusive ownership in it would not support the action against him.

Dispossessing Cotenant. — One tenant in common of a chattel cannot bring trover against his cotenant for dispossessing him; if the chattel be destroyed, or sold, which is constructively a destruction, the action lies. *Farr v. Smith*, 9 Wend. (N. Y.) 338.

2. For the rights and liabilities of joint tenants and tenants in common as to the sale of the common property, see Am. and Eng. Encyc. of Law, tit. *Joint Tenants and Tenants in Common*.

3. *Balch v. Jones*, 61 Cal. 237; *Loomis v. O'Neal*, 73 Mich. 582; *Stall v. Wilbur*, 77 N. Y. 158; *Channon v. Lusk*, 2 Lans. (N. Y.) 211; *Lobdell v.*

times by express statute one tenant in common may recover from his cotenant his share of divisible personal property or the value thereof, if the cotenant withholds it from him.¹

7. Trespass to Try Title. — One tenant in common cannot maintain an action for trespass to try title against his cotenant unless there has been an ouster of the plaintiff.²

8. Waste. — Under a statute in *England*, provision was made for a remedy by one tenant in common against another for waste.³ And in this country, independently of what has been said of the remedy for the misuse or destruction of common property, an action for waste is often provided by statute.⁴

9. Ejectment. — The possession of one tenant in common is the possession of his cotenants, and is consistent with the seizure of the latter; but one may oust the other either by actual disseizin or by exclusion from occupation, using the estate inconsistently with the rights of his cotenant, and in such event, and in that event only, the tenant ousted may bring ejectment or that form of action appropriate under reformed procedure to recover possession of an undivided part of the land.⁵

Stowell, 37 How. Pr. (Chenango County Ct.) 88, 51 N. Y. 70.

Waiver of Tort—Assumpsit. — It is also held that in such a case the tenant may waive the tort and sue in assumpsit for the part of the divisible property withheld from him. *Loomis v. O'Neal*, 73 Mich. 582. Though in the cases in which this is done there is an element of contract involved under which the parties are entitled to a division of the property. *Ripley v. Davis*, 15 Mich. 79; *Webb v. Mann*, 3 Mich. 139; *McLaughlin v. Salley*, 46 Mich. 221, referring to *Watson v. Stever*, 25 Mich. 386, and *Tolan v. Hodgeboom*, 38 Mich. 624.

One Having the Right to Make Partition by Taking His Share may sue for conversion if he is prevented from so doing. *Pickering v. Moore*, (N. H. 1894) 32 Atl. Rep. 830; *Evans v. Mason*, 64 N. H. 98.

1. *Wood v. Noack*, 84 Wis. 401; *George v. McGovern*, 83 Wis. 558.

2. *Harvin v. Hodge*, *Dudley L. (S. Car.)* 23; *Gibson v. Vaughn*, 2 *Bailey L. (S. Car.)* 390; *Martin v. Quattlebam*, 3 *McCord L. (S. Car.)* 205.

3. "If land be given to two for life, and to the heirs of one of them, and tenant for life do waste, he that hath the fee cannot have an action of waste on the statute of Gloucester, but he may have one on Westm. 2, c. 22, which enacts that if there be two tenants in common of a wood, turbary, piscary, etc., and one do waste, the

other shall have a writ of waste, and the waster shall have election before judgment, either to have his part in certain assigned to him by the oath of twelve men (and then the place wasted shall be assigned for part thereof), or to grant that he will take no more for the future than his companion shall approve of; and this act by construction has been held to extend to joint tenants, but not to parceners, because they might have the writ *de partitione facienda* at common law. Co. Litt. 200b; 2 Inst. 403." 5 Bac. Abr., title Joint Tenants (L).

4. *Jenkins v. Wood*, 145 Mass. 494; *Hubbard v. Hubbard*, 15 Me. 200; *Blake v. Milliken*, 14 N. H. 213; *Elwell v. Burnside*, 44 Barb. (N. Y.) 447; *Hinson v. Hinson*, 120 N. Car. 400; *Wheeler v. Carpenter*, 107 Pa. St. 271.

A statute giving an action of trespass for strip and waste against a cotenant and relieving the complaining tenant of the necessity of stating in his declaration his cotenants other than the defendant, does not require proof as to who his other cotenants are or the establishment of their title. *Hubbard v. Hubbard*, 15 Me. 200.

5. *California.* — *Owen v. Morton*, 24 Cal. 373; *Ewald v. Corbett*, 32 Cal. 499; *Packard v. Johnson*, 57 Cal. 180; *Salmon v. Wilson*, 41 Cal. 610; *Carpenter v. Mendenhall*, 28 Cal. 487.

Connecticut. — *Cross v. Robinson*, 21 Conn. 385.

10. Mesne Profits. — An action for mesne profits is substantially a continuation of the action of ejectment, and when a party is allowed to maintain ejectment against his cotenant he may also have an action of trespass for mesne profits.¹

11. Parties. — The rule requiring a joinder of tenants in common, in personal actions for wrong done by a stranger,² does not apply where the injury is done by a cotenant, because the shares and rights of the tenants are entirely distinct as between themselves, and neither has any right to complain except of an injury done to himself.³ It is said that while each of several tenants in common may bring his separate action, two cannot join against a third in an action of account, because in such a case the interests are not joint.⁴

Florida. — *Gale v. Hines*, 17 Fla. 773.

Georgia. — *Daniel v. Daniel*, (Ga. 1897) 28 S. E. Rep. 167.

Kansas. — *Scantlin v. Allison*, 32 Kan. 376.

Illinois. — *Noble v. McFarland*, 51 Ill. 229.

Maine. — *Small v. Clifford*, 38 Me. 213.

Maryland. — *Van Bibber v. Frazier*, 17 Md. 436.

Massachusetts. — *Higbee v. Rice*, 5 Mass. 351.

Minnesota. — *Cook v. Webb*, 21 Minn. 429.

Mississippi. — *Harmon v. James*, 7 Smed. & M. (Miss.) 112.

Missouri. — *Falconer v. Roberts*, 88 Mo. 574; *Harrison v. Taylor*, 33 Mo. 211; *Peterson v. Laik*, 24 Mo. 543.

New Hampshire. — *Lyford v. Thurston*, 16 N. H. 408.

New York. — *Siglar v. Van Riper*, 10 Wend. (N. Y.) 419; *Gilman v. Gilman*, 111 N. Y. 265 [citing *Siglar v. Van Riper*, 10 Wend. (N. Y.) 419, and the statutes in that state]; *Clark v. Crego*, 47 Barb. (N. Y.) 617; *Clason v. Rankin*, 1 Duer (N. Y.) 341.

North Carolina. — *Camp v. Homesley*, 11 Ired. L. (N. Car.) 212; *Withrow v. Biggerstaff*, 82 N. Car. 84; *Johnson v. Swain*, Busb. L. (N. Car.) 335; *Halford v. Tetherow*, 2 Jones L. (N. Car.) 393.

Pennsylvania. — *Bennet v. Bullock*, 35 Pa. St. 364; *White v. Williamson*, 2 Grant's Cas. (Pa.) 249.

Tennessee. — *Story v. Saunders*, 8 Humph. (Tenn.) 668.

Vermont. — *State University v. Reynolds*, 3 Vt. 542; *Warren v. Henshaw*, 2 Aik. (Vt.) 141.

Virginia. — *Taylor v. Hill*, 10 Leigh (Va.) 477.

England. — *Goodtitle v. Tombs*, 3 Wils. 118.

See also article EJECTMENT, vol. 7, p. 260.

1. *Carpentier v. Mitchell*, 29 Cal. 333; *Camp v. Homesley*, 11 Ired. L. (N. Car.) 212; *Holdfast v. Shepard*, 9 Ired. L. (N. Car.) 222; *Lane v. Harold*, 72 Pa. St. 267; *Hare v. Fury*, 3 Yeates (Pa.) 13; *Chambers v. Lapsley*, 7 Pa. St. 24; *Bennet v. Bullock*, 35 Pa. St. 364; *Critchfield v. Humbert*, 39 Pa. St. 427; *Langendyck v. Burhans*, 11 Johns. (N. Y.) 461; *Goodtitle v. Tombs*, 3 Wils. 118; *Cutting v. Derby*, 2 W. Bl. 1077.

Joinder of Action for Partition. — A cause of action for rents and profits may be united with one for partition. *Cook v. Webb*, 21 Minn. 429; *Scantlin v. Allison*, 32 Kan. 376. And in *Kansas* it is held that an action for rents and profits and an action in ejectment may both be united with an action for partition. *Scarborough v. Smith*, 18 Kan. 399; *Scantlin v. Allison*, 32 Kan. 376.

2. See *infra*, II. 1. *Joinder of Parties*.

3. *Mooers v. Bunker*, 29 N. H. 420; *Odiorne v. Lyford*, 9 N. H. 512; *Blake v. Milliken*, 14 N. H. 213.

4. *Farrar v. Pearson*, 59 Me. 562 [citing *Sturton v. Richardson*, 13 M. & W. 17]; *McCreary v. Ross*, 7 Watts (Pa.) 483. See also *May v. Parker*, 12 Pick. (Mass.) 38.

Equity Jurisdiction. — In *Vermont* it was held that where there are several tenants in common of land, an action of account at law cannot be maintained by one against another, but he must resort to a court of equity; but that if the interest of one tenant in common were separate and that of the others joint, then there would be but two

12. **Equitable Jurisdiction and Remedies.** — The common-law rule, as hereinbefore shown, not permitting one joint tenant or tenant in common to have an action *ex contractu* against his companion unless as bailiff, his only remedy was by bill in equity;¹ but the change in the rule, giving an action, did not abridge the remedy in equity in proper cases, and where a case is presented involving a variety of adjustments, limitations, cross-claims, or other complications, a court of equity will afford the parties superior facilities for effecting distributive justice between them;² as well as in other cases where the relief sought is peculiar to a court of equity.³

parties, and the action of account might be brought. *Wiswell v. Wilkins*, 4 Vt. 137.

In *May v. Parker*, 12 Pick. (Mass.) 34, it was said, in sustaining the equitable jurisdiction of the court: "Here there are several different plaintiffs claiming interests as tenants in common, in this mill, some of whom are minors. If obliged to sue jointly, on account of the interest being joint, then the defendant, being one of the parties in such joint interest, cannot be sued, and no action lies. If they may sue severally, then each of the plaintiffs must bring his several action for his proportion of the damage, the plaintiffs together having no joint interest except with the defendant. *Graham v. Robertson*, 2 T. R. 282. This would give rise to a burdensome multiplicity of suits, so that the remedy at law, if it could be enforced, would be wholly inadequate."

Assumpsit on Express Promise. — In *Steele v. McGill*, 172 Pa. St. 100, which was assumpsit by three cotenants jointly against a fourth upon an express promise, it was said that, when tenants in common sever, each can recover only for his or her individual interest in that which is the subject of the action, but where they join in seeking redress for an injury to the property held in common, the trespasser will not be heard to object to the joinder; and that for the same reason, where one of several tenants in common promises his cotenants to indemnify them if they will risk the common property for his benefit, he ought not to object if they sue upon the promise as it was made.

For Use and Occupation. — Where assumpsit is proper by one tenant in common against his cotenant, for mere use and occupation, and one of several

tenants in common is in the use and occupation of land, all his cotenants must join in an action against him to recover rent; one cannot sue alone for his interest. *Blanton v. Vanzant*, 2 Swan (Tenn.) 276.

1. See *supra*, I. 2. *Assumpsit*.

2. *Hamilton v. Conine*, 28 Md. 635; *Dyckman v. Valiente*, 42 N. Y. 549; *Early v. Friend*, 16 Gratt. (Va.) 41; *Smith v. King*, 50 Ga. 192.

Where the Account Is Simple and all upon one side, and can be fully and readily adjusted by a judgment in an action of assumpsit, and no discovery is sought, the necessity for entertaining equity jurisdiction is said not to exist, and the court will decline it. *Carter v. Bailey*, 64 Me. 465 [citing *Gloninger v. Hazard*, 42 Pa. St. 401; *Blood v. Blood*, 110 Mass. 545].

If the exact interest of the plaintiff could be ascertained and determined without an accounting, as, for instance, if he owned one-half or one-fourth of the property, there would be no difficulty, and the remedy would be at law in an action of trover, unless there were charges upon it remaining unpaid, or other complications, in which event the rights of parties could be justly determined only in a suit in equity. *Dyckman v. Valiente*, 42 N. Y. 549.

3. **Partition of Personality.** — Tenants in common of personal estate cannot have partition at common law, and therefore a court of equity is a proper tribunal to decree such partition. *Smith v. Smith*, 4 Rand. (Va.) 95. See also, to the same effect, *Tinney v. Stebbins*, 28 Barb. (N. Y.) 291, wherein it was said that the case was treated below as a common-law action and was rightly disposed of on that ground, but that the plaintiff's case was one for equitable relief, and as his prayer was adapted to such relief he was clearly,

Injunction. — There are no doubt special cases in which an injunction will be granted between tenants in common,¹ as to stay destruction or waste, but the cases are rare and the jurisdiction is sparingly exercised.²

Receiver. — A court of equity has jurisdiction to appoint a receiver at the instance of one tenant in common against his insolvent

upon the proofs, entitled to a decree *in rem* in respect to the subject of the tenancy involved. See also article PARTITION.

Relief from Fraud. — In an action commenced in the Court of Common Pleas in South Carolina for the purpose of canceling a deed made by a cotenant upon the ground that such deed was fraudulent and void, having been executed, as it was alleged, for the purpose of defeating a trust, and that the same was a cloud upon the title of the complainants to a tract of land described in the complaint, the title to which was alleged to be vested in the plaintiffs and defendants in certain proportions set forth, it was held that if the land was owned by the parties as tenants in common the action complained of was an act of wrong and entitled the parties to seek relief in equity from the alleged fraud upon their rights. *Sires v. Sires*, 43 S. Car. 266.

1. Thus, where the plaintiff and defendant were tenants in common of a mill on one side of a stream, and of the milldam and water power, and occupied the mill alternately, in pursuance of a verbal agreement, it was held that such alternate use of the common property was an equitable and legal division so long as the parol agreement should remain in force, and that each cotenant, during his turn, had a right to use the whole of the water in such a manner as he pleased, doing no injury to the common property; and the court enjoined the defendant from drawing water during the plaintiff's turn. *Bliss v. Rice*, 17 Pick. (Mass.) 23.

2. **Insolvency** of a tenant in common in exclusive possession is sufficient ground for granting an injunction to restrain the commission of waste by him. *Stout v. Curry*, 110 Ind. 514.

For allegation of insolvency, see article INJUNCTIONS, vol. 10, p. 869.

In *Twort v. Twort*, 16 Ves. Jr. 128, Lord Eldon said that his experience did not furnish him with a single instance of an injunction between tenants in common, and that he had refused injunctions between tenants in common

except in special cases. The case before him, he said, was a special case — one of the tenants in common having become the occupying tenant, and the other having by that contract engaged as to one moiety to treat the land as an occupying tenant should treat it; and on this ground he granted an injunction, stating expressly in the order that the defendant was occupying tenant to the plaintiff, and restraining him from committing any waste upon the premises which he held as such occupying tenant. This, he said, was a safe principle, and would, by its necessary operation, prevent the defendant from committing any waste. This ground and that of destruction or insolvency seem to be the special grounds on which the jurisdiction has been exercised. *Obert v. Obert*, 5 N. J. Eq. 408; *Hawley v. Clowe*, 2 Johns. Ch. (N. Y.) 122; *Kennedy v. Scovil*, 12 Conn. 317; *Ballou v. Wood*, 8 Cush. (Mass.) 48.

Malicious Waste may be sufficient ground for injunction, but not pure equitable waste. *Hole v. Thomas*, 7 Ves. Jr. 589.

Under a Statute providing that if any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse, any property held in joint tenancy or tenancy in common, the party shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist, it was held that for such acts an injunction would be granted. *Anaconda Copper Min. Co. v. Butte, etc., Min. Co.*, 17 Mont. 524. This was in relation to mining lands. In the absence of such a statute as the one above set out it is held that an injunction will not lie against one tenant in common at the instance of another to restrain the former from working a mine in the usual way, without excluding the other owners. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134.

Necessary Allegations. — Pending an action at law an injunction against commission of waste may be issued

cotenants who are in possession of undivided valuable property, receiving the whole of the rents and profits and excluding their companion from the receipt of any portion thereof.¹

II. ACTIONS AGAINST THIRD PERSONS — 1. Joinder of Parties —

a. GENERAL RULES — Nature of Interest. — The general rule as to joinder of parties in actions by tenants in common and joint tenants is, in the absence of statute, founded upon the nature of the interest in the particular matter in controversy.²

Real Actions. — The title of tenants in common being several, they must sue separately in real actions.³

In Personal Actions they must join where the right to the redress sought is joint, although it arises out of the several titles,⁴ as in

upon an application made in due form and containing proper averments, one of which is the belief or fear of the plaintiff that the defendant is doing or is about to do the acts which the court is asked to restrain. *Adams v. Palmer*, 6 Gray (Mass.) 336; *Hihn v. Peck*, 18 Cal. 640.

Continuing and Permanent Injury. — A tenant in common may resort to a court of equity for an injunction to restrain the commission of a continuing and permanent injury. *Woods v. Early*, (Va. 1897) 28 S. E. Rep. 374.

1. *Williams v. Jenkins*, 11 Ga. 595 [citing *Street v. Anderton*, 4 Bro. C. C. 415; *Milbank v. Revett*, 2 Meriv. 405, wherein a motion for a receiver by a tenant in common was denied because the facts did not make out a case of exclusion].

2. *De Johnson v. Sepulbeda*, 5 Cal. 149.

Joint Tenants, being seized *per mie et per tout* and deriving by one and the same title, must jointly implead and be jointly impleaded by others. 5 Bac. Abr., tit. Joint Tenants (K); *Webster v. Vandeventer*, 6 Gray (Mass.) 429.

3. *Throckmorton v. Burr*, 5 Cal. 400; *De Johnson v. Sepulbeda*, 5 Cal. 149; *Briscoe v. McGee*, 2 J. J. Marsh. (Ky.) 370; *Rand v. Dodge*, 12 N. H. 67; *Hills v. Doe*, 6 N. H. 330; *Stevenson v. Cofferin*, 20 N. H. 151; *Minter v. Dunham*, 13 Oregon 481.

The Reason assigned for requiring tenants in common to sever in real actions is that "tenants in common are of several titles, and therefore the freehold is several; and if they are disseized, they shall be put to their several actions; as, therefore, the lands of tenants in common are to be considered as different estates, depending on different titles, the plaintiff shall not recover,

because that were to allow the plaintiff to try two several and different titles in one issue at the same time." *May v. Slade*, 24 Tex. 207; 5 Bac. Abr., tit. Joint Tenants (K).

4. *Bullock v. Hayward*, 10 Allen (Mass.) 462; *May v. Parker*, 12 Pick. (Mass.) 39; *Daniels v. Daniels*, 7 Mass. 137; *Lane v. Dobyns*, 11 Mo. 106; *Little v. Harrington*, 71 Mo. 390; *Odiorne v. Lyford*, 9 N. H. 512; *Wilson v. Gamble*, 9 N. H. 75; *Murray v. Webster*, 5 N. H. 391; *Low v. Mumford*, 14 Johns. (N. Y.) 426; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Penfield v. Rich*, 1 Wend. (N. Y.) 386; *Austin v. Hall*, 13 Johns. (N. Y.) 286; *May v. Slade*, 24 Tex. 205; *George v. McGovern*, 83 Miss. 558; Co. Litt. 197 b.

In *Indiana* it was said that tenants in common of personality may sue jointly for damages caused by the destruction of the property before the common interests are severed. *Louisville, etc., R. Co. v. Hart*, 119 Ind. 273.

Suit for Use of Property. — Tenants in common of personal property have a single claim and not separate claims for the use of the common property, and must join in an action therefor. *Stinson v. Fernald*, 77 Me. 576.

So, where the plaintiffs and other persons were joint owners of a steamboat, and entered into a contract with one of the defendants by which the latter hired the boat and agreed to pay to the owners \$100 per day for the use thereof, in an action to recover such compensation all the others should join. *Coster v. New York, etc., R. Co.*, 6 Duer (N. Y.) 46.

But in *Merritt v. Walsh*, 32 N. Y. 685, it was held that though the several owners of a vessel should join in an action for the recovery of freight, the nonjoinder is waived by an answer to

actions of trespass for damages to the common land, and the like.¹ And as a general rule tenants in common must join in personal actions in which all the parties are jointly interested, whether the action arises *ex contractu* or *ex delicto*.² But when the interests are separate, it is said that the tenants must sue separately, even in personal actions.³

Assumpsit on Waiver of Tort. — As tenants in common must in general join in an action of tort for an injury to the common property, so they must join in an action of assumpsit when the tort is waived.⁴

the merits. See also *Mitchell v. Chambers*, 43 Mich. 164.

Suit for Purchase Money and Chattel. — If two or more tenants in common of a chattel unite in a sale of it, the right of action for the consideration money is joint, and they cannot sue the purchaser in separate actions unless it be upon an agreement by the purchaser to pay to each of them his particular share. *Suydam v. Combs*, 15 N. J. L. 133.

Where the agent of the plaintiffs, who were tenants in common with others of certain lands, having no authority from the other tenants, sold to the defendant a quantity of timber standing upon the lands, which he cut and converted to his use, it was held that an action of general *indebitatus assumpsit* would lie to recover the value of their interest in the timber. *Kenniston v. Ham*, 29 N. H. 501. See also *Lyman v. Boston etc., R. Co.*, 58 N. H. 384.

1. *Galveston, etc., R. Co., v. Stockton*, (Tex. Civ. App. 1897) 38 S. W. Rep. 647; *Jones v. De Coursey*, 12 N. Y. App. Div. 164; *De Puy v. Strong*, 37 N. Y. 372 [citing *Austin v. Hall*, 13 Johns. (N. Y.) 286; *Hill v. Gibbs*, 5 Hill (N. Y.) 56; *Decker v. Livingston*, 15 Johns. (N. Y.) 479]; *McCreary v. Ross*, 7 Watts (Pa.) 485; *Coryton v. Lithebye*, 2 Saund. 115. See *infra*, II. 5. *Trespass to Land*.

2. *Hill v. Gibbs*, 5 Hill (N. Y.) 56; *Clapp v. Pawtucket Sav. Inst.*, 15 R. I. 489.

"May" or "Must" Join — English and American Expressions. — The English cases say they *may* join, while the American cases generally say they *must* join. *Clapp v. Pawtucket Sav. Inst.*, 15 R. I. 489 [citing *Litt.*, §§ 311, 312, 315, 317; *Chamier v. Chingo*, 5 M. & S. 64; *Kitchin v. Buckley*, T. Raym. 80, 1 Lev. 109]. See the American cases cited in this section.

But in *May v. Parker*, 12 Pick.

(Mass.) 38, it is said that though the phrase "may join" is used, yet the reason given brings the case within the rule of law that where a personal claim is joint and the right survives, all must join.

3. *Lothrop v. Ambrose*, 25 Me. 140; *Melville v. Brown*, 15 Mass. 82; *McCreary v. Ross*, 7 Watts (Pa.) 485; *Odiorne v. Lyford*, 9 N. H. 512, citing *Cutting v. Derby*, 2 W. Bl. 1077.

A Several Tort against two or more persons, as a false and fraudulent affirmation made by the vendor of an estate to two or more purchasers, must not be the subject of joint action. *Baker v. Jewell*, 6 Mass. 460. See also article PARTIES.

Severance of Claim. — The reason of the rule requiring joinder of tenants in common in personal actions is said to be for the purpose of preventing a multiplicity of suits, and the rule itself is said to apply unless there has been a severance of the claim; as, for instance, where the defendant has previously to the suit promised to settle or has settled with one of the claimants for his share. *Clapp v. Pawtucket Sav. Inst.*, 15 R. I. 489 [citing *Austin v. Walsh*, 2 Mass. 405; *Baker v. Jewell*, 6 Mass. 461; *Beach v. Hotchkiss*, 2 Conn. 697; *Stedman v. Shelton*, 1 Ala. 88; *Parker v. Elder*, 11 Humph. (Tenn.) 547]. Or where the share of one tenant has been sold under execution. *Hopkins v. Forsyth*, 14 Pa. St. 34.

Trover. — In *Bleaden v. Hancock*, 4 C. & P. 152, 19 E. C. L. 317, it was held that two persons jointly interested in a chattel could maintain separate actions of trover against a person who unjustly retained the chattel.

4. *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; *White v. Brooks*, 43 N. H. 402; *Putnam v. Wise*, 1 Hill (N. Y.) 235; *Clapp v. Pawtucket Sav. Inst.*, 15 R. I. 489.

In *Irwin v. Brown*, 35 Pa. St. 331, it

b. EXCEPTION TO RULE REQUIRING JOINDER. — There is sometimes an exception to the rule requiring a joinder of cotenants when the interests are joint, as where one tenant refuses to join in the action, in which case it has been said that the reason for the exception is stronger than that for the rule.¹

is said: "Now, whether we treat the defendant's wrong as waste or trespass, his legal liability for it was to the tenants in common jointly; and if the tort be waived and a constructive contract substituted, it must be a joint one. One cannot, by his election of a substitute, destroy the primary action to which his cotenants were entitled with him."

In *Alabama* it was held that where there is a conversion of property owned by several tenants in common, they may waive the tort and join in assumpsit, or each may bring a separate action of assumpsit without joining the others. *Tankersley v. Childers*, 23 Ala. 783; *Smith v. Wiley*, 22 Ala. 396; *Smyth v. Tankersley*, 20 Ala. 212.

Nonjoinder — Waiver of Objection. — In *New Hampshire* it was said that tenants in common, while the tenancy continues, should join in trespass or trover for injuries to personal property thus owned in common, or in assumpsit for money received from the sale of their common property, but in such case the nonjoinder could only be taken advantage of by plea in abatement. *White v. Brooks*, 43 N. H. 402.

1. *Peck v. McLean*, 36 Minn. 228, wherein it is said: "Chitty states the rule as 'in general,' implying that there may be exceptions to it; and unless there may be exceptions, it is apparent that what is only a rule of practice, affecting only the mode of proceeding to redress a wrong, will sometimes operate to altogether prevent a remedy. The reason for the rule — to protect defendants against multiplicity of suits — is good. But if, adhered to, it will in a particular case cause a failure of justice, the reason for departing from it is stronger than that for the rule. It is better that a defendant should be put to the danger and inconvenience of several suits than that a plaintiff should be deprived of a remedy. So, where a third person concluded with a partner in a firm to injure the other partners, they might, without joining their partner, maintain an action against the third person. Long-

man v. Pole, M. & M. 223, 22 E. C. L. 297. An instance of an exception allowed of necessity to the general rule as to parties was in the case of *femes covert*. Thus, the wife was permitted to sue alone where the husband was in exile (1 Co. Litt. 132 a), or had abjured the realm (*Wilmut's Case*, Moo. 851; *Dubois v. Hole*, 2 Vern. 614), or where he was an alien enemy (*Derry v. Mazarine*, 1 Ld. Raym. 147); or where he, a foreigner, never in the United States, had deserted her in a foreign country (*Gregory v. Paul*, 15 Mass. 31)."

Statutory Provisions have sometimes been enacted for the purpose of relieving a tenant from the effects of the refusal of a cotenant to join him in an action, as by permitting the refusing tenant to be made a defendant. *Gock v. Keneda*, 29 Barb. (N. Y.) 120.

A statutory provision that all or any tenants in common, etc., may join or sever in personal actions for injuries done to their lands, setting forth in the declaration the names of all the cotenants, if known, etc., and that the court shall enter judgment for the whole amount of the injury proved, but award execution only for the proportion thereof sustained by the plaintiff, and that the remaining cotenants may afterwards jointly or severally issue a *scire facias* on such judgment and have execution for their proportion of the damages, was said to be intended to prevent a plaintiff from being deprived of redress by plea in abatement by reason of the refusal of his cotenants to join in his suit. *Hobbs v. Hatch*, 48 Me. 55.

Summons and Severance — Coparceners. — The common law rigidly required coparceners to join in real actions for the recovery of their estate. But because it sometimes became impracticable, either from the refusal of some of the parties or from other causes, for all to prosecute a joint action, provision was made by summons and severance for such as chose to prosecute, by which they were enabled to proceed without the defaulting parcener. *Stevenson v. Cofferin*, 20 N. H. 151.

2. Objections for Nonjoinder — Waiver. — In Actions *Ex Delicto* the nonjoinder of a cotenant must, in the absence of a statute making the objection available in some other way, be pleaded in abatement or it will avail only for the purpose of apportionment of damages at the trial according to the real interest of the plaintiff.¹

In Actions *Ex Contractu* a different rule prevails in the absence of statutory regulations otherwise controlling, and a nonjoinder of a cotenant as plaintiff in such cases need not be pleaded in abatement, but is available under the general issue.²

3. In Replevin or Detinue. — While it is true, as above stated, that where there is a want of proper joinder of a cotenant as plaintiff in personal actions *ex delicto* the objection must be taken by

1. Branch *v.* Doane, 17 Conn. 415; Starnes *v.* Quin, 6 Ga. 86, which case, however, is *disapproved* in Howard *v.* Snelling, 28 Ga. 473, in so far as it seems to hold that a plea in abatement will be good in any event, the latter case holding that one tenant in common has the right to sue for his share; Rolette *v.* Parker, 1 Ill. 350; Frazier *v.* Spear, 2 Bibb (Ky.) 385; Holmes *v.* Sprowl, 31 Me. 73; Lothrop *v.* Arnold, 25 Me. 140; Jones *v.* Lowell, 35 Me. 538; Phillips *v.* Cummings, 11 Cush. (Mass.) 469; Harker *v.* Dement, 9 Gill (Md.) 16; Webber *v.* Merrill, 34 N. H. 208; White *v.* Brooks, 43 N. H. 402; Rich *v.* Penfield, 1 Wend. (N. Y.) 380; Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471; Brotherson *v.* Hodges, 6 Johns. (N. Y.) 108; Hill *v.* Gibbs, 5 Hill (N. Y.) 56; Tripp *v.* Riley, 15 Barb. (N. Y.) 336; Agnew *v.* Johnson, 17 Pa. St. 378; Sedgworth *v.* Overend, 7 T. R. 275; Addison *v.* Overend, 6 T. R. 766; Brown *v.* Hedges, 1 Salk 290; Cabell *v.* Vaughan, 1 Saund. 291 *f.*

Harmless Error — Action for Whole Damage. — If one cotenant recovers only his share of the whole damages to realty, there is no error, although he sues for the whole damage. Jones *v.* De Coursey, 12 N. Y. App. Div. 164.

A tenant not joined in an action by his cotenant may recover from the same defendant his interest in a chattel, and in this second action the defendant is precluded from interposing a plea in abatement. Harker *v.* Dement, 9 Gill (Md.) 16; Brizendine *v.* Frankfort Bridge Co., 2 B. Mon. (Ky.) 33; Sedgworth *v.* Overend, 7 T. R. 229.

Code and Statutory Provisions. — The manner of objecting for a misjoinder or a defect of parties must also be con-

sidered under code and statutory regulations. (See the article PARTIES.) Thus, as a modification of the rule stated in the text, under code provisions, a defendant may have his remedy for a nonjoinder of a cotenant as plaintiff by demurrer if the defect appears on the face of the complaint, or by answer if it does not, each method under the circumstances prescribed being exclusive. De Puy *v.* Strong, 37 N. Y. 372; Patchin *v.* Peck, 38 N. Y. 39; Fisher *v.* Hall, 41 N. Y. 416; Zimmerman *v.* Schoenfeldt, 3 Hun (N. Y.) 692. And while the provisions may be as to parties generally, they apply to cotenants as parties. De Puy *v.* Strong, 37 N. Y. 372; Williams *v.* Southern Pac. R. Co., 110 Cal. 457; Foley *v.* Bullard, 99 Cal. 516; Wendt *v.* Ross, 33 Cal. 650; Alvarez *v.* Brannan, 7 Cal. 510.

Under the *Missouri* Code, if the plaintiff sues as the sole owner of goods, the objection for the nonjoinder of a joint owner, if not available upon demurrer, can be taken by answer, and such answer may unite this objection with matter in bar of the action. Little *v.* Harrington, 71 Mo. 390.

Recovery of the Whole Damage by One Part Owner. — In *New Jersey* it was held that a part owner in possession of goods might recover all the damages resulting from a trespass upon the goods. Hasbrouck *v.* Winkler, 48 N. J. L. 431.

The same rule is announced where the tenants are joint tenants and the nonjoinder of one of the joint tenants is not pleaded in abatement. Zabriskie *v.* Smith, 13 N. Y. 337.

2. Clapp *v.* Pawtucket Sav. Inst., 15 R. I. 489; Hill *v.* Gibbs, 5 Hill (N. Y.) 56; Hart *v.* Fitzgerald, 2 Mass. 510; Jones *v.* Lowell, 35 Me. 538.

plea in abatement, and that, in the absence of such a plea, the defendant will be confined to giving in evidence the ownership of the others in mitigation of damages, yet in actions of replevin and detinue, though in form *ex delicto*,¹ one of several tenants in common or joint tenants of a chattel cannot succeed even though the defendant should fail to plead the nonjoinder of the others in abatement, and the objection may be taken by demurrer, under the general issue, or whenever the nonjoinder appears.² Where this defect appears, the court may abate the writ *ex officio*.³

4. Actions for Recovery of Real Property. — The common-law rule does not permit tenants in common to join in an action for the recovery of the common estate, but each must have a separate action for his share;⁴ but joint tenants cannot sue separately.⁵ But, by reason of statutory changes upon the subject of parties or in the system of pleading, these common-law rules do not now generally prevail.⁶ In ejectment it is sometimes stated that a

1. *Smoot v. Wathen*, 8 Mo. 522.

2. *Price v. Talley*, 18 Ala. 25; *Miller v. Eatman*, 11 Ala. 614; *Bell v. Hogan*, 1 Stew. (Ala.) 536; *Parsons v. Boyd*, 20 Ala. 117; *Waldman v. Broder*, 10 Cal. 378; *Ellis v. Culver*, 2 Harr. (Del.) 129; *Smoot v. Wathen*, 8 Mo. 522; *George v. McGovern*, 83 Wis. 558 [citing *Hart v. Fitzgerald*, 2 Mass. 511, 3 Am. Dec. 75; *Reinheimer v. Hemingway*, 35 Pa. St. 438; *Cain v. Wright*, 5 Jones L. (N. Car.) 283, 72 Am. Dec. 551; *Rogers v. Arnold*, 12 Wend. (N. Y.) 30; *Colton v. Mott*, 15 Wend. (N. Y.) 622; *Fay v. Duggan*, 135 Mass. 242; *Corcoran v. White*, 146 Mass. 329; *Atwood v. Ernest*, 13 C. B. 881, 76 E. C. L. 881].

In *Michigan* it has been held that a tenant in common who is entitled to the possession of an undivided interest in personal property can maintain replevin against a wrongdoer who is a stranger to the title. *McArthur v. Oliver*, 60 Mich. 605.

In *D'Wolf v. Harris*, 4 Mason (U. S.) 515, the court said: "The doctrine is undoubtedly true that where a personal chattel is owned by several persons, all ought to join in a writ of replevin for it; and one part owner has no right to bring such suit severally for his own share. * * * If he sues for a moiety only in his writ, the court will, *ex officio*, abate it. But I am clearly of opinion that where the action is brought for the whole chattel, the exception is pleadable in abatement only, and is not a plea to the merits; and that pleading over to the merits is a waiver of it."

3. *Hart v. Fitzgerald*, 2 Mass. 509;

D'Wolf v. Harris, 4 Mason (U. S.) 515.

4. *Throckmorton v. Burr*, 5 Cal. 400; *De Johnson v. Sepulveda*, 5 Cal. 149; *Hillhouse v. Mix*, 1 Root (Conn.) 247; *Briscoe v. McGee*, 2 J. J. Marsh. (Ky.) 370; *Rehoboth v. Hunt*, 1 Pick. (Mass.) 224; *Wathen v. English*, 1 Mo. 746; *Doe v. Errington*, 1 Ad. & El. 750, 28 E. C. L. 197.

5. *Dewey v. Lambier*, 7 Cal. 347.

6. Where the fiction of the common law which encumbered the action of ejectment has been abolished, it is held that tenants in common may unite. *Corbin v. Cannon*, 31 Miss. 570. See also *Alford v. Dewin*, 1 Nev. 211; *Poole v. Fleeger*, 11 Pet. (U. S.) 185; and article EJECTMENT, vol. 7, p. 260.

While tenants in common have several freeholds, and, if disseized, cannot join at common law in a writ of entry, under an early statute in *Maine* the joinder was permissible, though not necessary, and it was decided that if they did join the joinder did not change the nature of the estate and the tenancy. *Swett v. Patrick*, 11 Me. 180: See also *Poor v. Robinson*, 10 Mass. 131; *Oxnard v. Kennebec Purchase*, 10 Mass. 179; *Chandler v. Simmons*, 97 Mass. 508; *Harrelson v. Sarvis*, 39 S. Car. 14, wherein it is said: "Indulgence is extended in allowing tenants in common to join in an action against a stranger, but they are not required to do so. *Dorn v. Beasley*, 6 Rich. Eq. (S. Car.) 408; *Bannister v. Bull*, 16 S. Car. 229; *Reams v. Spann*, 28 S. Car. 530."

Objection for Misjoinder. — In *Camp-*

tenant in common *may* sue separately and recover his share from a mere trespasser,¹ but there appears to be no reason for so phrasing the rule when originally they *must* have severed, unless the phraseology has reference to the right of one to recover the whole as sometimes decided.²

Unlawful Detainer. — One joint tenant or tenant in common may, in an action of unlawful detainer, recover the possession of the whole land without joining his cotenant in the action.³

Trespass to Try Title. — It is said to be well settled by adjudicated cases and by the elementary authorities that one joint tenant or tenant in common may maintain trespass to try title or ejectment against a mere trespasser or wrongdoer.⁴

bell v. Wallace, 12 N. H. 362, it was said that the parties who take together by descent under the statute in *New Hampshire* may join in an action for the recovery of land as coparceners, or they may elect to pursue their remedies as tenants in common, in which case they should bring several actions; but that if tenants in common join in a real action, the objection must, in general, be taken in abatement or by a motion for a nonsuit at the trial, and it is too late to take it after verdict, unless the matter appears upon the face of the record.

Amendment. — Where two join in a writ of entry, the court may authorize one to be stricken out. *Rehoboth v. Hunt*, 1 Pick. (Mass.) 224. But see *Rand v. Dodge*, 12 N. H. 67.

1. *Harrelson v. Sarvis*, 39 S. Car. 14; *Hammett v. Blount*, 1 Swan (Tenn.) 386; *Cavillaud v. Tanner*, 7 Cal. 39; *Craig v. Taylor*, 6 B. Mon. (Ky.) 457.

2. *French v. Edwards*, 5 Sawy. (U. S.) 266; *Collier v. Corbett*, 15 Cal. 183; *Touchard v. Crow*, 20 Cal. 150; *Wilson v. Wilson*, 64 Cal. 92; *Rowe v. Baci-galluppi*, 21 Cal. 633; *Treat v. Reilly*, 35 Cal. 129; *Barrett v. French*, 1 Conn. 364; *Dolph v. Barney*, 5 Oregon 194; *Chandler v. Spear*, 22 Vt. 405 [*citing* *Pomeroy v. Mills*, 3 Vt. 279; *State University v. Reynolds*, 3 Vt. 553; *House v. Fuller*, 12 Vt. 172; *Johnson v. Tilden*, 5 Vt. 426]. *Contra*, *Mattis v. Boggs*, 19 Neb. 703; *Hillhouse v. Mix*, 1 Root (Conn.) 246.

Waiver of Objection. — If tenants in common join as plaintiffs in ejectment, the defect will be waived if the defendant pleads without objecting. *Minter v. Durham*, 13 Oregon 470; *Craig v. Taylor*, 6 B. Mon. (Ky.) 457.

Joinder of More than One and Less than All. — In *Nevada* it was said that

it was not disputed that one tenant in common might sue for his undivided fraction, but that more than one and less than all could not unite in such an action. *Bullion Min. Co. v. Croesus Gold, etc.*, Min. Co., 2 Nev. 175.

Failure of Title in One Joint Tenant. —

If one of the plaintiffs has no title, the coplaintiffs cannot recover though they may be vested with the whole title, because the joinder of too many plaintiffs is ground for nonsuit on the trial, whether the action be for tort or on contract. *De Vaughn v. McLeroy*, 82 Ga. 687; *Echols v. Sparks*, 79 Ga. 417, [*citing* *Cheney v. Cheney*, 26 Vt. 606; *Dickey v. Armstrong*, 1 A. K. Marsh. (Ky.) 39; *De Mill v. Lockwood*, 3 Blatchf. (U. S.) 61; *Murphy v. Orr*, 32 Ill. 489; *Wood v. McGuire*, 15 Ga. 202].

3. *Rabe v. Fyler*, 10 Smed. & M. (Miss.) 440; *Lee Chuck v. Quan Wo Chong*, 91 Cal. 593, (under the code provision that any number less than all of the tenants in common may prosecute or defend actions severally or jointly); *Voss v. King*, 33 W. Va. 242 [*citing* *Allen v. Gibson*, 4 Rand. (Va.) 468; *Treat v. Reilly*, 35 Cal. 129; *King v. Bullock*, 9 Dana (Ky.) 41].

Summary Proceeding for Nonpayment of Rent. — Where premises owned by two persons are let by them jointly to a tenant, reserving rent to both, and subsequently one of them becomes the sole owner of the property and of the rents, by purchase of the other's interest, he may demand the whole rent, and upon refusal to pay may dispossess the tenant, by proceedings in his own name, under the statute relative to summary proceedings to recover the possession of land. *Griffin v. Clark*, 33 Barb. (N. Y.) 46.

4. *Presley v. Holmes*, 33 Tex. 476; *Grassmeyer v. Beeson*, 18 Tex. 753;

5. Trespass to Land. — In an action of trespass for injury to lands held in common the tenants should join,¹ but the law is equally clear that in this, as well as in an action of tort to a chattel, one of two persons jointly injured may alone maintain an action for the injury unless the nonjoinder of the other is pleaded in abatement; and that, under the general issue, evidence of such nonjoinder will not defeat the action, but will merely restrict the plaintiff to a recovery of a moiety of the damage.² But when the cotenants are not jointly interested in the damages, the

Moore *v.* Stewart, (Tex. 1887) 7 S. W. Rep. 771; Carley *v.* Parton, 75 Tex. 98; Sowers *v.* Peterson, 59 Tex. 216; Bounds *v.* Little, 75 Tex. 316; Croft *v.* Rains, 10 Tex. 520.

Tenants in common may maintain separate actions of trespass to try title for their separate interests. Boyleston *v.* Cordes, 4 McCord L. (S. Car.) 144; Hines *v.* Trantham, 27 Ala. 361 [citing Craig *v.* Taylor, 6 B. Mon. (Ky.) 457; Baker *v.* Chastang, 18 Ala. 417]. Or a tenant in common who sets forth in his petition the extent of his interest may, in trespass to try title, recover the entire property as against a mere trespasser. Sowers *v.* Peterson, 59 Tex. 216; Read *v.* Allen, 56 Tex. 176; Hutchins *v.* Bacon, 46 Tex. 414; Ney *v.* Mumme, 66 Tex. 268; Mitchell *v.* Mitchell, 80 Tex. 101; Contreras *v.* Haynes, 61 Tex. 103; Carley *v.* Parton, 75 Tex. 98; Bounds *v.* Little, 75 Tex. 316; Telfener *v.* Dillard, 70 Tex. 139.

Character of Title. — A tenant in common, though holding by the title bond merely, may recover the severed part of the freehold from a mere trespasser. Against such trespasser the plaintiff need not prove a compliance with the conditions which would entitle him to a specific performance. Hooper *v.* Hall, 30 Tex. 154.

Partition After Suit Begun. — It cannot be objected, in a suit by a tenant in common, where there has been a partition since the commencement of the suit, that he seeks to recover on a title acquired after the commencement of the suit. Croft *v.* Rains, 10 Tex. 520.

Effect of Death of Party. — One tenant in common having a right to maintain an action of trespass to try title against a stranger, an action by more than one of such tenants jointly will not abate by the death of one, and therefore there is no necessity to make the heirs of the deceased parties to the suit. Watrous *v.* McGrew, 16 Tex. 506;

Boyleston *v.* Cordes, 4 McCord L. (S. Car.) 144.

1. Lowery *v.* Rowland, 104 Ala. 426, [citing Thompson *v.* Mawhinney, 17 Ala. 367; Pruitt *v.* Ellington, 59 Ala. 454; Austin *v.* Hall, 13 Johns. (N. Y.) 286]; Allen *v.* Woodward, 22 N. H. 544; Tucker *v.* Campbell, 36 Me. 347; Merrill *v.* Berkshire, 11 Pick. (Mass.) 274; May *v.* Slade, 24 Tex. 209; Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 339. See also article EMINENT DOMAIN, vol. 7, p. 511.

Waste. — Real actions of waste to recover the place wasted must be brought by tenants in common separately, but in a personal action in the nature of waste they must all join. Bullock *v.* Hayward, 10 Allen (Mass.) 462.

Misjoinder. — In Murray *v.* Webster, 5 N. H. 392, it was said that if the plaintiff had no title to the land as tenant in common she might maintain trespass *quare domum fregit* for pulling down the house; but that, whatever cause of action she had, it was a fatal objection to recovery that she had joined in the action with another who had no cause of action.

Amendable Defect under Statute. — In Bullock *v.* Hayward, 10 Allen (Mass.) 462, it was said that a misjoinder need not be pleaded at common law, but might be given in evidence under the general issue or taken advantage of at any stage of the case at which it appeared; but that, since the statutes had authorized amendments by striking out or inserting the names of joint parties to an action, and abolished the general issue, and required the grounds of defenses to be precisely stated, the court was unwilling to say that a defendant was not required by law to specify this defense in his answer to the merits instead of merely denying all the plaintiff's allegations.

2. Branch *v.* Doane, 17 Conn. 415; Thompson *v.* Hoskins, 11 Mass. 419; Putney *v.* Lapham, 10 Cush. (Mass.)

remedy is severable; and in such a case, where less than the whole number sue, the recovery is graduated to the interests of those who do.¹

234; *Bullock v. Hayward*, 10 Allen (Mass.) 462; *Webber v. Merrill*, 34 N. H. 208; *Moulton v. Robinson*, 27 N. H. 563; *Wilson v. Gamble*, 9 N. H. 74; *Pickering v. Pickering*, 11 N. H. 141; *Winters v. McGhee*, 3 Sneed (Tenn.) 128; *Lee v. Turner*, 71 Tex. 264; *Rowland v. Murphy*, 66 Tex. 534; *Addison v. Overend*, 6 T. R. 766. See *supra*, II. 1. *a. General Rules.*

Continuing Damage.—In *Tucker v. Campbell*, 36 Me. 347, it was held that in a complaint for flowing land owned by tenants in common all the cotenants must join. This decision was reached in construing a statute providing that any person sustaining damage in his lands by their being overflowed by a milldam might obtain compensation, and that the damage, having been ascertained, should continue to be the measure of the yearly damages until the owner of the land or dam should, by new process, apply for an increase or decrease. In applying the provisions of this statute to suits by tenants in common it was said: "If several tenants in common may maintain several complaints, there may be several and contradictory decisions upon each of these matters. * * * Should different measures of damages be found for the different tenants in common, their several shares might become united in one sole owner, and there would be no one measure of damages on which a new complaint could be founded by either party. Such sole owner might by conveyances create other and different tenancies in common than those existing when the damages were ascertained; or tenants without any union of shares might entirely change their respective proportions, and under such circumstances no new process could be maintained by either party for the increase or decrease of any ascertained annual damages."

Recovery of Whole Damage by One Tenant.—If one tenant in common sues for the entire damage to realty, and the defendant fails to interpose an objection on the ground of the nonjoinder of the other owners, such judgment is not a bar to an action by the others to the extent of their damage. *Gillum v. St. Louis, etc., R. Co.*, 4

Tex. Civ. App. 622. But it is error to refuse a charge limiting the right to recovery to such damages as resulted to the interest shown to have been in the plaintiff. *Rowland v. Murphy*, 66 Tex. 534; *Lee v. Turner*, 71 Tex. 264. And it has been held that if the defendant fails to ask an instruction limiting the recovery to the share of the tenant suing, he cannot assign as error an omission so to charge. *Winters v. McGhee*, 3 Sneed (Tenn.) 128. On the other hand, a judgment was reversed where it appeared that one tenant in common had recovered the entire damage. *Galveston, etc., R. Co. v. Stockton*, (Tex. Civ. App. 1897) 38 S. W. Rep. 647.

Mesne Profits.—In an action for mesne profits, one tenant can recover only for the injury done to his own interest in the land, and the addition of "John Doe" will not avail to change the rule, as the statute makes real parties necessary. *Masterson v. Hagan*, 17 B. Mon. (Ky.) 325.

Recovery of Whole in Ejectment.—But in *Vermont*, where mesne profits are recovered in the ejectment suit, it was said that in real and possessory actions one tenant in common may always recover the damage due his cotenant as against a mere stranger. *Hibbard v. Foster*, 24 Vt. 546, *distinguishing* *Chandler v. Spear*, 22 Vt. 388, in that that case was *trespas de bonis*, which action is merely personal, although it was said that the same rule was thought to be applicable when the action was in that form notwithstanding the damage grew out of an injury to land.

1. *Lowery v. Rowland*, 104 Ala. 426 [citing *Pruitt v. Ellington*, 59 Ala. 454; *Lothrop v. Arnold*, 25 Me. 136].

Tenants in Possession of Distinct Parts by Agreement.—If, by agreement between tenants in common, one is permitted to have the exclusive use and possession of a part of the land which they own together, while the other has such use and possession of other lands so owned, either may recover for an injury done to that which he has the right to use and possess exclusively. *Gulf, etc., R. Co. v. Wheat*, 68 Tex. 133; *Milner v. Milner*, 101 Ala. 599.

But, conversely, tenants in common

6. Action for Rent. — One tenant in common or joint tenant cannot by himself maintain a suit for rent, where the contract is joint and the rent is reserved to the tenants jointly.¹

may, by agreement, occupy distinct portions of their common land in severalty without affecting their rights as tenants in common, and in such case, in an action for an injury to the portion occupied by one, all may join. *Johnson v. Goodwin*, 27 Vt. 288.

Trespass Qu. Cl. Fr. by a Tenant Out of Possession for Injury to Personalty. — One tenant in common of a pasture field may maintain an action against the owner of a domestic animal which breaks into the field and injures the live stock of such tenant rightfully grazing therein, and the other tenants are not necessary parties to such action. "If the conclusion just stated is justified — and we think it is — the only question remaining is as to the right of one of several tenants in possession, holding by separate contracts, to maintain an action in trespass, where the damage for which he seeks to recover is to his own individual property rightfully in the close, by virtue of his rental contract. That the damage is to personalty will not, according to the authorities, stand in the way of a recovery. True, such damage is treated by many authorities as an incident, and in the nature of aggravation. But this distinction seems to have arisen from a desire to pre-

serve the common-law form of action, and at the same time not deny the injured party a remedy. The old action for trespass *quare clausum fregit* was strictly an action for damages to the land following an unlawful entry, and hence could not be resorted to for the purpose of a recovery for damages to personalty only. But forms of action not being important in this state, since the adoption of the code, we need not be embarrassed by any such distinction. The question in every case is, not what is the proper form of action, but, has the party a right of action? Upon this phase of the inquiry we do not find authorities. But, upon principle, why should not one of several tenants in common have such an action? Had he been in exclusive possession, no doubt would exist. Why should the mere fact that others are interested in the growing herbage bar a recovery?" *Morgan v. Hudnell*, 52 Ohio St. 552.

1. *Churchill v. Lammers*, 60 Mo. App. 251; *Dorsett v. Gray*, 98 Ind. 273.

This question, as well as others relating to the subject of landlord and tenant when tenants in common or joint tenants are involved, will be fully treated in the article LANDLORD AND TENANT.

JUDGES.

By S. B. FISHER.

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CROSS-REFERENCES.

- As to *Power to Take Affidavits*, see article *AFFIDAVITS*, vol. 1, p. 329.
- Quorum of Appellate Court*, see article *APPEALS*, vol. 2, p. 12.
- Powers and Duties in Respect of Bills of Exceptions*, see article *BILLS OF EXCEPTIONS*, vol. 3, pp. 374, 441, 452.
- Settling and Signing Case Made on Appeal*, see article *CASE MADE ON APPEAL*, vol. 3, p. 900.
- Signature to Return to Writ of Certiorari*, see article *CERTIORARI*, vol. 4, p. 215.
- Powers at Chambers and in Vacation*, see article *CHAMBERS AND VACATION*, vol. 4, p. 337.
- Change of Venue*, see article *CHANGE OF VENUE*, vol. 4, p. 373.
- Decisions by the Court*, see article *DECISIONS*, vol. 5, p. 936.
- Division of Opinion*, see article *DIVISION OF OPINION*, vol. 7, p. 44.

As to *Examination of Witnesses by Trial Judge*, see article *EXAMINATION OF WITNESSES*, vol. 8, p. 71.

Findings of Court, see article *FINDINGS OF COURT*, vol. 8, p. 931.

I. IMPEACHMENT PROCEEDINGS BEFORE A COURT. — Proceedings in the impeachment of a judge before a court of justice are criminal in their nature, and are governed by the rules of law applicable to criminal causes.¹

II. INDICTMENT. — Where a judge has been indicted for neglect or misconduct the same rules apply as in the case of other criminal prosecutions, with regard to charging the offense, and the indictment will be vitiated by the same defects.²

III. PRACTICE WHERE JUDGE IS DISQUALIFIED — **1. Recusation on Judge's Motion.** — Where a judge is satisfied that he is legally disqualified to act in a case he should not wait until an objection to him is raised by the parties, but should refuse to hear the cause by an entry on the docket that he does not sit in the case.³ This indeed is the usual practice,⁴ and the judge's decision in such cases

1. *State v. Robinson*, 111 Ala. 482; *State v. Buckley*, 54 Ala. 599; *State v. Tally*, 102 Ala. 25.

Proceedings by Information. — Impeachment proceedings may be commenced by information. *State v. Robinson*, 111 Ala. 482.

Accused Not Entitled to Jury Trial. — In *Alabama* it is held that impeachment, while a criminal prosecution, is not one in which the accused has a constitutional right to a jury trial. *State v. Buckley*, 54 Ala. 599.

2. See article *INDICTMENTS, INFORMATION, AND COMPLAINTS*, vol. 10, p. 344.

Receiving Illegal Compensation. — An indictment charging the defendant (a county judge) with having received two hundred and fifty dollars feloniously for the payment of the amount of salary due him should state the length of time the salary was unpaid, or otherwise designate the service or duty charged for. *State v. Perham*, 4 Oregon 189.

Charging Two Offenses in Same Count. — A charge in an indictment that the defendant, as judge of the County Court, did wilfully and unlawfully draw and issue warrants against the county, etc., is bad, because it charges two or more offenses in the same count. The drawing of each warrant was a separate and substantial transaction, and a criminal prosecution would lie for each if the drawing was wilfully and illegally done. *State v. Ferriss*, 3 Lea (Tenn.) 700.

3. *Moses v. Julian*, 45 N. H. 52. See also *Ochus v. Sheldon*, 12 Fla. 138; *Williams v. Robinson*, 6 Cush. (Mass.) 333; *Hall v. Thayer*, 105 Mass. 224; *Edwards v. Russell*, 21 Wend. (N. Y.) 63; *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 331; *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 713; *Ten Eick v. Simpson*, 11 Paige (N. Y.) 177; *Oakley v. Aspinwall*, 3 N. Y. 547; *Hibbard v. Odell*, 16 Wis. 633; *Great Charte v. Kennington*, 2 Stra. 1173.

Recusation on Judge's Own Motion. — In *Nugent v. Stark*, 34 La. Ann. 628, it was held that the recusation of a judge *proprio motu* when such judge is petitioned for an appeal from a judgment rendered in a case in which he acted as counsel for the application is proper and legal.

A judge can legally recuse himself only where a party to the case has a right to recuse him. *State v. Judges*, 41 La. Ann. 319.

In *Missouri* it is provided by statute that whenever it shall be within the knowledge of the judge in a criminal case "that any of the causes enumerated which disqualify him to sit in any case exists, he shall, without any application on the part of the defendant, proceed to order the election of a special judge," etc. *Rev. Stat. Mo. (1889), § 4177.*

4. *Reg. v. Justices*, 14 Eng. L. & Eq 93.

Duty to Suspend Proceedings. — Where

that he is incompetent through interest is not reversible except for manifest error.¹

2. Objection by Parties — *a.* **GENERALLY.** — Since, however, it is not only possible, but very probable, that a judge may be ignorant of the disqualification, the party desiring to object to his hearing the case may and should request that such judge shall not sit.²

b. **HOW RAISED.** — Such request should be in the form of a petition or an affidavit setting out the facts which are claimed by the petitioner to operate as a disqualification.³ An affidavit asking for a change of judge must be made and sworn to by the party himself.⁴ He need not, however, appear in person and

a justice finds that he has proceeded in an action wherein one of the parties is his relative by consanguinity or affinity, he must suspend further proceedings; he cannot render judgment of nonsuit. If he does, such judgment will be reversed. *Edwards v. Russell*, 21 Wend. (N. Y.) 63.

1. *Childress v. Grim*, 57 Tex. 56. See also *Slaven v. Wheeler*, 58 Tex. 23.

Mandamus to Compel Special Judge to Proceed. — In *Texas* it is held that upon refusal of a special judge to act, on the ground that the regular judge was in fact not disqualified, he may be compelled by mandamus to proceed with the trial of the case. *Schultze v. McLeary*, 73 Tex. 92.

2. *Moses v. Julian*, 45 N. H. 52.

3. *Moses v. Julian*, 45 N. H. 52; *State v. Brownfield*, 83 Mo. 448; *State v. Greenwade*, 72 Mo. 298. See also *Firestone v. Hershberger*, 121 Ind. 201; *Wiltfong v. Schafer*, 121 Ind. 264; *German Ins. Co. v. Landram*, 88 Ky. 433; *Russell v. Russell*, (Ky. 1889) 12 S. W. Rep. 709; *Powers v. Reynolds*, 89 Ky. 259; *State v. Palmer*, 4 S. Dak. 543; *State v. Rodway*, 1 S. Dak. 575; *State v. Chapman*, 1 S. Dak. 414; *Rev. Stat. Ind.* (1896), §§ 412, 1769.

Under the Kentucky Statute an affidavit that the regular judge will not give the affiant a fair and impartial trial must set out the grounds of such belief, and the personal integrity of the judge must be affected thereby. *German Ins. Co. v. Landram*, 88 Ky. 433.

"Reason to Believe and Do Believe," etc. — In *State v. Palmer*, 4 S. Dak. 543, the accused, in setting out his grounds for believing that the presiding judge would not give him a fair and impartial trial on account of bias, used the following language: "I have reason to

believe, and do believe, and therefore charge the truth to be, that I cannot have a fair and impartial trial." The affidavit was held sufficient.

Prejudice Must Be Shown to Satisfaction of Court. — Affidavits making the naked allegation of the bias and prejudice of the judge do not necessarily make it "appear to the satisfaction of the court" that the judge is so biased or prejudiced. The clear intimation of the expression "to the satisfaction of the court" is that the court shall judicially consider and pass upon the sufficiency of the affidavits presented, or other testimony, to prove the fact of bias or prejudice. It is the judgment of the court, and not that of the affiant, that is to be satisfied. *State v. Chapman*, 1 S. Dak. 414; *State v. Rodway*, 1 S. Dak. 575.

In Missouri, in a criminal prosecution, the defendant's application must be supported by his own affidavit and the affidavits of two or more reputable persons not of kin to or counsel for him, that the judge of the court in which the case is pending will not afford him a fair trial. *Rev. Stat. Mo.* (1889), § 4174; *State v. Greenwade*, 72 Mo. 298; *State v. Brownfield*, 83 Mo. 448.

Should Allege Statutory Grounds of Disqualification. — In *Jones v. State*, 61 Ark. 88, the application, based upon the grounds of prejudice of the judge and that he was a material witness, failed to set out any of the grounds of disqualification mentioned in the constitution (Ark. Const., art. 7, § 20). The judge stated that he knew no material facts in the case, nor was he called as a witness. It was held that the application was properly denied.

4. *Firestone v. Hershberger*, 121 Ind. 201; *Wiltfong v. Schafer*, 121 Ind. 264.

make application, nor need he personally file his affidavit. Both of these offices may be performed by his attorney.¹

c. **DECISION.** — If the facts alleged by the petitioner are unquestioned, the judge may have the entry made that he does not sit.² If, however, the allegations are not admitted by the judge, or are denied by the other party, the petitioner must lay before the court proof of their truth. As to the sufficiency of such proof the judge himself, if alone, or the other judges, if present, shall decide.³

d. **WAIVER** — **Effect of Statutes.** — In many of the states it is held that where disqualified judges are forbidden by statute to act, such disqualification cannot be waived by the consent of the parties.⁴ In other states, however, it is expressly provided that

1. *Firestone v. Hershberger*, 121 Ind. 201; *Wiltfong v. Shafer*, 121 Ind. 264.

In *Firestone v. Hershberger*, 121 Ind. 201, the court, *distinguishing* *Stevens v. Burr*, 61 Ind. 464, said: "We now hold that the only point authoritatively decided in that case is that the party must himself make the affidavit, and that it cannot be made for him by another."

2. *Moses v. Julian*, 45 N. H. 52.

Should Not Withdraw upon Mere Suggestion. — "A judge ought not to withdraw upon a mere suggestion, unless the cause of recusation is true in fact and sufficient in law; because the office of judge is one necessary for the administration of justice, and from which a judge should not be permitted to withdraw without sufficient grounds." *Moses v. Julian*, 45 N. H. 52.

Regular Judge Must Be Actually Disqualified. — In *Ex p. State Bar Assoc.*, 92 Ala. 113, it is held that the refusal of the regular judge to act must be justified, and if he is not in fact disqualified, proceedings before an attorney selected by the clerk are *coram non judice* and void.

3. *Moses v. Julian*, 45 N. H. 52. See also *Waterhouse v. Martin*, Peck (Tenn.) 374; *Trustees Internal Imp. Fund v. Bailey*, 10 Fla. 238.

Must Call upon Another Judge. — In *Louisiana* it is held that the judge recused may not say that the recusation is groundless, but that it is his duty to stand aside and at once call upon a judge *ad hoc* to pass upon the validity of the recusation. *State v. Judge*, 39 La. Ann. 994. See also *State v. Judge*, 33 La. Ann. 1293; *Roman Catholic Church v. Pierche*, 36 La. Ann. 160; *State v. Judge*, 37 La. Ann. 253; *State v. Judge*, 38 La. Ann. 247; *Amacker v.*

Varnado, 19 La. Ann. 381; *Hunter v. Blackman*, 32 La. Ann. 403. These decisions do not refer to motions which upon their face, and admitting all their allegations to be true, afford no legal ground for recusation. Such pleas the judge may treat as frivolous and set aside without motion. *State v. Chantlain*, 42 La. Ann. 718.

Statutes Mandatory. — In some states the appointment of a special judge, or the calling in of a neighboring judge, on affidavit being filed as to the regular official's bias, has been declared by statute to be mandatory. *Burkett v. Holman*, 104 Ind. 6; *Krutz v. Griffith*, 68 Ind. 444; *Shoemaker v. Smith*, 74 Ind. 71; *Heshion v. Presley*, 80 Ind. 490; *State v. Shipman*, 93 Mo. 147; *State v. Bacon*, 107 Mo. 627; *State v. Gilmore*, 110 Mo. 1; *Barnes v. McMullins*, 78 Mo. 265; *State v. Palmer*, 4 S. Dak. 543. See also *State v. Judge*, 37 La. Ann. 253; *State v. Judge*, 39 La. Ann. 994; *Hunter v. Blackman*, Mann. Unrep. Cas. (La.) 427.

In *Kentucky* such a statute was condemned as lowering the dignity of the bench, and rigid construction was held proper. *Byram v. Holliday*, 84 Ky. 18.

Applies Only to Regular Judge. — In *Missouri* it is held that the statute providing that in a criminal case the judge shall be incompetent to try the case if the defendant files his affidavit, properly supported, that the judge will not afford him a fair trial, applies only to the regular judge. After the regular judge has been thus disqualified, and the judge of another circuit has been called in to try the case, he cannot be disqualified in the same way. *State v. Greenwade*, 72 Mo. 298.

4. *Hall v. Thayer*, 105 Mass. 219; *Tay-*

the parties may, by consent, waive such objection to the judge;¹ and a formal waiver of objection in writing, entered of record, is not necessary² unless specifically required by the statute.³

1or *v. Worcester County*, 105 Mass. 225; *Moses v. Julian*, 45 N. H. 52; *Foot v. Morgan*, 1 Hill (N. Y.) 654; *Edwards v. Russell*, 21 Wend. (N. Y.) 64; *Chambers v. Clearwater*, 1 Keyes (N. Y.) 310; *Converse v. McArthur*, 17 Barb. (N. Y.) 410; *Oakley v. Aspinwall*, 3 N. Y. 547; *Murdock v. International Tile, etc., Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 225; *Chambers v. Hodges*, 23 Tex. 104; *Dallas v. Peacock*, 89 Tex. 58; *Hibbard v. Odell*, 16 Wis. 635.

This Rule Is Based on Public Policy. — *Oakley v. Aspinwall*, 3 N. Y. 547, where the Court of Appeals said: "It is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind. The party who desired it might be permitted to take the hazard of a biased decision if he alone were to suffer for his folly; but the state cannot endure the scandal and reproach which would be visited upon its judiciary in consequence. Although the party consent, he will invariably murmur if he do not gain his cause; and the very man who induced the judge to act when he should have forbore, will be the first to arraign his decision as biased and unjust." *Approved* in *Matter of White*, 37 Cal. 192; *Newcome v. Light*, 58 Tex. 141.

In *Chambers v. Hodges*, 23 Tex. 104, the court said: "We conclude that the presiding judge, being interested, was absolutely incapacitated to take cognizance of or sit in the case. The consent of parties could not remove his incapacity, or restore his competency, against the prohibitions of the law, which was designed not merely for the protection of the party to the suit, but for the general interests of justice. And, consequently, the judgment rendered by him was a nullity, and left the case remaining undisposed of as completely as if the judge had not been present at the court."

1. *Hine v. Hussey*, 45 Ala. 496; *Beall v. Siquelfield*, 73 Ga. 48; *McMillan v. Nichols*, 62 Ga. 36; *Rogers v.*

Felker, 77 Ga. 46; *Stone v. Marion County*, 78 Iowa 14; *Jewett v. Miller*, 12 Iowa 85; *Chase v. Weston*, 75 Iowa 159; *Barnes v. McMullins*, 78 Mo. 260. See also *Shropshire v. State*, 12 Ark. 190.

In *Chase v. Weston*, 75 Iowa 159, where it was held that a judge who is an uncle of the plaintiff is disqualified from trying the case, and that such irregularity is not waived by any conduct on the plaintiff's part, the court said: "Nothing but the mutual consent of both parties, or that which would in law amount to such consent, would remove the disability imposed by statute, nor do we think it was necessary for plaintiff to do more than to make the fact of the relationship a matter of record to preserve his rights, if the consent required by statute is not given."

In *Georgia* it is held that the grant of a rule for a new trial by an interested judge allows argument before a qualified substitute to whose hearing the parties consent. *Thomas v. Jones*, 64 Ga. 139.

Not Applicable Where Judge Is Party of Record. — In *Missouri* it is held that the provision authorizing a judge "who is interested in any suit" to try it, if the parties consent, does not apply where the judge is a party to the record. *Kansas City v. Knotts*, 78 Mo. 356.

2. *Hine v. Hussey*, 45 Ala. 496; *Groton v. Hurlburt*, 22 Conn. 178; *McMillan v. Nichols*, 62 Ga. 36; *Ellsworth v. Moore*, 5 Iowa 486; *Stearns v. Wright*, 51 N. H. 610; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167.

3. In *Tennessee* it was formerly held that the waiver of incompetency could be by parol, or might be implied, *Wroe v. Greer*, 2 Swan (Tenn.) 172; but under the code (§ 4098) the waiver must be in writing if before a court which is not a court of record, or if a court of record, must be entered of record. *Hilton v. Miller*, 5 Lea (Tenn.) 395; *Smith v. Pearce*, 6 Baxt. (Tenn.) 72; *Reams v. Kearns*, 5 Coldw. (Tenn.) 217.

Need Not Be in Express Words. — In *Hilton v. Miller*, 5 Lea (Tenn.) 395, it is held that the waiver of record or in writing need not be in express words, but may be implied, and that a confession in writing or of record of a judge

Before Issue Joined. — Where waiver by consent is permitted, objection to the judge for disqualification should be made before issue joined.¹

Application of Common-law Principles. — Even without the provisions above mentioned, it would seem that unless the statute has the force of a prohibition, the common-law rule which distinguishes between acts which are in themselves void and those merely voidable would apply.²

IV. SPECIAL AND SUBSTITUTE JUDGES — 1. Definition. — A special judge is a member of the bar presiding in the place of the regular judge, on account of the absence or disqualification of the latter; or he is a judge of another court, called in for similar reasons. In the latter instance he is, strictly speaking, more properly termed a substitute judge.³

2. Constitutional Limitations Regarding. — In some states the statutory provisions for the election or appointment of special judges have been held unconstitutional,⁴ while in others it is held that the constitutional provision for the substitution of a judge from another court forbids a statutory provision for the appointment of attorneys as special judges; yet even in these states such

ment is a waiver, under section 4098 of the code, of all objection to the competency of the judge.

1. *Stearns v. Wright*, 51 N. H. 600; *Moses v. Julian*, 45 N. H. 52; *Peebles v. Rand*, 43 N. H. 337; *Dolan v. Church*, 1 Wyoming 187. See also *Adams v. State*, 11 Ark. 466; *Shropshire v. State*, 12 Ark. 190; *Crosby v. Blanchard*, 7 Allen (Mass.) 385.

"After a trial has been commenced, no attempt to recuse a judge will be listened to unless it is shown affirmatively that the party was not aware of the objection and was in no fault for not knowing it." *Moses v. Julian*, 45 N. H. 52. See also *Peebles v. Rand*, 43 N. H. 342.

In **Wyoming** it was held that where an application was not made until after both parties had consented in open court that the trial of the case should be set down for a day certain, such application came too late, and that the moving party had waived his rights. *Dolan v. Church*, 1 Wyoming 187.

2. *Moses v. Julian*, 45 N. H. 52; *Dimes v. Grand Junction Canal Co.*, 16 Eng. L. & Eq. 63; *Mercers, etc., Co. v. Bowker*, 1 Stra. 639; *Hesketh v. Brad-dock*, 3 Burr. 1847.

"If the facts are known to the party recusing, he is bound to make his objection before issue joined, and before the trial is commenced; otherwise he

will be deemed to have waived the objection, in cases where a statute does not make the proceedings void." *Moses v. Julian*, 45 N. H. 52. See also *Adams v. State*, 11 Ark. 466; *Shropshire v. State*, 12 Ark. 190.

3. *Brown v. Buzan*, 24 Ind. 194.

4. *Winchester v. Ayres*, 4 Greene (Iowa) 104; *Hoagland v. Creed*, 81 Ill. 506; *Ex p. Amos*, 51 Ala. 57.

In **Alabama** the construction of the constitutional provisions was formerly very liberal. There the court alluded to the rule that constitutional provisions relating to legislative power are not grants, but limitations to be strictly construed, and held that the implied restriction upon the legislative power to erect and regulate courts, contained in the declaration that the judicial power shall consist of a Supreme Court, a Circuit Court, etc., and that judges of such Circuit Courts should be elected, did not extend to the case of trials in such Circuit Courts which the regular judge should decline, or be incompetent, to try. As to such emergencies, the innate power of the legislature continued unrestrained. *Alabama, etc., R. Co. v. Burkett*, 42 Ala. 83. See also *Holly v. Carson*, 39 Ala. 345.

Attorney May Act as Arbitrator. — In *Ex p. Amos*, 51 Ala. 57, it was held that if both parties consented to the appointment of an attorney, he might act

constitutional provision is held not to apply in the case of inferior tribunals created by the legislature.¹

3. When Necessary.—As to the occasions demanding the appointment or election of a special judge, the statutes of each state must be consulted, but, generally speaking, such election or appointment is proper in case of the unavoidable absence of the regular judge, or where he is disqualified by prejudice or interest.² When the court of which a disqualified judge is an officer is also represented in the same district by another judge of concurrent powers who is not disqualified, it is not necessary to appoint a special judge.³

4. When May Act.—A party may ordinarily, upon proper application, obtain a change of judge in all civil actions, such as proceedings by an administrator for the sale of real estate,⁴ proceedings supplementary to execution,⁵ divorce proceed-

as a *quasi* court of arbitration, and that an appeal would lie from his award or judgment.

1. *Harper v. Jacobs*, 51 Mo. 296; *Smith v. Haworth*, 53 Mo. 88.

The fact that as to one grade of courts, viz., the Circuit Courts, the constitution had provided in case of temporary inability of the regular incumbent did not create the inference that its silence respecting inferior courts showed intent to deny similar provision for them; for the legislative power to establish inferior courts was enough. *Brown v. Buzan*, 24 Ind. 194.

In *Mississippi* the court intimated very strongly that the constitutional provision for calling in the judge of another circuit would prevent the passage of any statute allowing agreement for selection of an attorney as special judge. *Peter v. State*, 6 How. (Miss.) 326.

Reference to Master or Referee.—

Reference may be made to a master or referee. *Underwood v. McDuffee*, 15 Mich. 361; *Hards v. Burton*, 79 Ill. 504. But the referee shall not have power of final decision. *Johnson v. Wallace*, 7 Ohio, pt. ii. 62; *King v. Hopkins*, 57 N. H. 334; *St. Paul, etc., R. Co. v. Gardner*, 19 Minn. 132, 18 Am. Rep. 334.

2. Death of Judge.—In *State v. Lewis*, 107 N. Car. 967, it is held that the death of a judge is an "unavoidable accident," such as will authorize the governor to assign another judge to preside instead of the regular judge, unable to preside.

Sickness of Judge.—When the judge at a trial becomes sick and unable to

proceed, after the evidence is all in, and the instructions are given to the jury, the trial should proceed under a special judge before the same jury, and without rehearing the testimony. *Bullock v. Neal*, 42 Ark. 278.

In *State v. Punshon*, 133 Mo. 44, it is held that where the regular judge is indisposed by illness he need make no effort to procure another judge, but that the members of the bar may at once elect a special judge under the statute providing for such election where the judge is unable to hold term and fails to procure another judge.

Delay of Substitute Judge.—The fact that a judge, who has been called to try a criminal case in which the regular judge is disqualified by the defendant's oath of prejudice, states that he will not be able to be present until a date later than that to which the case has been adjourned, does not require the calling of another judge, but the judge first selected is authorized to try the case. *State v. Noland*, 111 Mo. 473.

Detention by Other Judicial Duties.—The absence of a judge at the time appointed for an adjourned session, caused by judicial duties in another county, is not such inability to hold court as will authorize an election of a special judge. *Butler v. Williams*, 48 Ark. 227.

3. *State v. Judges*, 35 La. Ann. 1007.

4. *Scherer v. Ingberman*, 110 Ind. 428. See also *Lester v. Lester*, 70 Ind. 201.

5. *Burkett v. Holman*, 104 Ind. 6. See also *Toledo, etc., R. Co. v. Howes*, 68 Ind. 458; *Kissell v. Anderson*, 73 Ind. 485; *McMahon v. Works*, 72 Ind. 19; *Abell v. Riddle*, 75 Ind. 345; *John-*

ings,¹ motions for a receiver,² settlement of bills of exceptions,³ and actions involving the judge's right to office.⁴ While in some states the statutory provisions for the appointment of attorneys as special judges are limited, in their application, to civil cases,⁵ in others they are held to apply equally to criminal cases.⁶ According to at least one decision, an equity case is not one wherein there can be a transfer to another court because of objection to the chancellor.⁷

son *v.* Jones, 79 Ind. 141; Fowler *v.* Griffin, 83 Ind. 297; Baker *v.* State, 109 Ind. 47.

1. Powell *v.* Powell, 104 Ind. 18; *limiting* Musselman *v.* Musselman, 44 Ind. 106. And see Evans *v.* Evans, 105 Ind. 204, *disapproving* Musselman *v.* Musselman, 44 Ind. 106; Alsup *v.* Jordan, 69 Tex. 300.

2. Corbin *v.* Berry, 83 N. Car. 27.

3. Bowden *v.* Wilson, 21 Fla. 167; Garvin *v.* Jennerson, 20 Kan. 371; Holliday *v.* Mansker, 44 Mo. App. 465.
4. Nugent *v.* Stark, 34 La. Ann. 628; State *v.* Judge, 33 La. Ann. 1293; Magruder *v.* Swann, 25 Md. 173.

5. In Georgia there is no provision for the appointment of a member of the bar as judge *pro hac vice*. If there was before the Constitution of 1877 and the Act of 1879, it is clear there is none now. Castleberry *v.* State, 68 Ga. 49.

In Mississippi an attorney cannot be made special judge of a Circuit Court in a criminal case. Peter *v.* State, 6 How. (Miss.) 326.

In Maine a Superior Court judge may request a Supreme Court judge to sit in a criminal case in the Superior Court where the judge of the latter court is related to one of the parties. Maine Pub. L. 1868, c. 151, § 12, providing for transfer under certain circumstances to the Supreme Court, relates to civil cases only. State *v.* Thomas, 56 Me. 490.

In Pennsylvania the substitution is of another judge learned in the law. President Judge's Application, 64 Pa. St. 33.

6. Alabama. — Rev. Code Ala. 758; Alabama, etc., R. Co. *v.* Burkett, 42 Ala. 83.

Indiana. — Herbster *v.* State, 80 Ind. 484; Feigel *v.* State, 85 Ind. 580; State *v.* Murdock, 86 Ind. 124; Burrell *v.* State, 129 Ind. 290.

In Feigel *v.* State, 85 Ind. 580, it was so held notwithstanding the statute was entitled "An Act concerning proceedings in civil cases," the statute re-

lating to Circuit Courts, wherein both classes of cases were triable.

Missouri. — State *v.* Gilmore, 110 Mo. 1; *Ex p.* Clay, 98 Mo. 578; State *v.* Wofford, 111 Mo. 526; State *v.* Sanders, 106 Mo. 188; State *v.* Bishop, 22 Mo. App. 435; *Ex p.* Allen, 67 Mo. 534; State *v.* Daniels, 66 Mo. 192; State *v.* Neiderer, 94 Mo. 79.

Tennessee. — Glasgow *v.* State, 9 Baxt. (Tenn.) 485; Ligan *v.* State, 3 Heisk. (Tenn.) 159.

Texas. — Thompson *v.* State, 9 Tex. App. 649; Early *v.* State, 9 Tex. App. 476; Davis *v.* State, 44 Tex. 523.

Pronouncing Sentence Merely Ministerial. — In State *v.* Shea, 95 Mo. 85, it is held that the act of pronouncing sentence is merely ministerial, and can be done by a judge who was attorney for the state on the trial. He may not call in the judge of another circuit merely for such purpose. In the same case it was also held that although such sentence by the substitute judge is error, and will be reversed, the reversal is to be confined to the judgment and sentence. It does not invalidate or overthrow the steps antecedent to the judgment and sentence.

In Mississippi the exercise of his right to pronounce sentence in such cases is in the discretion of the regular judge. Thomas *v.* State, 5 How. (Miss.) 20.

7. In Cooke *v.* Cooke, 41 Md. 362, it is held that the provision in the Maryland Constitution for the transfer to a different court in case of local prejudice, or of the disqualification of the regular judge, does not apply to equity cases. The provision is to provide against an evil which cannot exist in equity, first, because of the right to have an issue awarded for jury trial; second, because appeals in equity are as to facts as well as to law.

Contra. — In Kentucky provision is made for the election of chancellors *pro tem.* from time to time, as emergencies may require. Rudd *v.* Woolfolk, 4 Bush (Ky.) 555.

5. Selection — Statutory Mode Exclusive and Jurisdictional. — Where a mode of selection of special or substitute judges is prescribed by the constitution, and the causes for such selection are indicated, other modes and other causes are thereby excluded.¹ Parties cannot, independently of constitutional or statutory provisions, confer judicial authority, and where this is attempted a judgment by the appointee is a nullity;² nor will the parties be estopped, by their consent, from denying the jurisdiction.³

Mode of Selection. — The provisions for the selection of special judges vary in the different states. Thus in some jurisdictions the parties may, by agreement, select the judge from the attorneys of the court;⁴ or, in case of their failure to do so, the attorneys of the court who are present and not interested or employed in the case may elect an attorney of the court then in attendance.⁵

1. *State v. Phillips*, 27 La. Ann. 663; *State v. Fritz*, 27 La. Ann. 689; *State v. Judge*, 9 La. Ann. 62; *Hayes v. Hayes*, 8 La. Ann. 468. A provision that a recused judge who is not personally interested may appoint a lawyer in his stead, and when interested may call on a district or parish judge, excludes the idea of a sick judge so doing. *State v. Fritz*, 27 La. Ann. 689; *State v. Phillips*, 27 La. Ann. 663.

It was held in *Georgia* that a provision authorizing substitution in the Superior Court did not prevent legislation authorizing litigants to select an attorney in place of the disqualified judge. *Henderson v. Pope*, 39 Ga. 361. See also *State v. Williams*, 14 W. Va. 851.

A provision that the legislature may provide for special judges authorizes a statute allowing selection by the bar, *Ligan v. State*, 3 Heisk. (Tenn.) 159; *State v. Williams*, 14 W. Va. 851; or by the governor, *Kennedy v. Com.*, 78 Ky. 447. And a statute allowing election by the bar is applicable although one of the parties does not consent to the choice. *Smith v. Blake-man*, 8 Bush (Ky.) 476.

2. *Hyllis v. State*, 45 Ark. 478; *Dansby v. Beard*, 39 Ark. 254; *Gaither v. Wasson*, 42 Ark. 126; *Haverly Invincible Min. Co. v. Howcutt*, 6 Colo. 574; *McGarvey v. Hall*, 7 Colo. App. 426; *Wright v. Boon*, 2 Greene (Iowa) 458; *Winchester v. Ayres*, 4 Greene (Iowa) 104; *Hoagland v. Creed*, 81 Ill. 506; *Bishop v. Nelson*, 83 Ill. 601; *Cobb v. People*, 84 Ill. 511; *Herbster v. State*, 80 Ind. 484; *McClure v. State*, 77 Ind. 287; *Glasgow v. State*, 9 Baxt. (Tenn.) 485.

3. *Haverly Invincible Min. Co. v. Howcutt*, 6 Colo. 574; *Castleberry v. State*, 68 Ga. 49; *Hoagland v. Creed*, 81 Ill. 506; *Herbster v. State*, 80 Ind. 484.

In *Kentucky* it has been held that agreement upon matters of fact touching the election of a special judge, whereby the choice is relegated to the governor, is binding. *Kennedy v. Com.*, 78 Ky. 447.

4. *Rev. Stat. Mo.* (1889), § 3323; *Gen. Stat. Ky.* (B. & F.), c. 28, art. 7, § 1; *Pasch. Tex. Dig.*, art. 1419; *Laws of Wash.* (1889-90), p. 343, § 11; *Ala. Const.*, § 18, art. 6; *Alabama, etc., R. Co. v. Burkett*, 42 Ala. 83; *Beck v. Henderson*, 76 Ga. 360; *Henderson v. Pope*, 39 Ga. 361; *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682; *Davis v. Wilson*, 11 Kan. 74; *Howard v. Lillard*, 17 Mo. App. 228; *Brogan v. Savage*, 5 Sneed (Tenn.) 689; *Radford Trust Co. v. East Tennessee Lumber Co.*, 92 Tenn. 126; *Castles v. Burney*, 34 Tex. 470; *Schultze v. McLeary*, 73 Tex. 92; *State v. Sachs*, 3 Wash. 691.

5. *Gen. Stat. Ky.* (B. & F.), c. 28, art. 7, § 1; *Rev. Stat. Mo.* (1889), § 3323; *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682.

Election Held by Clerk. — The election in such cases shall be by the clerk of the court, who shall, in case of a tie, cast the deciding vote. *Rev. Stat. Mo.* (1889), § 3324; *Gen. Stat. Ky.* (B. & F.), c. 28, art. 7, § 1; *State v. Bulling*, 105 Mo. 204.

Appointment by Governor. — In *Kentucky*, upon the failure of the parties to agree, followed by the failure or refusal of the bar to elect, the governor may appoint a special judge, upon

In other states it is provided that special judges must be elected, and cannot be selected by agreement of the parties.¹ Still another method is in use in a few states, where, by statutory provision, the regular judge, when unable to preside, may appoint an attorney to act as special judge.² Where a special judge who has been chosen for a term is disqualified to preside in a certain action, another should be selected for such trial, in the same manner as prescribed for the selection of the first.³ In those states allowing the selection of special judges in criminal cases, the manner of such selection is usually the same as in civil cases,⁴

notification of the facts by the clerk of the court. *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682. See also *Schultze v. McLeary*, 73 Tex. 92.

Appointment by Clerk.—In *Alabama*, where the parties fail to select a special judge from the attorneys present, the clerk must nominate the attorney who shall preside over and try the cause at that term. *Alabama, etc., R. Co. v. Burkett*, 42 Ala. 83. See also *Beck v. Henderson*, 76 Ga. 360.

1. *Trotter v. Neal*, 50 Ark. 340; *Gaither v. Wasson*, 42 Ark. 126; *Dansby v. Beard*, 39 Ark. 254; *Fishback v. Weaver*, 34 Ark. 569.

A special judge must be elected by the attorneys of the court, as provided by the constitution, and not by agreement of parties to the cause to be tried. A judgment or decree rendered by a special judge, selected by agreement, is *coram non judge*, and void. *Gaither v. Wasson*, 42 Ark. 126; *Dansby v. Beard*, 39 Ark. 254.

2. *Shugart v. Miles*, 125 Ind. 445; *Zonker v. Cowan*, 84 Ind. 395; *State v. Murdock*, 86 Ind. 124; *Bowlus v. Brier*, 87 Ind. 391; *Walter v. Walter*, 117 Ind. 247; *Cargar v. Fee*, 119 Ind. 536; *Perkins v. Hayward*, 124 Ind. 445; *Burrell v. State*, 129 Ind. 290; *Harris v. U. S. Savings Fund, etc., Co.*, 146 Ind. 265; *Granite Mountain Min. Co. v. Durfee*, 11 Mont. 222.

In *Indiana*, if the judge for any reason is unable to appoint a judge *pro tem*, "the clerk, auditor, and sheriff of the proper county, or a majority of them, may appoint, in writing, any other judge of a court of record of this state, or any attorney thereof eligible to the office of such a judge, to preside at such term, or during any day or part of said term." Rev. Stat. Ind. 1896 (Homer), § 1383a.

3. *Little Rock, etc., R. Co. v. Barker*, 39 Ark. 491; *Lacy v. Barrett*, 75 Mo.

469; *Davis v. Wilson*, 11 Kan. 74, where the regular judge left before all the cases on the docket had been reached for trial, and the judge *pro tem*. elected to dispose of the remaining cases was found to be of counsel in one of such cases. It was held proper to elect another attorney judge *pro tem*. for that case, the parties not being able to agree.

Failure or Refusal to Act.—"If the person first elected to act as special judge fails or refuses to act, * * * another election shall be held in like manner," etc. *Lacy v. Barrett*, 75 Mo. 469.

Judge Pro Tem. May Not Appoint Successor.—A person who acts as judge *pro tempore* in a particular case has not the authority of the regular judge, and may not appoint another person judge *pro tempore* in his stead. *Cargar v. Fee*, 119 Ind. 536; *Smith v. State*, 145 Ind. 176; *Hayes v. Sykes*, 120 Ind. 180.

4. Const. Ala., § 18, art. 6; Gen. Stat. Ky. (B. & F.), c. 28, art. 7, § 1; *Hughes v. Com.*, 89 Ky. 227; *State v. Millsops*, 39 La. Ann. 793; *State v. Phillips*, 27 La. Ann. 663; *State v. Gilmore*, 110 Mo. 1; *State v. Wofford*, 111 Mo. 526; *State v. Silva*, 130 Mo. 440; *State v. Bishop*, 22 Mo. App. 435; *State v. Anderson*, 96 Mo. 241; *State v. Daniels*, 66 Mo. 192; *Davis v. State*, 44 Tex. 523; *Early v. State*, 9 Tex. App. 476; *Thompson v. State*, 9 Tex. App. 649; *State v. Sachs*, 3 Wash. 691.

In *Missouri* the power of the members of the bar to elect a special judge under section 3323, Rev. Stat. 1889, depends solely on the failure of the regular judge to procure another in his stead, and the fact that he made no effort to do so is immaterial. *State v. Punshon*, 133 Mo. 44.

Order for Election.—"Whenever in any cause the defendant shall make application * * * for a change of

but in at least one state the right of the parties to select a judge by consent is limited to civil cases.¹

Request and Notice to Substitute Judge. — Where a regular judge is incompetent to sit in the trial of a case he may call on the judge of another court of like jurisdiction to preside.² In such case the regular judge should fix the time for trial and notify the judge whom he wishes to preside.³

6. Proof of Authority — *a.* **NECESSITY AND SUFFICIENCY OF.** — The selection or appointment of a special judge should be affirmatively shown by the record.⁴ In some states the appointment of

venue for any of the reasons stated, * * * it shall be lawful for the judge to hear such application, and immediately thereafter, by an order of record, to empower the members of the bar present * * * to proceed to the election of a special judge for the trial of the particular cause pending," etc. Rev. Stat. Mo. (1889), § 4175; State v. Thomas, 32 Mo. App. 159; State v. Daniels, 66 Mo. 192; State v. Bulling, 105 Mo. 204.

When Unnecessary. — Where a special judge is chosen by agreement, no order for an election is necessary. State v. Bishop, 22 Mo. App. 435.

Selection by District Attorney and Defendant. — In holding that the district attorney may agree with the defendant upon a special judge, the court in Davis v. State, 44 Tex. 523, said: "In such a case the state is a party litigant, and speaks and acts through its appropriate district attorney the same as any other party does through an attorney." See also Early v. State, 9 Tex. App. 476.

1. Neil v. State, 2 Lea (Tenn.) 674.

2. Rev. Stat. Mo., § 4178; Acts Va. (1884), p. 748; Va. Code, § 3049; Sess. Laws S. Dak. (1890), c. 78, § 20; Benjamin v. Evansville, etc., R. Co., 28 Ind. 416; State v. Newsum, 129 Mo. 154; State v. Greenwade, 72 Mo. 298; State v. Gonce, 87 Mo. 627; Combs v. Com., 90 Va. 88; Gresham v. Ewell, 85 Va. 1.

3. Benjamin v. Evansville, etc., R. Co., 28 Ind. 416; State v. Shea, 95 Mo. 85; State v. Greenwade, 72 Mo. 298; Walker v. Sneed, 7 Ark. 233.

In Missouri it is provided by statute that "if the case in which the judge shall be incompetent to sit * * * be a felony, and no suitable person to try the case will serve when elected as such special judge, or if, in the opinion of the judge of said court, no compe-

tent or suitable person can or will be elected as such special judge, he need not order such election, but may, in either case, set the cause down for trial on some day of the term, or on some day as early as practicable in vacation, and notify and request the judge of some other circuit to try the cause," etc. Rev. Stat. Mo. (1897), § 1881; Rev. Stat. Mo. (1889), § 4178; State v. Shea, 95 Mo. 85. See also State v. Wear, 129 Mo. 619.

Notice Not Part of Record. — The object of the notice in such case is simply to secure the attendance of a competent judge, and the notice is not part of the record. Benjamin v. Evansville, etc., R. Co., 28 Ind. 416.

4. Wall v. Looney, 52 Ark. 113; Dansby v. Beard, 39 Ark. 254; Worsham v. Murchison, 66 Ga. 715; Smith v. Haworth, 53 Mo. 88; McMurry v. State, 9 Tex. App. 207; Brinkley v. Harkins, 48 Tex. 225; Bailey v. State, (Tex. App. 1890) 15 S. W. Rep. 117.

An Appeal Will Be Dismissed where the record fails to show that the special judge who presided at the trial of the cause was elected for that purpose. Wall v. Looney, 52 Ark. 113.

Must Be Entered on Order Book. — The appointment of a special judge must be entered on the order book. Kennedy v. State, 53 Ind. 542; Taylor v. Bosworth, 1 Ind. App. 54. See also Rudd v. Woolfolk, 4 Bush (Ky.) 555; Slone v. Slone, 2 Metc. (Ky.) 339.

Record Must Show Manner of Selection. — Where a case is tried before a special judge the record must show the reasons for his selection and the manner of such selection. Smith v. State, 24 Tex. App. 290; Bailey v. State, (Tex. App. 1890) 15 S. W. Rep. 117; Brinkley v. Harkins, 48 Tex. 225; Thompson v. State, 9 Tex. App. 649.

Order of Appointment Should Be Entered of Record. — When a cause is tried by a

a special judge or the agreement of the parties by which he is chosen must be in writing.¹ The record need not recite the facts

special judge appointed for that purpose, the transcript should show that the order of appointment was entered of record. *Smith v. Haworth*, 53 Mo. 88. In this case the court said: "The entry of record in such a case constitutes at once both the authority of the special judge and the evidence of that authority, without which he is utterly powerless to act."

Necessity of Oath.—An attorney who has been chosen to act as a special judge must be sworn. *Kennedy v. State*, 53 Ind. 542; *Herbster v. State*, 80 Ind. 484; *Rudd v. Woolfolk*, 4 Bush (Ky.) 555; *Slone v. Slone*, 2 Metc. (Ky.) 339; *Thompson v. State*, 9 Tex. App. 649.

"It would be monstrous to hold that an attorney, where the objection is made, may sit in judgment upon the life, liberty, character, and property of a citizen, without having taken the oath prescribed by the constitution and the statute." *Kennedy v. State*, 53 Ind. 546.

Contra.—In *Georgia* it is held that there is no need of a judge *pro hac vice* being sworn. "The law does not require it, probably because the oath taken by all attorneys at law, when admitted to practice, was deemed by the legislature sufficient to bind their conscience in the discharge of all duties devolved by law on those officers of court. * * * The statute does not require a special oath." *Reeves v. Graffing*, 67 Ga. 512.

Oath Must Appear of Record.—In *Texas* it is held that the fact that the oath was administered to a special judge must appear of record. *Bailey v. State*, (Tex. App. 1890) 15 S. W. Rep. 117; *Smith v. State*, 24 Tex. App. 290; *Ford v. Cameron First Nat. Bank*, (Tex. Civ. App. 1896) 34 S. W. Rep. 684; *Thompson v. State*, 9 Tex. App. 649.

Contra.—In *Kentucky* it is held that the reasons for the election of a special judge and the fact of taking the required oath must be entered on the order book. On appeal, this order need not be copied in the record, but will be presumed to be correct; but when it is copied, and thereby no qualification appears, the presumption of correctness is rebutted. *Rudd v.*

Woolfolk, 4 Bush (Ky.) 555; *Slone v. Slone*, 2 Metc. (Ky.) 339.

Sufficient Recital of Oath.—Where the record recited that a special judge "appeared at the bar of this court, and duly qualified to act as judge," it was held that, in the absence of any recitals to the contrary, the fact that the special judge was properly sworn was sufficiently shown by such recital. *Ford v. Cameron First Nat. Bank*, (Tex. Civ. App. 1896) 34 S. W. Rep. 684.

Waiver of Oath.—In *Ford v. Cameron First Nat. Bank*, (Tex. Civ. App. 1896) 34 S. W. Rep. 684, it is held that the failure of the special judge to take the oath may be waived by the parties. See also on this point, *Vandever v. Vandever*, 3 Metc. (Ky.) 137; *Salter v. Salter*, 6 Bush (Ky.) 624; *State v. Van Wye*, 136 Mo. 227.

1, Necessity for Written Appointment.—In *Indiana* the appointment of a special judge must be in writing; and where the record does not show such written appointment, and objection is seasonably made to the court below, a reversal may follow on appeal. *Littleton v. Smith*, 119 Ind. 230; *Kennedy v. State*, 53 Ind. 542; *Evans v. State*, 56 Ind. 459; *Greenwood v. State*, 116 Ind. 485; *McClure v. State*, 77 Ind. 287; *Herbster v. State*, 80 Ind. 484; *Smith v. State*, 145 Ind. 176.

Not Necessary for Substitute Judge.—Where the judge of another court is called in no written appointment is necessary. *Wood v. Franklin*, 97 Ind. 117.

Written Agreement of Parties.—In *Thompson v. State*, 9 Tex. App. 649, it is held that an agreement of counsel to appoint a special judge to try a cause should be perpetuated in writing, and such writing filed among the papers and made a part of the record.

Presumption as to Written Stipulation.—In *State v. Sachs*, 3 Wash. 691, it was held that where the attorneys for the parties to an action agree upon a member of the bar as a judge *pro tem.*, and such agreement is approved by the judge of the court, and the approval entered upon the journal, and the judge *pro tem.* properly sworn to try the case, the presumption arising from the journal entries is that a written stipulation, as required by law, was en-

disqualifying the regular judge,¹ though, according to some decisions, where a substitute judge is called in the disability of the regular judge should be set forth.² Nor need the record show the qualifications of the special judge for the office.³

b. PRESUMPTION OF AUTHORITY. — According to some decisions it will be presumed on appeal that all prerequisites were duly performed by the special judge.⁴ Where a special judge continues to act during a term subsequent to that for which he was elected, it will be presumed on appeal, the record being silent,

tered into for the appointment of such judge.

1. *State v. Hosmer*, 85 Mo. 553; *Rudd v. Woolfolk*, 4 Bush (Ky.) 555.

"The disqualifying facts are not issuable when the judge himself declares their existence. He alone determines, in such case, his own disqualification, and there is no necessity for stating more in the order than the one under consideration contains." *State v. Hosmer*, 85 Mo. 553.

Disqualification Shown by the Agreement. — Where the agreement as to the selection of a special judge discloses the disqualification of the regular judge, there is no need for such regular judge to have it entered of record. *State v. Bishop*, 22 Mo. App. 435.

Where Cause Is Transferred. — In *Bates v. Casey*, 61 Tex. 592, it is held that where a county judge declines to hear a cause and transfers the same to the District Court, because he is disqualified to hear and determine it, the grounds of his disqualification need not be stated unless their existence be questioned.

Contra. — In *Roberts v. State*, 27 Fla. 244, it is held that it will not be sufficient for the judge transferring the case merely to state that he is "disqualified to hear and determine" it, but the cause of disqualification must be stated.

2. Where a substitute judge is called in by the president judge, it is necessary that a proper certificate, setting forth the disqualification, etc., and the call on the president substituted to hold the regular term — signed by the proper president — should be filed of record and entered on the minutes of the court, as the evidence of the authority to hold the courts and of title to the compensation. *President Judges' Application*, 64 Pa. St. 33. See also *Matter of Rhinebeck*, 19 Hun (N. Y.) 346; *People v. Petty*, 32 Hun (N. Y.) 443.

3. *State v. Gamble*, 108 Mo. 500; *Matter of Loehr*, 11 Mo. App. 53. See also *Garvin v. Jennerson*, 20 Kan. 371; *Hunter v. Ferguson*, 13 Kan. 462.

The order of appointment need not recite that the one appointed "was a disinterested person, learned in the law" in the terms in which the statute defines the qualifications of the person to be appointed. *Lawler v. Lyness*, 112 Ala. 386.

Record Must Show Him to Be an Attorney. — In *Horton v. Pool*, 40 Ala. 629, it is held that where an attorney is appointed by consent of parties to preside instead of the regular judge, the record must affirmatively show that the person so appointed is an attorney of the court.

4. *Harper v. Jacobs*, 51 Mo. 296.

Manner of Appointment Need Not Be Shown. — In *Indiana* it is held that where no objections were made to the special judge or judge *pro tem.*, and no questions were made below as to the regularity of his appointment, the record upon appeal need not show the manner of his appointment. The record being silent, the court will presume that the appointment was properly and legally made. *Bartley v. Phillips*, 114 Ind. 189.

Presumption as to a Second Appointment. — In *Fassinow v. State*, 89 Ind. 235, a judge *pro tem.*, duly appointed, held court on the first day of the term; on the second day another judge *pro tem.*, appointed on that day, appeared and held the court, and did so for several days, the record during those days being silent as to the one first appointed. It was held that it would be presumed that the second appointee had due authority. See also *Cincinnati, etc., R. Co. v. Rowe*, 17 Ind. 568; *Hutts v. Hutts*, 51 Ind. 581; *Glenn v. State*, 46 Ind. 368; *Singleton v. Pidgeon*, 21 Ind. 118.

that the reappointment, if such was necessary, was duly made.¹ The record of the court is conclusive and unimpeachable, and cannot be denied by proof *aliunde* showing that in fact the bench was occupied by a stranger,² or that the commission of the special judge was defective.³ If, however, the record is not silent, but shows that a special judge sat illegally, the error must be declared fatal on appeal.⁴

7. Objections to Authority.—A party to an action which a special judge has been selected to try has the right to question the authority of such judge to try the case,⁵ and, if the objection is overruled, the grounds of the objection and the authority of the judge may be spread upon the record by a bill of exceptions, in order to enable the court on appeal to determine his right to exercise the powers of special judge in the case.⁶

Waiver of Objection.—Where, however, no objection is made below, all objections to the authority of the special judge will be assumed by the appellate court to have been waived.⁷ This rule, however, applies only to the original parties to the record, before the court on actual service of process, and who are under no disabilities.⁸

1. Bartley v. Phillips, 114 Ind. 189.

2. Winchester v. Ayres, 4 Greene (Iowa) 104.

3. Kennedy v. Com., 78 Ky. 447.

4. Haverly Invincible Min. Co. v. Howcutt, 6 Colo. 574; Winchester v. Ayres, 4 Greene (Iowa) 104.

In Rudd v. Woolfolk, 4 Bush (Ky.) 555, it is held that while the order stating the reasons for electing a special judge and the fact of his taking the oath need not be copied in the record, but will be presumed to be correct, yet if such order is copied, and thereby no qualification appears, the presumption of correctness is rebutted.

5. White v. Reagan, 25 Ark. 622; Kennedy v. State, 53 Ind. 542; Greenwood v. State, 116 Ind. 485; Schlunger v. State, 113 Ind. 295; Herbst v. State, 80 Ind. 484; Bowen v. Swander, 121 Ind. 164; Taylor v. Bosworth, 1 Ind. App. 54; Lillie v. Trentman, 130 Ind. 16; Bartley v. Phillips, 114 Ind. 189; Higby v. Ayres, 14 Kan. 331; Slone v. Slone, 2 Metc. (Ky.) 339; Vandever v. Vandever, 3 Metc. (Ky.) 137; Lacy v. Barrett, 75 Mo. 469; Grant v. Holmes, 75 Mo. 109; Schultze v. McLeary, 73 Tex. 92.

"The refusal of the court to hear evidence or pass on the objections raised to the authority of the special judge, *pro or con*, was manifest error." White v. Reagan, 25 Ark. 622.

Parties Only May Object.—It is for

the parties to a cause, and not the judge, to object, on the ground of disqualification, to a person elected special judge. Lacy v. Barrett, 75 Mo. 469.

To Be Made to Clerk.—In those states where the election of the special judge is held by the clerk, the objection to a person elected special judge must be made to the clerk. Lacy v. Barrett, 75 Mo. 469.

6. White v. Reagan, 25 Ark. 622. See also Rives v. Pettit, 4 Ark. 582; Adams v. State, 11 Ark. 466; Sweeptzer v. Gaines, 19 Ark. 96.

7. Kennedy v. State, 53 Ind. 542; Bartley v. Phillips, 114 Ind. 189; Feaster v. Woodfill, 23 Ind. 493; Kenney v. Phillippy, 91 Ind. 511; Rogers v. Beauchamp, 102 Ind. 33; Greenwood v. State, 116 Ind. 485; Montgomery County v. Courtney, 105 Ind. 311; Lillie v. Trentman, 130 Ind. 16; Smurr v. State, 105 Ind. 125; Winterrowd v. Messick, 37 Ind. 122; Bowen v. Swander, 121 Ind. 164; Vandever v. Vandever, 3 Metc. (Ky.) 137; Slone v. Slone, 2 Metc. (Ky.) 339; Rudd v. Woolfolk, 4 Bush (Ky.) 555; Salter v. Salter, 6 Bush (Ky.) 624; Grant v. Holmes, 75 Mo. 109; Texas Cent. R. Co. v. Rowland, 3 Tex. Civ. App. 158.

They cannot be heard for the first time on appeal. Vandever v. Vandever, 3 Metc. (Ky.) 137; Higby v. Ayres, 14 Kan. 331.

8. "Consent cannot be presumed

8. Powers and Duties. — A special judge possesses all the powers of and is subject to the same restrictions as the regular judge during the hearing of the cause which he has been elected to try or during the term for which he has been elected,¹ and his powers continue until the final determination of the cause for which he was chosen.² He has the right to hear and determine all motions,³ grant appeals,⁴ sign bills of exceptions,⁵ and, in general, to make

against one only constructively before the court, nor against minors nor married women; much less can it be presumed against purchasers who are not parties to the original record." *Rudd v. Woolfolk*, 4 Bush (Ky.) 555.

1. *Georgia*. — *Henderson v. Pope*, 39 Ga. 361.

Indiana. — *Shugart v. Miles*, 125 Ind. 445; *Beitman v. Hopkins*, 109 Ind. 177; *Staser v. Hogan*, 120 Ind. 207; *Perkins v. Hayward*, 124 Ind. 445; *Mayer v. Haggerty*, 138 Ind. 628.

Kentucky. — *Bush v. Lisle*, 86 Ky. 504; *Paducah Land, etc., Co. v. Cochran*, 18 Ky. L. Rep. 465; (Ky. 1896), 37 S. W. Rep. 67; *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682; *Childers v. Little*, 96 Ky. 376.

Louisiana. — *State v. Millsops*, 39 La. Ann. 793; *MacKenzie v. Wooley*, 39 La. Ann. 944.

Missouri. — *State v. Wofford*, 111 Mo. 526; *State v. Sneed*, 91 Mo. 552; *State v. Neiderer*, 94 Mo. 79; *State v. Ross*, 118 Mo. 23; *Harper v. Jacobs*, 51 Mo. 296; *State v. Moberly*, 121 Mo. 604; *Naffzieger v. Reed*, 98 Mo. 87; *Holliday v. Mansker*, 44 Mo. App. 465; *State v. Davidson*, 69 Mo. 509; *Dawson v. Dawson*, 29 Mo. App. 521; *State v. Higginson*, 110 Mo. 213.

Nebraska. — *Nebraska Mfg. Co. v. Maxon*, 23 Neb. 224.

Texas. — *Harris v. Musgrave*, 72 Tex. 18; *Powers v. State*, 23 Tex. App. 42.

Jurisdiction Over Consolidated Causes. — Where a special judge has been appointed in a cause with which others have been consolidated, he will have jurisdiction over each consolidated cause. *Mills v. Paul*, (Tex. Civ. App. 1895) 30 S. W. Rep. 242.

Termination of Powers. — The powers of a special judge terminate when the occasion for his existence ceases. *Coles v. Thompson*, 7 Tex. Civ. App. 666. In this case it was held that when the judge by reason of whose disqualification the special judge came to be appointed has gone out of office, and another has been elected who is not

disqualified, the powers of the special judge are thereby terminated.

In *Arkansas* it is held that the judicial power of a special judge elected by the bar under the provisions of the constitution (art. 7, § 21, Const. of 1874), where there is a vacancy in the office, or where the regular judge fails to appear, terminates when the regular judge appears and takes the bench; and he has no power after that to try a cause even by consent, and though the regular judge be disqualified. But where the regular judge is disqualified in a cause, or during the term falls ill or dies, or becomes unable from any cause to hold the court, the authority of the special judge elected in his place continues for the remainder of the term of his election. *Hyllis v. State*, 45 Ark. 478.

2. *Beitman v. Hopkins*, 109 Ind. 177; *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682; *State v. Davidson*, 69 Mo. 509; *Holliday v. Mansker*, 44 Mo. App. 465; *Dawson v. Dawson*, 29 Mo. App. 521; *Nebraska Mfg. Co. v. Maxon*, 23 Neb. 224.

A continuance of the cause to a subsequent term does not abate the powers of a special judge. *State v. Davidson*, 69 Mo. 509.

The fact that the regular judge has adjourned the term of court does not deprive the special judge of his authority to proceed in the trial of the case for which he was appointed. *Perkins v. Hayward*, 124 Ind. 445.

3. *State v. Wofford*, 111 Mo. 526; *Bremen Bank v. Umrath*, 55 Mo. App. 43.

Motion for Nunc Pro Tunc Entry. — A special judge appointed to try a cause is the proper person to consider motions therein for a *nunc pro tunc* entry of judgment and for a new trial. *Mayer v. Haggerty*, 138 Ind. 628.

4. *State v. Wofford*, 111 Mo. 526.

5. *State v. Wofford*, 111 Mo. 526; *Illinois Cent. R. Co. v. Bowles*, 71 Miss. 994.

Signing After Term Time. — Special as

all orders and hear all matters that come before him in the trial and disposition of the case.¹ A writ of error may run to the court in which a special judge sat, as his judgment is the judgment of that court.² Since a judge *pro tem.* is only a substitute, and not a duplicate judge,³ in jurisdictions where the law intends that only one judge shall sit at a time in a county the regular and the special judge cannot hold courts at the same time in the same county.⁴

well as regular judges may sign bills of exceptions after term time. *Watkins v. State*, 37 Ark. 370; *Cowall v. Althul*, 40 Ark. 172; *Bacon v. State*, 22 Fla. 46; *Lerch v. Emmett*, 44 Ind. 331; *Shugart v. Miles*, 125 Ind. 445; *Holliday v. Mansker*, 44 Mo. App. 465.

Signature in Vacation Not Having Heard Evidence. — Where a motion for a new trial is heard by one acting as judge *pro tem.* who did not hear the evidence, and a bill of exceptions is signed by him in vacation, no reason being shown why the regular judge who heard the evidence did not sign the same, the bill of exceptions will be disregarded. *Travellers' Ins. Co. v. Leeds*, 38 Ind. 444.

1. *State v. Wofford*, 111 Mo. 526.

Illustrations. — May settle bill of exceptions. *Holliday v. Mansker*, 44 Mo. App. 465. May decide a motion for a new trial. *Staser v. Hogan*, 120 Ind. 207. May determine defendant's right to a change of venue. *State v. Higgeson*, 110 Mo. 213. Has jurisdiction to order a change of venue and to try the cause in the county to which it is sent. *State v. Higgeson*, 110 Mo. 213. When reversed on appeal, he may hear the case upon the new trial. *State v. Sneed*, 91 Mo. 552. May try a subsequent action to vacate the judgment in

the first. *Harris v. Musgrave*, 72 Tex. 18. May suspend the trial. *Powers v. State*, 23 Tex. App. 42. May adjourn court till next regular term. *State v. Ross*, 118 Mo. 23.

2. *Henderson v. Pope*, 39 Ga. 361; *Alabama, etc., R. Co. v. Burkett*, 42 Ala. 83.

3. *Cox v. State*, 30 Kan. 202; *In re Millington*, 24 Kan. 214.

4. *Clark v. Rugg*, 20 Fla. 861; *In re Millington*, 24 Kan. 214; *Tarpenning v. Cannon*, 28 Kan. 665; *Bear v. Cohen*, 65 N. Car. 511; *Baisley v. Baisley*, 15 Oregon 183; *Williams v. Strauss*, 4 Okla. 160. But see *Paducah Land, etc., Co. v. Cochran*, (Ky. 1896) 37 S. W. Rep. 67, in which it is held that it is no objection to the correctness of the judgment that the special judge sat at the same time as the regular judge.

Proceedings Before Special Judge at Chambers. — In *Arkansas* it is held that while the regular judge is occupying the bench a special judge is without judicial power to proceed with the trial of an action at chambers, or to appoint a guardian *ad litem* therein. Such proceedings will not be cured by a *nunc pro tunc* order, made afterwards in court by the special judge, entering them of record as of the day on which they were had. *Cox v. Gress*, 51 Ark. 224.

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CROSS-REFERENCES.

For *Branches of the Practice Related to Judgments Treated of in Separate Articles in This Work*, see articles *RENDITION AND ENTRY OF JUDGMENTS*; *OFFERS IN PLEADINGS*; *SENTENCES*; *SATISFACTION AND DISCHARGE OF JUDGMENTS*; *OPENING, AMENDING AND VACATING JUDGMENTS*; *SCIRE FACIAS AND REVIVAL*.

As to *Judgments in Particular Actions, and in Actions and Proceedings for Particular Relief*, see the specific titles in this work and the General Index.

Judgments Against Particular Classes of Persons, see the specific articles, as *EXECUTORS AND ADMINISTRATORS*, vol. 8, p. 650; *INFANTS*, vol. 10, p. 581; *INSANE PERSONS*, vol. 10, p. 1169; *HUSBAND AND WIFE*, vol. 10, p. 191; *PARTNERSHIP*; *RECEIVERS*, etc.

Arrest of Judgment, see article *ARREST OF JUDGMENT*, vol. 2, p. 793.

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Justices' Judgments, see article *JUSTICES OF THE PEACE*.

Sufficiency of Verdict to Support Judgment, see article *VERDICT*.

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Judgment for Costs, see article *COSTS*, vol. 5, p. 100.

As to *Jurisdiction to Render Judgment*, see articles *JURISDICTION*, vol. 12, p. 114; *PROCESS*; *PUBLICATION*; *SERVICE OF PROCESS*.

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Judgment by Default, see article *DEFAULTS*, vol. 6, p. 1.

Judgment on Motion, see article *SUMMARY PROCEEDINGS*.

Judgment on Demurrer, see article *DEMURRERS AT COMMON LAW AND UNDER THE CODES*, vol. 6, p. 292.

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Excessive Judgments, see article *REMITTITUR*.

Collateral Attack on Judgments, see article *JURISDICTION*, vol. 12, p. 114.

Decrees in Equity, see article *DECREES*, vol. 5, p. 946.

And see for the *Substantive Law of Judgments*, AM. AND ENG. ENCYCLOPÆDIA OF LAW, title *JUDGMENTS*.

I. INTRODUCTORY. — The Scope of This Article is limited by the plan of this work in several obvious particulars. In the first place, it is not intended to treat specifically of the judgments in the various forms of actions or in actions for various kinds of particular relief. This matter will be found in the articles which treat specifically of such actions.¹ In the second place, matters peculiar to judgments in actions upon particular contracts, torts, or crimes are excluded, because they are treated of in the articles on the different kinds of contracts, torts, and crimes.² In the third place, judgments as affected by the status of parties belong more properly to the law of persons. This matter will accordingly be found in the articles dealing with the various classes of persons and their status.³ In the fourth place, this article does not treat of decrees in equity or of judgments under the codes for equitable relief. This subject is treated of under the various equitable titles of this work.⁴

The exclusion of these various matters limits the scope of this article to the general principles of the law of judgments in actions where only a money judgment is sought. In illustration of these principles, cases must, of course, be cited from all of the above enumerated classes of cases, but the detailed treatment of judgments in each particular class must be sought elsewhere.

1. See articles *ASSUMPSIT*, vol. 2, p. 1034; *AUDITA QUERELA*, vol. 3, p. 124; *COVENANT*, vol. 5, p. 387; *DEBT*, vol. 5, p. 932; *DOWER*, vol. 7, p. 167; *EJECTMENT*, vol. 7, p. 349; *FORECLOSURE OF MORTGAGES*, vol. 9, p. 451; *GARNISHMENT*, vol. 9, p. 848, etc.

2. See such articles as *ASSAULT AND BATTERY*, vol. 2, p. 861; *BASTARDY*, vol. 3, p. 305; *BONDS*, vol. 3, p. 670;

CONSPIRACY, vol. 4, pp. 736, 740; *CONTEMPT*, vol. 4, p. 797, etc.

3. See articles *EXECUTORS AND ADMINISTRATORS*, vol. 8, p. 687; *GUARDIANS*, vol. 9, pp. 945, 968, 995; *HEIRS AND DEVISEES*, vol. 10, p. 20; *INFANTS*, vol. 10, p. 700; *INSANE PERSONS*, vol. 10, p. 1226, etc.

4. See article *DECREES*, vol. 5, p. 946, and cross-references there given.

II. DEFINITION, NATURE, AND VARIOUS KINDS OF JUDGMENTS—

1. Definition.—In Its Broadest Sense a judgment is the decision or sentence of the law given by a court of justice or other competent tribunal as the result of proceedings instituted therein.¹

1. *Crippen v. People*, 8 Mich. 117. See also *Davidson v. Smith*, 1 Biss. (U. S.) 351; *Blaikie v. Griswold*, 10 Wis. 293; *Cooper v. American Cent. Ins. Co.*, 3 Colo. 321; *Zeigler v. Vance*, 3 Iowa 530.

A finding that in a former action a "decision" was rendered was held not to be equivalent to a finding that a "judgment" was rendered. *Gray v. Noon*, 66 Cal. 186. The term "judgment" may be used as synonymous with "award." *Richards v. Griffin*, 5 Ala. 196.

Other Definitions.—A judgment is the conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit. *Boiv. Law Dict.*; *Tidd Pr.* 930; *Thompson v. People*, 23 Wend. (N. Y.) 587; *Fraser v. Willey*, 2 Fla. 123; *Truett v. Legg*, 32 Md. 147.

A judgment is "the very voyce of law and right." *Co. Litt.* 39a.

A judgment is the decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury. 3 *Black. Com.* 395; *Blood v. Bates*, 31 Vt. 150.

A judgment is the conclusion that naturally and regularly follows from the premises of law and fact, and depends not, therefore, on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. *In re Sedgely Ave.*, 88 Pa. St. 513.

A judgment in its legal acceptation is the determination of some judicial tribunal created by law for the administration of public justice according to law, and is in strictness the determination of the law. *Blood v. Bates*, 31 Vt. 150.

A judgment is the decision of a controversy, given by a court of justice, between parties who do not agree. *Union Bank v. Marin*, 3 La. Ann. 35.

Every final or definitive sentence or decision of the Supreme Court by which the merits of a cause are settled or determined, although such sentence is not technically a judgment or the proceedings are not capable of being enrolled so as to constitute what is

technically called a record, is a judgment. *Matter of Negus*, 10 Wend. (N. Y.) 44.

A judgment is the decision or sentence of a court on the main question in a proceeding, or on one of the questions, if there are several. *Rap. & L. Law Dict.*

A judgment is the decision or sentence of the law, pronounced by a court or other competent tribunal, upon the matter contained in the record. *Jac. Law Dict.*; *Ætna Ins. Co. v. Swift*, 12 Minn. 437.

A judgment is a final decision, entered of record, in a book of judgments, under the signature of a judge. *Evans v. Adams*, 15 N. J. L. 383.

A judgment is a settled adjudication of an existing debt. It is also a power by means of which a creditor may enforce his claims by the sale of the debtor's property. *Nichols v. Dissler*, 31 N. J. L. 473.

A judgment is the end of the law. *Blystone v. Blystone*, 51 Pa. St. 373.

A judgment or decree is the end for which the jurisdiction of a court is exercised; it is only through its judgments and the execution of them that the power of the court is made efficacious. A law which restricts the power of a court to render a judgment is therefore a limitation upon the exercise of its jurisdiction. *Fordyce v. Beecher*, 2 Tex. Civ. App. 29.

A judgment is an adjudication of the rights of the parties in respect to the claim involved. *McNulty v. Hurd*, 72 N. Y. 521.

"In its ordinary legal sense a judgment is the decision or sentence of the law, given by a court of justice, or other competent tribunal, as the result of proceedings instituted therein, to enforce a right or redress an injury. 1 *Bouv. Law Dict.* 676, title Judgment." *Smith v. Shawhan*, 37 Iowa 533.

A judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it. *Whitwell v. Emory*, 3 Mich. 84.

A judgment is the decision of the law, pronounced by the court or other competent tribunal, upon the matter

Decision of Any Court a Judgment. — In the broad sense as here defined, a decision of any court is a judgment,¹ and therefore the term "judgment" includes decrees in equity.²

Definitions under Codes. — Under most of the modern codes of procedure, judgments are defined in substance as the final determination of the rights of the parties in an action or proceeding.³ Under the codes the distinction between actions at law and suits in equity is very generally abolished, and in such states, therefore, it does not admit of question that the term "judgment" includes all that is meant by the term "decree."⁴

contained in the record. *Eppright v. Kauffman*, 90 Mo. 25.

Judgment Means Determination. — The word "judgment," as used in sections 11, 245, 268, and 348 of the code, relating to appeals, means determination. It is used in a general sense. *Lawrence v. Farmers' L. & T. Co.*, 15 How. Pr. (N. Y. Super. Ct.) 57. And see *Holister Bank v. Vail*, 15 N. Y. 593.

Judgment of His Peers means a trial by a jury of twelve men, according to the course of the common law. *Knight v. Campbell*, 62 Barb. (N. Y.) 34; *Wright v. Wright*, 2 Md. 453; *State v. Simons*, 2 Spears L. (S. Car.) 768. See also *Fetter v. Wilt*, 46 Pa. St. 460; *State v. Beswick*, 13 R. I. 217; *Sevier v. Justices*, Peck. (Tenn.) 339; *Jelly v. Dils*, 27 W. Va. 274; *Lincoln v. Smith*, 27 Vt. 362.

1. *Patterson v. Scott*, 33 Ill. App. 348.

The word "judgment" includes all that is meant by the words "order, decision, decree, or judgment." *Halbert v. Alford*, (Tex. 1891) 16 S. W. Rep. 814.

2. *Forsythe v. Richardson*, 1 Idaho 459; *U. S. v. Wonson*, 1 Gall. (U. S.) 7.

A decree rendered in an equity cause is the judgment of the court, and no other is necessary. *Loyd v. Hicks*, 31 Ga. 140.

Decrees rank as judgments in the administration of the estates of decedents, provided they are definitive. *Ex p. Farrars*, 13 S. Car. 254.

Decrees in chancery, of other states, are embraced within the spirit and meaning of the constitutional provision giving the same effect to a judgment in other states which it has in the state where rendered. *Green v. Foley*, 2 Stew. & P. (Ala.) 441. See also cases cited in second succeeding note for decrees in equitable causes under modern codes.

3. **Statutory Definitions.** — *Iowa* Code

(1873), § 2849, declares: "Every final adjudication of the rights of the parties in an action is a judgment." *Dullard v. Phelan*, 83 Iowa 471; *Walker v. Walker*, 93 Iowa 643; *Smith v. Shawhan*, 37 Iowa 533; *Taylor v. Runyon*, 3 Iowa 474.

California Code of Civil Procedure, section 577, defines a judgment as a "final determination of the rights of the parties." *Crim v. Kessing*, 89 Cal. 478.

New York Code, section 245, defines a judgment as "the final determination of the rights of the parties in the action." And see *Clason v. Shotwell*, 12 Johns. (N. Y.) 31.

In *Wisconsin*, under Rev. Stat. 1878, section 2882, a judgment is the final determination by a court of justice of the rights of the parties in an action.

4. **Under Codes "Judgments" Include "Decrees."** — *Croghan v. Livingston*, 17 N. Y. 226; *State v. McArthur*, 5 Kan. 280.

In *Kansas* the old systems of practice are by the code abolished; it furnishes the facilities in the civil action for all that could be accomplished by former systems. A decree or a judgment, or a compound of both, may be rendered therein. *Kimball v. Connor*, 3 Kan. 415.

In *Kentucky* a decree is a judgment within the meaning of the term as defined in code, section 397, and consequently the provisions of the code concerning judgments apply also to decrees. *Hughes v. Shreve*, 3 Metc. (Ky.) 547.

In *Virginia*, by express provisions of the Code of 1873, c. 182, § 1, a decree for specific property or the payment of money has the effect of a judgment. *Hutcheson v. Grubbs*, 80 Va. 251.

Even in *Iowa*, although the code did not abolish the distinction between actions at law and suits in equity, a

In a More Narrow Sense, the term "judgment" is limited to a decision of a court of law.¹

2. Essential Elements — a. RENDITION BY DULY CONSTITUTED COURT — (1) In General. — From the definitions collated in the preceding section may be gathered the essential elements of every judgment. The first of these is that the decision must be that of a duly constituted court.² The rendition of a judgment is a judicial act,³ and must be performed by a judicial and not by a ministerial officer of the court.⁴ Thus the decision must be rendered by the judge and not by the clerk of the court, in order to constitute it a judgment.⁵ So the auditing and allowance or

final adjudication in chancery was held to be a judgment in the meaning of the term as used in the code. *Kramer v. Rebman*, 9 Iowa 114.

Judgment at Law — Decree in Equity. — In *Ward v. Kenner*, (Tenn. 1896) 37 S. W. Rep. 707, it was held, construing the code, sections 2970, 2971, that the word "judgment" is usually applied to a determination of the rights of the parties in an action at law, and the word "decree" to a similar determination in equity, but that the words were interchangeable under the code.

1. *Patterson v. Scott*, 33 Ill. App. 348; *Ward v. Kenner*, (Tenn. 1896) 37 S. W. Rep. 707.

2. *Campbell v. Carroll*, 35 Mo. App. 640; *Clark v. Melton*, 19 S. Car. 509; *Blakie v. Griswold*, 10 Wis. 293.

Rendition in Absence of Quorum. — The judgment by the County Court in *Arkansas* in the absence of a quorum is an absolute nullity. *Ferguson v. Crittenden County*, 6 Ark. 479.

Presumption. — In the summary process jurisdiction of *South Carolina*, a decree, appearing on the records of the court as entered by the judge, must be considered as the judgment of the court. *Foster v. Chapman*, 4 McCord L. (S. Car.) 291.

Suspension of Court by Statute. — A judgment, rendered after a statute went in force suspending the court in which it was rendered for a period named in the act, is void. *Mallory v. Hiles*, 4 Metc. (Ky.) 54.

Allowance of Claim by Administrator. — The filing of a note as a claim against an estate, and the allowance thereof by the executor or administrator, in writing, on the appearance docket, is not such a judgment of a court of competent jurisdiction as will merge the note therein so that no action can thereafter be maintained on such note. The ad-

mission of a claim by the executor or administrator is not final as a judgment would be. *Fiscus v. Robbins*, 60 Ind. 100.

3. *Peck v. Courtis*, 31 Cal. 209; *Sieber v. Frink*, 7 Colo. 148; *Hall v. Marks*, 34 Ill. 358; *Taylor v. Runyon*, 3 Iowa 474; *California State Tel. Co. v. Patterson*, 1 Nev. 150; *Mathews v. Moore*, 2 Murph. (N. Car.) 181; *Godard v. Coffin*, *Davies* (U. S.) 381, 2 Ware (U. S.) 382. See also *Fitzsimmons v. Johnson*, 90 Tenn. 416.

Remedy by Writ of Error. — The objection to a judgment that it was rendered by persons having no judicial authority cannot be taken advantage of by writ of error. *Adams v. Wheeler*, 1 D. Chip. (Vt.) 417.

4. *Hall v. Marks*, 34 Ill. 358.

5. Clerk Cannot Render Judgment. — *Hinson v. Wall*, 20 Ala. 298; *Tombeckbee Bank v. Godbold*, 3 Stew. (Ala.) 240; *Campbell v. Carroll*, 35 Mo. App. 640.

A judgment at the rules in the clerk's office by default must be confirmed in the court, otherwise it cannot be pleaded as the judgment of the court, nor will it warrant an execution. *Nicholas v. Caldwell*, 2 Bibb (Ky.) 545.

An agreement by the parties to a foreclosure suit, empowering the clerk to render as well as enter judgment in the suit, will not render invalid a judgment which is in fact rendered by the court. *Cumnor v. Sedgwick*, 67 Conn. 66.

An entry by the clerk that judgment was confessed in open court, and that the amount was liquidated by the clerk at a certain sum, is not a judgment of the court on which a recovery can be had. *Hill v. Tiernan*, 4 Mo. 316.

A decree that execution shall issue unless a certain sum shall be paid by a certain day is erroneous in that it

rejection of demands against a county by a county court is not a judgment because the proceedings are not judicial.¹

Judgments by Administrative Officers. — Judicial powers are, however, sometimes conferred upon tribunals not technically courts, and decisions by such tribunals, in the exercise of powers thus conferred, are considered as judgments.² Thus the allowance of a claim by an assignee for the benefit of creditors has been held to constitute a judgment.³

leaves a matter proper for a judicial decision to the determination of the clerk. *Donalds v. Plumb*, 8 Conn. 458; *Sherwood v. Sherwood*, 32 Conn. 14.

In *Thompson v. Cook*, 21 Iowa 472, a demurrer on the ground that the record showed that the judgment was rendered by the clerk, and not by the court, was held to have been properly overruled.

Dismissal Must Be by Court, Not Clerk or Parties. — The dismissal of a civil action is in the nature of a judgment, and necessarily requires an order of the court. *Smith-Frazer Boot, etc., Co. v. Derse*, 41 Kan. 150.

"We are informed that a practice has grown up in this state sanctioning the dismissal of suits in vacation, by the plaintiffs' filing a memorandum to that effect with the clerk, but such memorandum necessarily goes for naught except as evidence of an estoppel by matter *in pais*, or of abandonment, unless the court by some appropriate entry of record at a succeeding term gives effect to it as a judgment. The court alone is competent to order a judgment, and not the parties litigant or the clerk." *Campbell v. Carroll*, 35 Mo. App. 640.

A Judgment Confessed Before a Clerk is not a judgment upon which an execution can issue, unless judgment is entered thereon by the court at the next term. *Holmes v. Carr*, 1 Mo. 56; *Phelps v. Hawkins*, 6 Mo. 197.

The statute authorizing confessions of judgment does not give judicial powers to the clerk of the court. The judgment entered is to be treated as one entered by the court itself. *Grattan v. Matteson*, 54 Iowa 229.

1. Auditing Demands by County Court. — *Phelps County v. Bishop*, 46 Mo. 68. But see *State v. Hiekman*, 84 Mo. 74, wherein it was held that the orders of a county court in its settlement with the clerk by which the amount of fees to be retained by the clerk and the amount to be paid into the treasury are deter-

mined, partake of the nature of judgments. See also *Kelly v. Wimberly*, 61 Miss. 548, holding that where a claim is for a certain and ascertained amount its auditing and allowance by the town council is equivalent to a judgment at law, and mandamus will lie to enforce its payment. Compare *State Board of Education v. West Point*, 50 Miss. 638.

2. Road Commissioners in Adjudicating upon the Necessity of a Road, and in locating and making assessments for the same, act judicially. The records of their proceedings and judgments are entitled to the same respect as the records and judgments of other tribunals, so long as they act within their jurisdiction, and cannot be attacked collaterally. Certiorari is the proper remedy to review the legality of the acts of road commissioners. *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525.

3. Allowance of Claim by Assignee. — *Nanson v. Jacob*, 93 Mo. 331.

"These statutory provisions are too plain to require extended comment. When the assignee passes on a claim and allows it, the question involved therein becomes *res judicata*, and the decision of the assignee becomes final — in a word, a judgment, having all the force, effect, and conclusive attributes of any other judgment. If the statute is not meaningless, then its provisions bring the allowed claim of the plaintiff fully within the definition of a judgment given by Mr. Freeman. He says: 'A judgment * * * is defined as being the decision or sentence of the law pronounced by a court or other competent tribunal upon the matter contained in the record.' 'Every definite sentence or decision by which the merits of a cause are determined, although it be not technically a judgment, or although the proceedings are not capable of being technically enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law.' 'A large number of persons and tribunals not

Summary Judgments, or what is equivalent thereto, the issue of an execution,¹ are sometimes authorized by statute upon a determination of a ministerial officer as in the case of forfeited bonds, recognizances, etc. Such decisions are regarded as valid judgments.²

(2) *At Unauthorized Time or Place* — (a) **Statement of Rule.** — It is absolutely essential to the validity of a judgment, according to some authorities, that it be rendered by a court sitting at the time and in the place authorized by law, the tribunal not being otherwise regarded as a court in any legal sense.³ In some cases it is held that the fact that a term of court at which a judgment was rendered was held at a time other than that prescribed or authorized by law, while not rendering the judgment absolutely

ordinarily spoken of as "judges" nor as "courts" are nevertheless authorized to investigate and determine certain questions. Their authority in this respect is judicial, and their determinations are conclusive unless set aside by some competent authority.' Freeman on Judgments, §§ 2, 16, 531." Eppright v. Kauffman, 90 Mo. 25.

1. Burton v. Miller, 14 Tex. 300.

2. See article SUMMARY PROCEEDINGS and cross-references there given.

3. Norwood v. Kenfield, 34 Cal. 329; Wicks v. Ludwig, 9 Cal. 173; Cooper v. American Cent. Ins. Co., 3 Colo. 318; State v. Roberts, 8 Nev. 239; Dalton v. Libby, 9 Nev. 192; Herndon v. Hawkins, 65 Mo. 265.

"A judgment is the sentence of the law, pronounced by a court of competent jurisdiction, as the result of proceedings instituted. It is a judicial act, and to be valid must be pronounced by the court, at a time and place appointed by law, and in the form it requires." Cooper v. American Cent. Ins. Co., 3 Colo. 318.

Proceedings Otherwise Are Void. —

"The holding of a court at a time or place other than that prescribed or authorized by law, and all proceedings thereunder, are *coram non jure* and void." Grimmer v. Askew, 48 Ark. 151. And see Dunn v. State, 2 Ark. 229; Brumley v. State, 20 Ark. 77; Ex p. Jones, 27 Ark. 349.

Mistake in Time of Holding Court. —

Where court is held at the accustomed time, but, owing to a change by statute enacted on the eve of the term, at a time not fixed by law, a judgment in a cause heard and decided is void, the proceedings being *coram non jure*. Goodsell v. Boynton, 2 Ill. 555, fol-

lowed by Galusha v. Butterfield, 3 Ill. 227.

Judgment at Special Term. — An order or judgment imports to itself verity so far as its recitals go; but this rule will not raise a presumption of regularity of a judgment of a special term of a court, where the record of the proceeding does not show that such special term was called according to law. Territory v. Delinquent Tax-List, (Arizona 1889) 21 Pac. Rep. 888.

Judgment Rendered at Temporary County Seat. — If it appears by record of the judgment that the court which pronounced it had jurisdiction of the person of the defendant and of the subject-matter of the suit, such judgment will not, in a collateral proceeding, be held void upon proof that it was rendered at a place other than the established seat of justice of the county, when it is shown that all the houses at the latter place had, at the rendition of the judgment, been destroyed by fire, and that the County Court had accepted as a temporary seat of justice the place at which the judgment was rendered. Herndon v. Hawkins, 65 Mo. 265.

Trial at Chambers by Consent. — Where a cause, of which the court has jurisdiction, is tried at chambers, by consent of the parties, the judgment rendered therein is not necessarily void, in the absolute sense, for want of trial in open court. Ex p. Bennett, 44 Cal. 84; Beach v. Beckwith, 13 Wis. 21. See also article CHAMBERS AND VACATION, vol. 4, p. 336.

The judgment is presumed, in the absence of anything to the contrary, to have been rendered in open court. Christian v. Lebeschultz, 18 S. Car. 602.

void constitutes a ground for its reversal.¹ So also it has been held that the mere fact that the court was held at a place other than that directed by law, will not of itself render the judgment a nullity.²

(b) **After Expiration of Term.** — Where regular terms are provided by law, judgments can properly be rendered only during such terms.³ A judgment rendered by the court after the time appointed by

1. *Smithson v. Dillon*, 16 Ind. 169. And see in general article **TERMS OF COURT**.

Innocent Mistake as to Time Fixed by Law. — In *Venable v. Curd*, 2 Head (Tenn.) 582, the time of the sitting of the court was changed by law, but such change was not known to the officers of the court, the act having been passed but a short time before the term of said court was to be held. The court was held by the presiding judge at the time before fixed by law, but at a different time from that required by the law then in force. A judgment was rendered by the court thus sitting, the justice of which was not controverted. It was held that the judgment was valid; that the judgments and decrees of the judge regularly in office are valid, if he holds his court under color of law, although the law may be repealed, or invalid. But see, *contra*, *Goodsell v. Boynton*, 2 Ill. 555, followed by *Galusha v. Butterfield*, 3 Ill. 227.

Time Changed During Term. — In the case of *Clare v. Clare*, 4 Greene (Iowa) 411, it was held that where the February term of the court was commenced under an act in force at the time, but a new act took effect on the third day of the term, changing the time of holding the court, a decree rendered at that term of court, after the new act took effect, was valid. In this case the court said: "The new law effected no change or abatement of any term commenced under the old law. A term legally commenced could be continued to its close in the absence of any law to the contrary. The new law did not repeal the old; it only changed the time of holding court. It could produce no such change till after it took effect."

2. *Le Grange v. Ward*, 11 Ohio 257. In this case the court said: "Suppose * * * that the judges were required by law to do all official business at the county-seat, it by no means follows that the acts of the court or of the associate judges are void. If a court have jurisdiction over the subject-mat-

ter, its solemn acts and adjudications, although erroneous, are not void."

Mistake in Place of Holding Court. — The judgments of the court are not rendered void by the holding of the court at a place not the county-seat, under an erroneous opinion as to where the county-seat is. *Robinson v. Moore*, 25 Ill. 135.

Presumption that Entire Term Was Held at Same Place. — The entire term of a court of record is in contemplation of law but one day, and therefore, when the caption of an indictment shows that on the first day of the term court was opened by the clerk at the time and place prescribed by law, and adjourned by him from day to day till the appearance of the judge, it will be presumed that it was held the balance of the term at the same place. *Smith v. State*, 9 Humph. (Tenn.) 9. See also article **TERMS OF COURT**.

3. *Arkansas*. — *Ex p. Osborn*, 24 Ark. 479; *Brumley v. State*, 20 Ark. 77.

California. — *Peabody v. Phelps*, 7 Cal. 53; *Smith v. Chichester*, 1 Cal. 409; *Wicks v. Ludwig*, 9 Cal. 175; *Coffinberry v. Horrill*, 5 Cal. 493; *Bates v. Gage*, 40 Cal. 183.

Colorado. — *Filley v. Cody*, 4 Colo. 109; *Cooper v. American Cent. Ins. Co.*, 3 Colo. 318.

Georgia. — *Stewart v. Stewart*, 89 Ga. 138.

Illinois. — *Bruce v. Doolittle*, 81 Ill. 103.

Iowa. — *Townsley v. Morehead*, 9 Iowa 565; *Sheppard v. Wilson*, 1 Morr. (Iowa) 448.

Kansas. — *Dodge v. Coffin*, 15 Kan. 277; *Earls v. Earls*, 27 Kan. 538.

Louisiana. — *Culver v. Leovy*, 21 La. Ann. 306; *State v. Judge*, 26 La. Ann. 119; *New Orleans v. Gauthreaux*, 32 La. Ann. 1128; *Hernandez v. James*, 23 La. Ann. 483.

Mississippi. — *Wilson v. Rodewald*, 61 Miss. 228.

Nevada. — *Champion v. Sessions*, 1 Nev. 478; *State v. Roberts*, 8 Nev. 239; *Dalton v. Libby*, 9 Nev. 192.

law for its adjournment is invalid.¹ Although this is a general rule, yet it is held in several states that a judgment in a civil action may be rendered by consent of the parties after expiration of the term. See also article TERMS OF COURT.²

(c) **In Vacation.**—The rendition of judgment during vacation, unless specially authorized by statute, is void.³ Decisions to

1. *California*.—Smith *v.* Chichester, 1 Cal. 409, Peabody *v.* Phelps, 7 Cal. 53; Wicks *v.* Ludwig, 9 Cal. 175; Norwood *v.* Kenfield, 34 Cal. 333.

Iowa.—Grable *v.* State, 2 Greene (Iowa) 559.

Nebraska.—Sharp *v.* Brown, 34 Neb. 406.

New York.—Orvis *v.* Curtiss, (C. Pl.) 28 N. Y. Supp. 728.

Oklahoma.—Irwin *v.* Irwin, 2 Okla. 180.

Texas.—Robbin *v.* Lewis, 1 Tex. App. Civ. Cas., § 346.

Conflicting Terms.—It is error to receive a verdict and render a judgment after the term of a court, as designated by law, has expired, and on a day fixed for a term of the court in another county. Grable *v.* State, 2 Greene (Iowa) 559.

See, however, State *v.* Knight, 19 Iowa 94, in which it is held that where a trial of a cause is commenced in a term with the *bona fide* expectation and belief that it will be concluded before the day shall arrive when the judge is directed but not imperatively required by law to hold court in another county, he may remain, conclude the trial of that cause, receive the verdict and pass judgment, even though this may happen to be done on a day or at a time when regularly he would be opening or holding court in another county.

Judgment Ordered During Term.—If a judgment be ordered and terms prescribed by the court during the term, it is a judgment rendered in term-time, although the entry thereof be not in fact prepared and transcribed on the journal until after the close of the term. Iliff *v.* Arnott, 31 Kan. 672.

Indefinite Adjournment by a Justice.—In *Wisconsin* it is held that where a justice of the peace adjourns a cause without specifying the hour of the day or the place to which it is adjourned, he loses jurisdiction and the judgment is void. Crandall *v.* Bacon, 20 Wis. 639.

Judgment by Justice After Statutory Time.—In *Nebraska*, it is held that

where a justice of the peace has jurisdiction of the subject-matter and the parties, the judgment rendered by him after expiration of the time fixed by statute must be corrected by a direct proceeding for that purpose, and will not be enjoined upon that ground alone. Gould *v.* Loughran, 19 Neb. 392.

2. *Molyneux v. Huey*, 81 N. Car. 106; *Hardin v. Ray*, 89 N. Car. 364; *Shackelford v. Miller*, 91 N. Car. 181; *Morrison v. Citizens Bank*, 27 La. Ann. 401.

Implied Assent.—Where a party to an action fails at the time to interpose an objection, he waives his right, which amounts to implied assent, and the judgment concludes him. *Molyneux v. Huey*, 81 N. Car. 106. See also *Hervey v. Edmunds*, 68 N. Car. 243.

Judgment Continued to Hear Argument.—In *Thorpe v. Corwin*, 20 N. J. L. 311, it is held that if a judgment be continued after verdict, to hear argument, and it be not given until the term succeeding that at which the verdict was rendered, the judgment must be entered and signed as of such succeeding term.

3. *California*.—*Coffinberry v. Horrill*, 5 Cal. 493; *Bates v. Gage*, 40 Cal. 183.

Colorado.—*Filley v. Cody*, 4 Colo. 109.

Illinois.—*Bruce v. Doolittle*, 81 Ill. 103; *Pond v. Simons*, (Ind. App. 1896) 45 N. E. Rep. 48, (adjudicating upon the validity of an Illinois judgment).

Indiana.—*Backer v. Eble*, 144 Ind. 287.

Kansas.—*Earls v. Earls*, 27 Kan. 538.

Louisiana.—*Hernandez v. James*, 23 La. Ann. 483.

Oklahoma.—*Irwin v. Irwin*, 2 Okla. 180.

Texas.—*Hodges v. Ward*, 1 Tex. 244.

West Virginia.—*Kinports v. Rawson*, 29 W. Va. 487.

"The judge of the court below had no power to render any judgment or decree in vacation. The statute provides for regular terms of the court to

this effect are based upon the proposition that the authority to hear and determine is vested by law in the *court*, sitting at stated times and places, and not in the judge.¹

Rendition in Vacation by Consent. — In states where the rendition of judgments in vacation is not authorized, judgments rendered at such a time have been held void, although the parties had expressly consented to such rendition.² In a number of states, however, it is provided that where the parties to the action consent, a judgment may be rendered during vacation.³ Where this

be held for the trial of causes, and it does not provide for the rendering of judgments or decrees at any time except during the term. It is, perhaps, true that a judgment or decree rendered during the term may be entered afterward; but that is not this case. The judgment or decree in this case was not rendered during the term of the court, but was actually rendered and entered in vacation." *Earls v. Earls*, 27 Kan. 538.

In Mississippi, under the Code of 1880, § 1707, authorizing cases to be taken under advisement, a judgment cannot be rendered in vacation, but must be given by the court upon the delivery of the judge's opinion in writing at the next term, after the submission of the case. *Wilson v. Rodewald*, 61 Miss. 228.

In Illinois the court, after hearing a chancery case in term time, may take it under advisement and announce the decree thereon to be rendered in vacation; but under the statute (Rev. Stat. 1874, c. 37, § 47), the decree may not become final until after the expiration of the next term (thereafter), and then only as modified and approved, if modified at all. *Hook v. Richeson*, 115 Ill. 431.

1. Reason for Rule. — "The distinction between the act of a judge and the act of a court is well understood. * * * In vacation the judge is not clothed with the character of a court. Hence, in this interval between the terms fixed or authorized by law, he has no power to hear and determine. In other words, in his character as judge, acting in vacation, he has no jurisdiction, which is but the power to hear and determine." *Filley v. Cody*, 4 Colo. 109.

2. Garlick v. Dunn, 42 Ala. 404; *Brumley v. State*, 20 Ark. 77; *Ex p. Osborn*, 24 Ark. 479; *Filley v. Cody*, 4 Colo. 109; *Galusha v. Butterfield*, 3 Ill. 227; *Hernandez v. James*, 23 La. Ann. 483.

Jurisdiction Not Conferred by Consent.

— "As the objection, then, to such a judgment is jurisdictional in its character, it is obvious that it cannot be removed by stipulation. It is a well settled principle that jurisdiction cannot be conferred by consent. There was no authority of law for the hearing and judgment in vacation, and the judgment was absolutely void. The agreement by the litigant parties that the judgment so rendered should be treated (contrary to the fact) as having been rendered and entered as of the trial term, is substantially, notwithstanding the terms in which it is couched, an attempt to confer by consent a jurisdiction which the law did not authorize or afford." *Filley v. Cody*, 4 Colo. 109. See generally article JURISDICTION, vol. 12, p. 114.

3. Alabama. — *King v. Green*, 2 Stew. (Ala.) 133.

Iowa. — *Hattenback v. Hoskins*, 12 Iowa 109; *O'Hagen v. O'Hagen*, 14 Iowa 264; *Townsley v. Morehead*, 9 Iowa 565.

Louisiana. — *New Orleans v. Gauthreaux*, 32 La. Ann. 1126; *Green v. Reagan*, 32 La. Ann. 974; *Rust v. Faust*, 15 La. Ann. 477.

North Carolina. — *Hervey v. Edmunds*, 68 N. Car. 243; *National Bank v. Gilmer*, 118 N. Car. 668; *Coates v. Wilkes*, 94 N. Car. 174; *Shackelford v. Miller*, 91 N. Car. 181.

Virginia. — *Morriss v. Virginia Ins. Co.*, 85 Va. 588.

"There can be no question as to the authority of the court to hear the cause and render the decree in vacation, the parties consenting thereto." *O'Hagen v. O'Hagen*, 14 Iowa 264.

In *Morrison v. Citizens' Bank*, 27 La. Ann. 401, the Supreme Court held: "As to the rendition and signature of the judgment out of term time, it was agreed that the judge who tried the case should take it under advisement and render judgment and sign it after

is the case a judgment so rendered by consent is not only binding upon the parties, but is valid even as to third persons in the absence of proof of fraud or collusion.¹

(d) **At Premature Term.** — Where a judgment is rendered in term time, but prematurely, as when it is rendered at the return term of the writ when the law provides that it shall not be rendered until a succeeding term, the decision is the act of a court, and therefore a judgment although an erroneous one.²

(3) **Disqualification of Judge.** — Where a judge is forbidden to act in a case in which he is interested, any judgment rendered by him in such case is void.³ According to the decisions in some

the court should have adjourned. The parties were competent to make the agreement, and the judgment having been rendered in conformity therewith is good. The cases of *Culver v. Leovy*, 21 La. Ann. 306, and *Hernandez v. James*, 23 La. Ann. 483, are not authority for the defendants. In neither of them had the judgment been rendered and signed in vacation by consent."

Entered as of Preceding or Ensuing Term. — A judgment thus rendered in vacation by consent is to be entered as of the preceding or the ensuing term. *King v. Green*, 2 Stew. (Ala.) 133; *Hervey v. Edmunds*, 68 N. Car. 243.

1. *New Orleans v. Gauthreaux*, 32 La. Ann. 1126.

2. See article **RENDITION AND ENTRY OF JUDGMENTS**.

3. *Alabama*. — *State v. Castleberry*, 23 Ala. 85; *Heydenfeldt v. Towns*, 27 Ala. 423.

California. — *People v. De La Guerra*, 24 Cal. 73.

Florida. — *Ochus v. Sheldon*, 12 Fla. 138.

Massachusetts. — *Cottle, Appellant*, 5 Pick. (Mass.) 483; *Coffin v. Cottle*, 9 Pick. (Mass.) 287; *Gay v. Minot*, 3 Cush. (Mass.) 352.

Michigan. — *Horton v. Howard*, 79 Mich. 642.

New York. — *Place v. Butternuts Woolen, etc., Mfg. Co.*, 28 Barb. (N. Y.) 503; *Washington Ins. Co. v. Price*, Hopk. (N. Y.) 1; *Converse v. McArthur*, 17 Barb. (N. Y.) 410; *Schoonmaker v. Clearwater*, 41 Barb. (N. Y.) 200; *Chambers v. Clearwater*, 1 Keyes (N. Y.) 310, 1 Abb. App. Dec. (N. Y.) 341.

Tennessee. — *Reams v. Kearns*, 5 Coldw. (Tenn.) 217.

Texas. — *Chambers v. Hodges*, 23 Tex. 104.

In *Sigourney v. Sibley*, 21 Pick. (Mass.) 101, a judge of probate had a valid claim against the estate of a deceased person, but had determined in his own mind not to enforce his claim. He exercised jurisdiction of the estate by granting letters of administration. It was held that he nevertheless was interested as a creditor of the estate, and that the grant of administration was therefore void for want of jurisdiction.

Judge Disqualified by Having Been of Counsel. — A judge who has been of counsel in a former suit is disqualified to render judgment in a second suit between the same parties, and a judgment so rendered is not conclusive. *Newcome v. Light*, 58 Tex. 141.

At Common Law such judgments were not void, but merely voidable. *Gorrill v. Whittier*, 3 N. H. 268.

Disqualified Judge Sitting Pro Forma to Constitute Quorum. — In *Walker v. Rogan*, 1 Wis. 597, a curious state of facts arose. It appeared on appeal that two out of three judges constituting the Supreme Court were disqualified by reason of having been of counsel in the case below. There was, therefore, no quorum competent to decide the appeal. The obvious consequence was that the cause must remain undetermined until the constituent members of the court should be changed or until the legislature should provide for the contingency, unless the parties might by stipulation avoid the difficulty. It was held that the sitting upon the bench of the two justices who had been of counsel, *pro forma*, to make a quorum merely, in pursuance of a stipulation to that effect, was neither improper, irregular, nor unlawful. See also *Reg. v. Justices*, 18 Q. B. 421, note, 83 E. C. L. 421, note, holding that the mere presence on the bench of

states, a judgment attempted to be rendered by a judge disqualified by reason of his relationship with one of the parties is void.¹ But where there is no absolute prohibition of his acting, the mere fact that the judge was interested or related to a party does not render the judgment void, although it may render it voidable or reversible.²

(4) *De Facto Judges*. — A judgment rendered by a judge *de facto* is valid and not liable to collateral attack.³

Rendition After Expiration of Judge's Term. — In accordance with the rule just stated, that a judgment rendered by a *de facto* judge is

an interested magistrate during part of the hearing of an appeal is not sufficient ground for setting aside an order of sessions made on such hearing, if it be expressly shown that he took no part in the hearing, came into court for a different purpose, and did not in any manner influence the decision. Mr. Freeman, in his work on Judgments (§ 147), questions the correctness of the decision in the Wisconsin case, on the ground that it is a general rule that if a judge is disqualified he shall not sit, and that a court in which he, with other judges, participates, is not properly constituted and its judgments ought not to stand; citing in support of this doctrine, *Oakley v. Aspinwall*, 3 N. Y. 547; *Gorrill v. Whittier*, 3 N. H. 268; *Hesketh v. Braddock*, 3 Burr. 1847; *Reg. v. Justices*, 6 Q. B. 753, 51 E. C. L. 753. In all of these cases last cited, however, the interested person participated in the decision. In *Reg. v. Justices*, 6 Q. B. 753, 51 E. C. L. 753, it was held that if any one of the magistrates hearing the case at sessions be interested in the result, the court is improperly constituted, and an order made in the case will be quashed on certiorari. It is no answer to the objection, that there was a majority in favor of the decision without reckoning the vote of the interested party, nor that the interested party withdrew before the decision, if he appears to have joined in discussing the matter with the other magistrates.

1. *Hall v. Thayer*, 105 Mass. 219; *Chambers v. Clearwater*, 1 Keyes (N. Y.) 310; *Oakley v. Aspinwall*, 3 N. Y. 547.

Invalid Even Though Parties Consent. — Where a judge is disqualified to sit in a cause by reason of consanguinity to one of the parties, he cannot sit even by consent of both the parties, and if he should do so the judgment rendered by him will be vacated. *Oakley*

v. Aspinwall, 3 N. Y. 547. See also *Chambers v. Clearwater*, 1 Keyes (N. Y.) 310.

2. *Alabama*. — *Trawick v. Trawick*, 67 Ala. 271; *Hayes v. Collier*, 47 Ala. 726; *Plowman v. Henderson*, 59 Ala. 559; *Heydenfeldt v. Towns*, 27 Ala. 423.

Arkansas. — *Hanly v. Adams*, 15 Ark. 232.

Georgia. — *Rogers v. Felker*, 77 Ga. 46.

Nevada. — *Frevert v. Swift*, 19 Nev. 363.

New Hampshire. — *Fowler v. Brooks*, 64 N. H. 423.

Parties May Consent to Judge's Acting.

— It is provided by statute in some states that the judge may act by the consent of the parties, even though he may be related to one of them. *Hine v. Hussey*, 45 Ala. 496; *Beall v. Sinquefeld*, 73 Ga. 48.

As to Manner of Taking Advantage of Disqualification of a judge, and also as to waiver of objection, see article JUDGES, *ante*, p. 780.

As to Disqualification of Judges Generally, see also article JUDGES, *ante*, p. 780.

3. *Burt v. Winona*, etc., R. Co., 31 Minn. 472; *Campbell v. Com.*, 96 Pa. St. 344; *Taylor v. Skrine*, 3 Brev. (S. Car.) 516; *Ostrander v. People*, 29 Hun (N. Y.) 513; *Blackburn v. State*, 3 Head (Tenn.) 690. See also title *De Facto Officers*, Am. and Eng. Encyc. of Law.

Rendition Before Commencement of Judge's Term. — Where a judge was properly elected, and, believing that his term commenced immediately, proceeded to hold court, it was held that although the term of his predecessor had not then expired, he was a judge *de facto*, and his judgments were as valid and binding as if he had been a judge *de jure*. *McCraw v. Williams*, 33 Gratt. (Va.) 510.

valid, it is held that a judgment rendered by a judge after the expiration of his term is valid.¹

b. PARTIES.—A second essential element implied in all the definitions of a judgment which have been given is that there must be parties whose rights are determined by the adjudication.² Thus the response of a court to a question asked by a governor or legislature under constitutional or statutory provisions is not a judgment.³ And an opinion so rendered is advisory only and does not determine the right of any one.⁴ In the case of *ex*

1. *Cary v. State*, 76 Ala. 78; *Carli v. Rhener*, 27 Minn. 292; *Sheehan's Case*, 122 Mass. 445; *Woodside v. Wagg*, 71 Me. 207; *Read v. Buffalo*, 4 Abb. App. Dec. (N. Y.) 22; *Threadgill v. Carolina Cent. R. Co.*, 73 N. Car. 178; *Gilliam v. Reddick*, 4 Ired. L. (N. Car.) 368; *Hamlin v. Kassafer*, 15 Oregon 456; *Cromer v. Boinest*, 27 S. Car. 436; *State v. Williams*, 5 Wis. 308.

Judgment rendered by a retiring superior judge on the first Monday of January next after election of his successor is not *coram non judice* and void for want of jurisdiction where it appears that both the outgoing and incoming judges were of the opinion that the term of the incoming judge did not commence until the following day, and the outgoing judge was in fact holding court on that day, and the superior judge-elect was before him as an attorney. Under such circumstances the outgoing judge was clearly a judge *de facto*. *Merced Bank v. Rosenthal*, 99 Cal. 39.

In *Cromer v. Boinest*, 27 S. Car. 436, the circuit judge, during his term of office, heard a case, and wrote, signed, and dated his decree, but did not file it until his term had expired, he and all parties concerned being at the time ignorant of that fact. A few days afterwards he was re-elected for another term, and at a special court subsequently convened he called this case for the purpose of resigning his decree as of that date, as he did in other cases, but upon objection of the plaintiff to his considering the case then, he did not change the date, but returned the decree to the clerk. It was held that this was a valid decree of the court, since the judge was a judge *de facto* when the decree was first filed.

Contra.—In *Mace v. O'Reilly*, 70 Cal. 231, it was held that where the term of office of the judge who tried the case expires after the order for judgment has been entered, but before the findings have been filed, no valid

judgment can be entered in the action without a new trial being had, unless agreed findings are filed or waived by both sides.

2. A judgment is the final determination by a court of justice of the right of the parties in an action. *Blaikie v. Griswold*, 10 Wis. 293. See also the definitions collated *supra*, II. 1. *Definition*.

"In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex*; the actor, or plaintiff, who complains of any injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain and apply the remedy. 3 Bl. Com. 25." 4 Minor's Institutes, pt. 1, p. 160.

3. **Advisory Judicial Opinions.**—See *In re* Chapter 6, Session Laws of 1890, 8 S. Dak. 274, wherein the Supreme Court replied to a request of the governor as to the construction of the above statute in the form of a simple letter, and not in the usual form of an opinion and judgment. In this case the court declined to answer on the ground that persons whose rights would be affected were not before it. See also *Reply of Judges*, 33 Conn. 586.

4. **Force and Effect of Advisory Opinions.**—In *Connecticut* the judges of the Supreme Court, in declining to answer a question as to the validity of proposed legislation, said: "Such action on our part would be clearly extrajudicial. It would be a case purely of advice and not of judgment. There are no parties before us, and nothing for us to adjudicate in any sense of the term. Our action being extrajudicial, and really rather our individual than official action, it cannot be of any binding character whatever. No judge of the Supreme or Superior Court, in any

parte proceedings there are parties upon only one side.¹ And in the case of proceedings *in rem* the parties on one side, at least, consist merely in the personification of a *res* or thing.² But the determinations in this class of cases are nevertheless judgments. The general rules relating to parties are treated in a succeeding section of this article.³

c. FORMAL PROCEEDINGS. — A third essential element of a judgment to be gathered from the definitions which have been given is that the decision must have been rendered in a proceeding before the court, and by this is meant some form of proceeding known to the law.⁴ Unless the legislature has provided another remedy than those which had previous existence, a party cannot adopt for himself a new mode before unknown to the law, by which he can obtain from a court of common law a binding judgment, which can be enforced, as by an execution duly issued upon a judgment recognized by the common law.⁵

case hereafter before him, would be bound by our opinion. We ourselves should not be bound by it. Being merely advice, it would be in contemplation of law, and probably in fact, of no more authority than the opinion of any other five judicious lawyers, except perhaps as we ourselves, if sitting upon any such case, might be inclined to adhere to an opinion which we had expressed." Reply of Judges, 33 Conn. 586. See also Matter of Senate Bill No. 65, 12 Colo. 469; *In re* Board of Sinking Fund Com'rs, (Ky. 1895) 32 S. W. Rep. 414.

It is usual for the court to decline to give an opinion in response to such questions when it might affect private rights or prejudice private interests. *In re* Fire, etc., Com'rs, 19 Colo. 482; *In re* Penitentiary Com'rs, 19 Colo. 409; *In re* Fire, etc., Com'rs, 21 Colo. 14.

"But Colorado has gone further than the states referred to, in this doubtful and perilous experiment, by adding two peculiar features, one of which, at least, seriously increases the danger. By the express words of the corresponding provisions in each of the other states the questions are limited to questions of law, and the justices, not the court, are to respond. These officers appear to be merely legal advisers, occupying much the same relation in this regard to their respective general assemblies as does the attorney-general of Colorado to the state legislature. Their written responses, when questioned, are not always published

in the reports. They are not pronounced by the court, and hence are not technically judicial decisions, nor do they necessarily constitute judicial precedents. In this state, on the other hand, the interrogatories are not expressly limited to questions of law, and it is the court, not the justices, that must answer. For obvious reasons, we hold that the intent could not have been to authorize questions of fact; but our responses must be reported as are other opinions, and they have all the force and effect of judicial precedents." Matter of Senate Bill No. 65, 12 Colo. 469, approved in *In re* Legislative Appropriations, 19 Colo. 58. Further as to advisory judicial opinions, see article *Constitutional Law*, 6 Am. and Eng. Encyc. of Law (2d ed.), p. 1065 *et seq.*

1. See the various titles in this work for cases where judgments are authorized to be rendered *ex parte*. See also article PARTIES.

2. See *infra*, XVIII. 1. c. *Judgments in Rem and in Personam*.

3. See *infra*, III. 4. *Parties*.

4. *Ex p.* Davis, 41 Me. 53. See also Matter of Cooper, 22 N. Y. 67.

5. **Established Modes of Procedure Must Be Followed.** — In *Ex p.* Davis, 41 Me. 58, the court said: "The remedy by forms of proceedings which are of themselves legal and in common use will fail, unless they are appropriate to the injury alleged. Much more certainly must they fail when they are entirely novel, and not provided for in any code of binding authority upon the

d. DEFINITIVENESS. — The fourth and last essential element of a judgment is that it must be definitive.¹ By this is meant that the decision itself must purport to decide finally the rights of the

courts. For the recovery of damages arising from the nonfulfilment of certain classes of promises the actions of debt and assumpsit may either be proper; but in other cases, where assumpsit is a suitable remedy, a suit in a plea of debt could not be maintained. An action of *resspass de bonis asportatis* when the injury designed to be proved was merely that of a breach of the close would be regarded an absurdity. An action of trover would be improper and ineffectual for a tortious invasion of the plaintiff's chattels without a conversion."

In this case a judge of the Supreme Court, who had been removed from office by the governor and legislature, memorialized the court to pass upon his right to sit as a member thereof. This the court refused to do, upon the ground that the proceeding by memorial was wholly unauthorized and unknown to the law. "When a case shall come before this tribunal, involving these important inquiries, whether between a judge of this court, attempted to be removed, and the state, or the branches of the government which made the attempt, under a writ of quo warranto or other process recognized by law which will confer jurisdiction, or in the more usual forms of law between private parties, where the removal of such an officer of the government is a matter at issue, it is believed that the court will, as it should do in the discharge of all its official duties, have a single eye to discern the right as it exists, and when seen satisfactorily, to make declaration thereof in its final judgment."

1. *Tombeckbee Bank v. Godbold*, 3 Stew. (Ala.) 240; *Hinson v. Wall*, 20 Ala. 298; *People v. Pirfenbrink*, 96 Ill. 68; *Whitwell v. Emory*, 3 Mich. 84; *Searles v. Lux*, 86 Iowa 61; *Ex p. Farrars*, 13 S. Car. 254; *McPherson v. Blacker*, 146 U. S. 1.

Illustrations. — Where a decree ascertained that certain moneys were in defendant's hands and applicable to a debt admitted in the pleadings, but made no statement nor directed payment, it was held not to constitute a final money decree, and as execution could not have issued thereon it is not

entitled to rank as a judgment in the administration of a decedent's estate. *Ex p. Farrars*, 13 S. Car. 254.

The mere investigation and computation of the amount due upon a claim presented against an estate is not a final judgment, from which an appeal may be taken. There is no judgment until an order is entered allowing such amount as a claim against the estate, and classifying the same. *Cohen v. Atkins*, 73 Mo. 163.

A written memorandum by the judge, of certain conclusions of fact, with a formal order for more evidence on certain points, is not a judgment. *Putnam v. Crombie*, 34 Barb. (N. Y.) 232.

For One of Two Alternatives. — In *Battell v. Lowery*, 46 Iowa 49, the Circuit Court found a garnishee to be liable for one of two amounts to be determined by a future contingency, and decreed that the plaintiff should recover against the garnishee one or the other of such amounts, according to the event of such contingency. This was held not to constitute a judgment. The court said: "A judgment has been said to be 'the conclusion of the law upon the facts found or admitted by the parties.' *Truett v. Legg*, 32 Md. 147. In the case at bar there was an alternative finding of facts. We are of opinion that such finding has no validity. The finding that one of two things must be true is not a finding that either is true. No one fact is found absolutely. Yet we think that that is necessary for the rendition of a judgment. If the finding is alternative, conditional, or contingent, the judgment necessarily partakes of the same character. Such a judgment would be an anomaly, and serve no useful purpose. It would not be available until it had become absolute. Further action of the court would be necessary. When that action was had there would be two judgments as in this case; first the alternative, conditional, or contingent judgment, and afterwards the absolute judgment. For both the clerk should be allowed to tax costs. It is sufficient to say that we think that there is no law for it. There is a sense, it is true, in which

parties upon the issue submitted, by specifically denying or granting the remedy sought by the action.¹ The converse of this proposition is also true, and therefore every definitive determination of the rights of the parties in a proceeding before a competent tribunal is a judgment.²

there may be a conditional judgment against a garnishee. Where the plaintiff has not obtained judgment against the principal debtor at the time the judgment is rendered against the garnishee it is necessarily conditional. But in such case the adjudication with respect to the indebtedness of the garnishee is absolute. No further adjudication against him is necessary or possible. In the present case the action of the court does not purport to be the rendering of a present judgment. The language is: 'It is decreed that in the event such litigation shall result, etc., the plaintiffs have and recover,' etc. The event was in the future. As the recovery was dependent on it, that was in the future. If there was a present judgment it was at most a judgment that there should be a judgment. But we cannot sanction such an anomalous proceeding."

1. *Alabama*. — *Hinson v. Wall*, 20 Ala. 298; *Tombeckbee Bank v. Godbold*, 3 Stew. (Ala.) 240.

Connecticut. — *Donalds v. Plumb*, 8 Conn. 458; *Sherwood v. Sherwood*, 32 Conn. 14.

Illinois. — *School Directors v. Newman*, 47 Ill. App. 364.

Iowa. — *Taylor v. Runyon*, 3 Iowa 474.

North Carolina. — *Bowen v. Lanier*, Term (N. Car.) 241; *Dunns v. Batchelor*, 3 Dev. & B. L. (N. Car.) 52.

South Carolina. — *Ex p. Farrars*, 13 S. Car. 254.

Judgment Subject to Unascertained Credit. — A judgment ought not to be entered on a bond for a sum of money "subject only to a credit for one hoghead of tobacco" without ascertaining its value; but the amount of such credit should in the first place be ascertained by a writ of inquiry, and judgment should be rendered for the balance. *Early v. Moore*, 4 Munf. (Va.) 262.

An entry, upon the rendition of a verdict in favor of the plaintiff, that "the defendant is entitled to a credit to be ascertained by M. F. and J. H. S., and the clerk is then authorized to enter a remittitur; judgment of the

court accordingly, and for costs, is not a judgment then rendered, because the balance for which judgment ought to be rendered had not been ascertained, but an agreement for a judgment to be rendered subsequently upon the ascertainment by the referees of the credit to which the defendant is entitled. *Dunns v. Batchelor*, 3 Dev. & B. L. (N. Car.) 52.

Other Illustrations. — "When we speak of a judgment under our law, in its broadest sense, we mean all final adjudications of civil actions. Code, § 1814. At common law this judgment is the sentence of the law, pronounced by the court, upon the matters contained in the record of an action before it. When we speak of a final judgment, therefore, we understand it to be the application of the law by the court to the particular case before it, and specifically granting or denying the remedy sought by the action." *Taylor v. Runyon*, 3 Iowa 474, citing 3 Bl. Com. 395.

In *Bowen v. Lanier*, Term (N. Car.) 241, it was held that an order of the County Court for the sale of lands after a constable's levy under a judgment of a justice of the peace, accompanied with the return of no chattels, is not a judgment, although it may have the quality of one in attaching a lien upon the land.

Mere Memorandum Insufficient. — In *Putnam v. Crombie*, 34 Barb. (N. Y.) 232, it was held that a judge who has merely made a memorandum of certain conclusions of fact has the right to change his opinion from that expressed in that memorandum. A successor cannot, therefore, treat it as a decision *pro tanto*, and proceed to decide the other points and give judgment on the whole.

2. *Johnson v. Gillett*, 52 Ill. 358; *Walker v. Walker*, 93 Iowa 643; *Eppright v. Kauffman*, 90 Mo. 25, holding that every definitive sentence or decision by which the merits of a case are determined, although it be not technically a judgment, and although the proceedings are not capable of being technically enrolled so as to constitute

An Order for a Judgment is not a judgment, because it does not purport of itself to determine the rights of the parties.¹ It is not enough that the judge concludes to render judgment, but he must declare it by an official act.²

Order for an Execution. — An order of a judge to the clerk to issue execution for a specific sum with costs has been held equivalent to a judgment.³

Interlocutory Judgments. — The definitions of a judgment as given

what is technically called a record, is a judgment. To the same effect see *Matter of Negus*, 10 Wend. (N. Y.) 44.

A Certificate from the Law Court, making a final disposition of a cause on its merits, is a final judgment of the court, although costs are to be taxed before execution can issue. "It ends the controversy, and determines with certainty which is the prevailing party." *Cooly v. Patterson*, 52 Me. 472.

1. *California*. — *Broder v. Conklin*, 98 Cal. 360.

Illinois. — *Edwards v. Evans*, 61 Ill. 492; *Faulk v. Kellums*, 54 Ill. 188.

Michigan. — *Whitwell v. Emory*, 3 Mich. 84.

North Dakota. — *Bode v. New England Invest. Co.*, 1 N. Dak. 121.

Illustrations. — A mere rule or order that the plaintiff recover of the defendant his costs, etc., on which no formal judgment is entered, is not a judgment. *Dean v. Williams*, 1 Chand. (Wis.) 22.

An order in these words, "ordered judgment in this action," etc., is not a judgment although signed by the judge, and will not justify the issuing of an execution. *Lincoln v. Cross*, 11 Wis. 91. See also *Dean v. Williams*, 1 Chand. (Wis.) 22; *Wheeler v. Scott*, 3 Wis. 362; *Rape v. Heaton*, 9 Wis. 328; *Remington v. Cummings*, 5 Wis. 138; *Wadsworth v. Willard*, 22 Wis. 238. And see *Potter v. Eaton*, 26 Wis. 382.

An entry upon verdict, "whereupon the court enters judgment upon the verdict," is not a judgment; it is a bare recognition of the finding of the jury. *Faulk v. Kellums*, 54 Ill. 188.

Incipitur. — The incipitur is not itself the judgment, but merely instructions for entering the judgment. *King v. Birch*, 2 G. & D. 513, 3 Q. B. 425, 43 E. C. L. 803.

Contra. — "We are of the opinion that the order of the judge of the Superior Court, in the case of *Keaton v. Vason*, allowing the plaintiff's attorney to

enter up judgment in favor of the plaintiff against the defendant, was itself a sufficient judgment. Construing this order with the pleadings in the case, it was a judgment for the plaintiff for the amount sued for in the declaration, and was sufficient for that purpose." *Tift v. Keaton*, 78 Ga. 237.

In *Young v. Dearborn*, 27 N. H. 324, the court held that an order of the Superior Court, after verdict, that judgment be rendered on the verdict, would be deemed the judgment so far as to give the attorney a lien for his fees and disbursements. In that case the court says that such an order is a final determination of the case, the end of all litigation and controversy as to the merits of the case; that the time when the judgment is entered up in form is immaterial; that time must ordinarily elapse between the making of such orders and the actual entry of judgment, but that the delay ought not to affect the rights of the parties or their attorneys; that, for the purpose of ascertaining their rights in this respect, the order of the court for judgment should be deemed the judgment itself. See also *Cooly v. Patterson*, 52 Me. 472.

2. *Seaman v. Ward*, 1 Hilt. (N. Y.) 52; *Whitwell v. Emory*, 3 Mich. 84. Generally, as to form of judgment, see *infra*, IV. *Form of Judgment*.

3. *Klink v. The Steamer Cusseta*, 30 Ga. 504; *Sears v. Sears*, 8 Ill. 47.

In *Hoehne v. Trugillo*, 1 Colo. 161, an entry in the following form: "Judgment given by default by order of the court," was held not a judgment, but inasmuch as the court below had awarded an execution, a writ of error to reverse such judgment was entertained, although the record of the judgment was defective. But see *Stark v. Billings*, 15 Fla. 318, where this entry in the minutes, "Verdict for plaintiff; let writ issue," was held not to constitute a judgment, and the execution thereon was declared void.

in the various codes of procedure all limit the term to final determinations.¹ Accordingly in code states there can be no such thing technically as a final judgment.² Under the code orders have taken the place of judgments formerly called interlocutory.³ But even under the common-law definitions of a judgment that have been given, it is doubtful if interlocutory judgments are included. The finality of the determination as to the rights of the parties enters as an express or implied element into them all.⁴ The phrase "interlocutory judgment" is a convenient one, however, to indicate the determination of steps or proceedings in an action preliminary to final judgment, and is not necessarily misleading. Standing alone, however, the term "judgment" would be intended to mean final judgment.⁵ This subject is treated more specifically in a succeeding section of this article.⁶

e. APPLICATION OF PRINCIPLES — ILLUSTRATIONS. — Applying the foregoing principles, it has been held that the dismissal of an action at plaintiff's costs,⁷ a judgment by confession,⁸ a decree allowing alimony,⁹ a record of the naturalization of an alien,¹⁰ a judgment on *sci. fa.* against special bail,¹¹ an allowance to a commissioner made by the chancellor,¹² and the disposition of a writ of habeas corpus¹³ constitute judgments.

1. See *supra*, II. i. *Definition*.

2. *Singer v. Heller*, 40 Wis. 544; *Sellers v. Union Lumbering Co.*, 36 Wis. 398; *Belmont v. Ponvert*, 3 Robt. (N. Y.) 696.

But interlocutory judgments seem to be recognized by the New York Code. See *Cambridge Valley Nat. Bank v. Lynch*, 76 N. Y. 514. See also *infra*, V. *Interlocutory and Final Judgments*.

3. *Sellers v. Union Lumbering Co.* 36 Wis. 398; *Belmont v. Ponvert*, 3 Robt. (N. Y.) 696; *Loring v. Illsley*, 1 Cal. 27.

An Interlocutory Order is not a judgment. *Webb v. Buckelew*, 82 N. Y. 555.

4. See *supra*, II. i. *Definition*.

A judgment *quod computet* is not a complete judgment until the account is stated. *Smith v. Eyles*, 2 Atk. 385. See also *McIntosh v. Wright*, Rich. Eq. Cas. (S. Car.) 385; *Ex p. Farrars*, 13 S. Car. 254.

Default. — "Judgment given by default by order of the court" is not a judgment where there is no statement that any sum of money was recovered by one party against the other, or that anything was considered and adjudged by the court. *Hoehne v. Trugillo*, 1 Colo. 161.

Where a default has been entered and no continuance ordered, the plaintiff may take judgment at any time, as

of the time when the default was entered, but a default is not a judgment. *Haynes v. Thom*, 28 N. H. 386; *Laighton v. Lord*, 29 N. H. 237. See generally article **DEFAULTS**, vol. 6, p. 1.

5. Notice of appeal specifying "the judgment" in the case sufficiently indicates that the appeal is from the final adjudication with reference to the party appealing. *Searles v. Lux*, 86 Iowa 61. See also *Denton v. Danbury*, 48 Conn. 368, where it was conceded, even in the dissenting opinion, that the word "judgment," when used in a statute without qualification, must be construed to mean the final or completed judgment.

6. See *infra*, V. *Interlocutory and Final Judgments*.

7. *Houston v. Clark*, 36 Kan. 412.

8. *Dullard v. Phelan*, 83 Iowa 471. See also *infra*, IX. *Judgments by Confession*; X. *Judgments by Agreement or Consent*.

9. *John v. John*, 12 Ohio Cir. Ct. Rep. 328; *Segear v. Segear*, 23 Neb. 306.

10. *State v. Hoeflinger*, 35 Wis. 393.

11. *Delano v. Jopling*, 1 Litt. (Ky.) 417.

12. *Jones v. Morehead*, 3 B. Mon. (Ky.) 386, holding that the allowance may be enforced by an award of execution.

13. *State v. Newell*, 13 Mont. 302,

Probate Orders and Judgments. — It has been held that the settlement of a conservator's account in a County Court, upon which execution cannot issue, is not a judgment.¹ So it has been held that the allowance of a claim against an estate in a Probate Court, on which execution cannot issue, is not a judgment.² But the contrary has also been distinctly held.³ An order of distribution, however, enforceable by execution, is a judgment.⁴

holding that a writ of habeas corpus is a special proceeding in the nature of an action, the disposition of the writ is a judgment, and the relator a plaintiff within the meaning of Code of Civil Procedure, section 495, allowing costs to the plaintiff upon a judgment in his favor in special proceedings in the nature of an action.

1. *Spalding v. Butts*, 5 Conn. 427. In this case it was contended that the record produced was insufficient as a judgment to support an action of debt, because *inter alia* it wanted the form of a judgment, there being only a finding that a certain sum was due from the conservator's estate; secondly, because it wanted proper parties, the proceeding being altogether *ex parte*. The court said: "If the County Court had jurisdiction, they rendered no judgment. The sentence of law pronounced by a court upon the matter contained in the record is a judgment of incontrovertible verity (3 Black. Com. 395), and must not be confounded with the adjustment of a conservator's account by the County Court, *ex parte* and summarily, without the usual form of adjudication, and not admitting of the issuing of an execution. The statute speaks of it as being the liquidation and adjustment of an account, and the only measure the court has authority to take, on finding a balance, is to authorize the sale of real estate." See also *Clark v. Clark*, 2 N. J. L. 104. But see *Garton v. Botts*, 73 Mo. 274, where it is said that the final settlement of a curator in the Probate Court is to all intents and purposes on the same footing as the judgment of any other court of competent jurisdiction.

2. *Smith v. Shawhan*, 37 Iowa 533; *Hays v. Horine*, 12 Iowa 61, holding that the order of a County Court allowing, approving, and ordering the payment of a claim against an estate is not a judgment in such sense as to deprive the plaintiff of his right to a vendor's lien.

"One of the necessary incidents of

every judgment is its means of enforcement by execution. An order of the County Court allowing a claim against an estate and ordering the payment of such claim cannot be thus enforced. The County Court has no power to issue execution upon such an order. We are of opinion that the filing and allowance of the plaintiff's claim in the County Court did not constitute a 'judgment,' in the sense in which that term is used in the clause of the statute of limitations which we have been considering, and consequently that the claim of the plaintiff is not barred as a judgment of a court of record." *Smith v. Shawhan*, 37 Iowa 533.

3. *Propst v. Meadows*, 13 Ill. 157; *May v. People*, 72 Ill. 343; *Mitchell v. Mayo*, 16 Ill. 83; *Wilks v. Murphy*, 19 Mo. App. 221.

The allowance by the County Court of a claim against an estate is to all intents and purposes a judgment of record, except that an execution cannot be issued thereon. *Jameson v. Barber*, 56 Wis. 630.

"It is true that no execution could be issued upon the judgment, but in this respect it is like a judgment of the Circuit Court against an administrator. Upon such a judgment as this no execution is awarded, but the judgment is ordered to be paid in the due course of administration. The effect of the order, adjudication, or judgment is precisely the same in the one case as in the other." *Mitchell v. Mayo*, 16 Ill. 83.

Rejection of Claim Constitutes a Judgment. — Where an administrator in his accounts makes a claim against the estate of his decedent, an order that "having taken the matter under advisement the court this day, after due deliberation, rejects the claim," is a judgment. *Johnson v. Gillett*, 52 Ill. 358.

4. *Whaley v. Cape*, 4 Mo. 233, holding that an amount due under an order of distribution may be set off as a judgment in an action by the executor or administrator against the distributees.

3. General Nature — *a.* THE DETERMINATION OF A PROCEEDING. — A judgment is neither an action nor a special proceeding, but is the determination of an action or proceeding.¹

b. SENTENCE OF LAW, NOT OF COURT. — A judgment should be a simple sentence of the law upon the ultimate facts admitted by the pleadings or proved by the evidence.² It is not a resolve or decree of the court, but the sentence of the law pronounced by the court upon the action or question before it.³

c. REASONS FOR JUDGMENT. — Although it has been said that every court should state on the record the legal grounds for its judgment,⁴ the reasons assigned by the court for the judgment rendered do not constitute a part of the judgment.⁵ Therefore a judgment or decree of the court controls the written opinion, and if they are at variance, the former prevails and determines the rights of the parties.⁶ So, also, if the judgment given be

Such a judgment is entitled to full faith and credit under Const. U. S., art. 4, § 1. *Fitzsimmons v. Johnson*, 90 Tenn. 416.

1. *Gray v. Iliff*, 30 Iowa 195. See also *supra*, II. 1. *Definition*.

2. *Gregory v. Nelson*, 41 Cal. 278.

3. *Baker v. State*, 3 Ark. 491; *Zeigler v. Vance*, 3 Iowa 528.

The judgment is the conclusion of the law from the facts which the court will draw and pronounce, though not prayed in the pleadings. *Kerley v. Hume*, 3 T. B. Mon. (Ky.) 183.

"When we speak of a judgment under our law, in its broadest sense, we mean all final adjudications of civil actions. Code, § 1814. At common law this judgment is the sentence of the law, pronounced by the court, upon the matters contained in the record of an action before it. When we speak of a final judgment, therefore, we understand it to be the application of the law by the court to the particular case before it, and specifically granting or denying the remedy sought by the action. 3 Black. Com. 395. And the same author speaks of the judgment as 'the remedy prescribed by the law for the redress of injuries, and the suit or action is the vehicle or means of administering it. What that remedy may be is indeed the result of deliberation and study to point out, and therefore the style of the judgment is not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but "it is considered," — *consideratum est per curiam* — that the plaintiff do recover his damages, his debt, his possession, and the like, which

implies that this judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.' In general, the nature of the judgment is intimated or stated by the court, and the clerk enters it on the minutes in due form." *Taylor v. Runyon*, 3 Iowa 474. See also *infra*, IV. *Form of Judgment*.

4. *Preston v. Auditor*, 1 Call (Va.) 471.

5. *Burke v. Table Mountain Water Co.*, 12 Cal. 403; *Sharkey v. Evans*, 46 Ind. 472; *Carr v. Carr*, 6 Ind. App. 377; *Butt v. Herndon*, 36 Kan. 370; *Davidson v. Carroll*, 23 La. Ann. 108; *Ex p. Dial*, 14 S. Car. 586; *Sheffield v. Goff*, 65 Tex. 354; *Watkins v. Junker*, 4 Tex. Civ. App. 629.

The point decided is the thing fixed by the judgment. *Burke v. Table Mountain Water Co.*, 12 Cal. 403.

The argument and process of reasoning, or the method by which the court reaches a certain conclusion, is no part of the judgment, and does not constitute a precedent, *Carr v. Carr*, 6 Ind. App. 377; *Ex p. Dial*, 14 S. Car. 586; and therefore the judge of a lower court is not bound by any expressions used by the appellate court beyond the decree. *Davidson v. Carroll*, 23 La. Ann. 108.

A party is bound by the judgments but not by the logic of the courts. *Sheffield v. Goff*, 65 Tex. 354.

6. *Goodenow v. Litchfield*, 59 Iowa 226.

The decree alone indicates the decision; and where, in an action for an account of tutorship, the decree, without

correct, it is immaterial whether the reasons adduced for giving such a judgment are correct.¹

In Louisiana, by constitutional provision, the court is required to state its reasons for the judgment rendered, and if this is not done the judgment must be reversed.²

d. ENTIRETY OF JUDGMENT — (1) *Statement of Rule.* — The cases are very numerous in which it is declared that a judgment is an entirety.³ By this is meant that a judgment cannot be bad in part and good in part, but must stand or fall as a whole.⁴

allowing or disallowing any particular items, simply remands the cause for a new trial, with leave to defendant to amend his pleadings in certain respects, the whole account will be open, whatever views in remanding the case may have been expressed on some of the items. *Fuselier v. Babineau*, 14 La. Ann. 777.

1. *Woodworth v. Raymond*, 51 Conn. 77; *Moreland v. Stephens*, 64 Ga. 289; *Lester v. Johnson*, 64 Ga. 295; *Wilkins v. Van Winkle*, 78 Ga. 557; *Seeley v. Albrecht*, 41 Mich. 525; *Botsford v. Simmons*, 32 Mich. 352; *Denslow v. Dodendorf*, 47 Neb. 328; *Leake v. Gallogly*, 34 Neb. 859; *Scott v. Haines*, 4 Nev. 426; *Stevens v. North Pennsylvania Coal Co.*, 35 Pa. St. 265; *Smalls v. Benevolent Soc.*, 23 S. Car. 602; *Clark v. Schipman*, 24 S. Car. 597; *Swift v. Trotti*, 52 Tex. 498.

It is not ground for an appellate court to reverse a correct judgment simply because the judge below gave wrong reasons for such judgment. *Seyburn v. Deyris*, 25 La. Ann. 486, and cases cited *supra*, this note.

2. *Block v. McGuire*, 18 La. Ann. 417; *Jacobs v. Levy*, 12 La. Ann. 410; *Police Jury v. Bozman*, 11 La. Ann. 94.

No statement of the judge's reasons are necessary in an order of seizure and sale, which for some purposes and to a certain extent has the effect of a judgment. *Garrish v. Hyman*, 29 La. Ann. 28.

Oral or Written Reasons. — Whenever practicable the reasons upon which a judgment is founded should be reduced to writing, but if orally assigned they will be sufficient. *Beard v. Simon*, 18 La. Ann. 271.

Sufficiency of Reason. — A reason for judgment in these words, "when the court, considering the law and the evidence," it is ordered, etc., is as much a reason for rendering judgment in favor of plaintiff as for the defendant, and is not a sufficient compliance with the

constitutional requirement. *Dorr v. Jouet*, 20 La. Ann. 27; *Emanuel v. Hatcher*, 19 La. Ann. 525; *Gallot v. McCluskey*, 18 La. Ann. 260; *Police Jury v. Bozman*, 11 La. Ann. 94.

It is a sufficient compliance with the constitution for the judge to state in the decree that "after hearing evidence and argument of counsel, for the reasons assigned in open court, it is adjudged" and decreed, etc. *Jacobs v. Levy*, 12 La. Ann. 410.

The absence of exception or answer is a sufficient reason for judgment, *Hemken v. Farmer*, 3 Rob. (La.) 156; and the phrase, "by reason of the law and the evidence," necessarily refers to the law and evidence adduced by plaintiff. *Powell v. O'Neil*, 24 La. Ann. 523.

3. See *infra*, III. 4. *Parties.*

A Judgment Is an Entire Cause of Action, and cannot be split so as to permit the maintenance of several suits thereon. *Hopkins v. Stockdale*, 117 Pa. St. 365; *Pinney v. Barnes*, 17 Conn. 420; *Camp v. Morgan*, 21 Ill. 255. And see generally, *infra*, XVIII. *Actions on Judgments.*

A Judgment for Debt and Costs is an entirety. *Waterman v. Curtis*, 30 Conn. 138; *Camp v. Morgan*, 21 Ill. 255.

A judgment without relief is an entirety comprising both the debt and the costs. *Martindale v. Tibbetts*, 16 Ind. 200. But see *Dixon v. Pierce*, 1 Root (Conn.) 138.

4. *Void in Part, Void in Toto.* — *Taaffe v. Josephson*, 7 Cal. 352; *Barth v. State*, 18 Conn. 442.

Where one portion of a judgment under which the prisoner is held is without the jurisdiction of the court which rendered the judgment, the whole is void and the prisoner must be discharged on habeas corpus. *Ex p. Kelly*, 65 Cal. 154.

A judgment cannot be void in part and good in part; and where fraud attaches to a part only the whole is a

Separable and Inseparable Error.—This rule applies, however, only where the error is an inseparable part of the judgment.¹ Where the error is severable, as where the judgment consists of several independent parts, it does not vitiate the whole judgment, but it may be reversed or vacated as to the erroneous part and sustained as to the remainder.² Thus where a judgment declares a personal liability, and also enforces a lien upon or adjudges the recovery of certain property, the judgment may be good as a personal judgment although bad in so far as it affects the property.³ Or it may be good as to the property involved and void as a personal judgment.⁴

nullity; *Hutchins v. Lockett*, 39 Tex. 165.

If entire judgment be composed of several elements and one or more of them is illegal, the whole judgment is void as against creditors. *Taaffe v. Josephson*, 7 Cal. 352.

1. In *Van Bokkelen v. Ingersoll*, 5 Wend. (N. Y.) 315, it was held, in a case where the special verdict stated the several items of damage and assessed the whole at a gross sum, for which sum the court below gave judgment, that the whole judgment must be reversed for one erroneous item. This was upon the declared principle that when distinct judgments are given by the court below, *e. g.*, one for damages and one for costs, one may be reversed and the other affirmed; but where the judgment is entire there must be a total affirmance or reversal. See *Parker v. Van Houten*, 7 Wend. (N. Y.) 145; *Smith v. Jansen*, 8 Johns. (N. Y.) 111; *Bradshaw v. Callaghan*, 8 Johns. (N. Y.) 558; *Anonymous*, 12 Johns. (N. Y.) 340; *Richards v. Walton*, 12 Johns. (N. Y.) 434; *Bronson v. Mann*, 13 Johns. (N. Y.) 460; *Arnold v. Sandford*, 14 Johns. (N. Y.) 417. See also *infra*, XIV. *Judgments on Appeal*.

In *Barth v. State*, 18 Conn. 442, the defendant was sentenced to pay a fine of thirty dollars, "which is to be paid to the treasury of New Haven county," whereas by law the fine belonged to the town of New Haven. It was held that the judgment might be construed as directing the payment to be made into the county treasury, not by the defendant, but by the officer to whom he should pay it, and was therefore valid; since thus considered it was divisible, and the clause giving this direction might be directed as surplusage and void, leaving the remainder to stand in full force, the direction as to payment

not being a requisite part of the judgment, a disposal of the fine being fixed by statute.

2. *Tyler v. Waddingham*, 58 Conn. 375; *Selleck v. Rusco*, 46 Conn. 370; *Taff v. State*, 39 Conn. 84; *Dixon v. Pierce*, 1 Root (Conn.) 138; *Totten v. Cooke*, 2 Metc. (Ky.) 280; *Eames v. Stevens*, 26 N. H. 117; *Edes v. Boardman*, 58 N. H. 580; *Satterwhite v. Carson*, 3 Ired. L. (N. Car.) 549; *Moore v. Ingram*, 91 N. Car. 376.

In all legal proceedings which are good in part and bad in part, the law corrects that which is erroneous and preserves that which is good whenever practicable. *Per Doe, C. J.*, in *Edes v. Boardman*, 58 N. H. 580.

Where Two Causes of Action Are Set Out in the same petition, and a trial is had and separate verdict and judgment on each, and one is found on appeal to be correct and the other erroneous, that which is right will be affirmed and the other reversed. *Totten v. Cooke*, 2 Metc. (Ky.) 280.

3. **A Judgment Foreclosing a Mortgage** may be void for failure to describe the property, without affecting the validity of the judgment for the debt. *Seguin v. Maverick*, 24 Tex. 526.

A Judgment by Default, directing the sale of a tract of land in general terms without describing it, is void to that extent, but this does not impair a money judgment rendered in the same action, nor is it an error of which the defendant can complain. *Gear v. Hart*, 31 Tex. 135.

Where a complaint in an action for a balance due for cutting logs does not ask for the statutory lien, a judgment by default for the amount claimed and also declaring a lien is good as a personal judgment, though void as to the part declaring a lien. *McKenzie v. Peck*, 74 Wis. 208.

4. *Barelli v. Wagner*, 5 Tex. Civ.

(2) *Joint Parties*. — The doctrine of the entirety of judgments is most frequently invoked in cases where the judgment is rendered for or against joint parties, and its validity as to all is assailed upon the ground of its invalidity as to one or more. The cases are very numerous and are in irreconcilable conflict. They will be found collated in a succeeding section of this article, where judgments as affected by joinder of parties are considered.¹

e. DECISIONS AND FINDINGS DISTINGUISHED FROM JUDGMENTS. — The decisions or findings of a court,² referee,³ or committee⁴ do not constitute a judgment, but merely form the basis upon which the judgment is subsequently to be rendered.⁵ The decision or findings is the determination made by a court upon a trial of issues without a jury, and corresponds to the report of a referee, or the verdict of a jury.⁶

f. RULES AND ORDERS DISTINGUISHED FROM JUDGMENTS. — The term "rule" is the common-law name for what is known under the codes as an "order."⁷ An order is a decision made during the

App. 445, wherein it was held that a personal judgment in attachment against a nonresident who was not served was void, but that this did not invalidate the judgment in so far as the attached property was concerned.

In *Shean v. Cunningham*, 6 Bush (Ky.) 126, it was held that in a suit for the recovery of land and damages for its detention, a judgment for the land and for rents was as distinct as if separate judgments had been rendered in different suits; the one is enforced by a *hab. fa.*, the other by a *fi. fa.* The judgment for rents depends on the recovery of the land; but if the judgment for the land is right, an error as to the rents alone is no reason for disturbing the judgment for the land.

1. See *infra*, III. 4. *Parties*.

2. *Gomer v. Chaffe*, 5 Colo. 383.

"The findings of the court amount to nothing more than an order for judgment, and are not in themselves the judgment of the court." *Andrews v. Welch*, 47 Wis. 134.

3. "The cause was tried by a referee. His 'decision,' as it is styled by him, is, after giving the style of the cause, as follows: 'I find for the plaintiff, and assess his damages at eight hundred and nine dollars and eighty-eight cents (\$809.88). Aug. 3, 1888.' This is not a final judgment, it is simply the referee's finding. The statute (McClell. Dig., §§ 4, 5, p. 858) contemplates both findings and a judgment in cases at law, and findings and decree in cases in equity. The term 'decis-

sion' is used in the statute at least once as convertible with that of 'findings.'" *Demens v. Poyntz*, 25 Fla. 654.

4. *Cothren v. Olmsted*, 57 Conn. 329.

5. In bastardy proceedings an appeal cannot be taken from the following before a justice: "The court * * * does now find the defendant not guilty." There was no judgment on the finding. "In the case before us there was no judgment. There was a finding; but a finding is not a judgment any more than is the verdict of a jury. As well might an appeal be taken from a verdict as from a finding without judgment. The case was not disposed of before the justice when the appeal was taken, judgment being necessary to a final disposition." *State v. Brown*, 44 Ind. 329.

The findings of a court are no more a judgment than the verdict of a jury. *Alvord v. McGaughey*, 5 Colo. 244.

6. See articles *DECISIONS*, vol. 5, p. 936; and *FINDINGS OF COURT*, vol. 8, p. 931.

7. "Rule" and "order" are practically synonymous. *Craft Refrigerating Mach. Co. v. Quinpiac Brewing Co.*, 63 Conn. 570.

Judgment Nisi. — "What is called a judgment *nisi* is nothing more than a rule to show cause why judgment should not be rendered." *Per Pennington, J.*, in *Young v. M'Pherson*, 3 N. J. L. 455.

Rule Absolute Distinguished from Judgment. — In *Wakefield v. Moore*, 65 Ga. 268, the court, in discussing the nature

progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment; ¹ while, as has been seen, a judgment is the determination of the court upon the issue presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject-matter in litigation, and puts an end to the suit.² According to these principles, a

of a rule absolute or summary judgment against one of its officers, said: "Such judgments are not final and conclusive, as are those rendered between parties litigant; they are but the dealings of the court with one of its defaulting officers, and for whose neglect of duty is ordered to pay over to the plaintiff in *fi. fa.* the amount of his actual injury. This being the character of the proceeding, the court may review and annul its order absolute against a sheriff at the same or at a subsequent term upon motion, when it is made to appear that he was not in contempt. This principle was ruled as early as the 2d Georgia Reports, and may be found in the case of *Chipman v. Barron*, 2 Ga. 220. It was reaffirmed in the case of *Davis v. Dempsey*, 15 Ga. 182, where it was held that there was no question but that the court had power to grant the motion. And so, too, in *Holcombe v. Dupree*, 50 Ga. 335. it was held that orders absolute do not operate as estoppels, but the court, upon a proper case made, will go behind the order and look into the truth of the case, and in its discretion re-examine the same."

1. *Per Bennett, J.*, in *Loring v. Illsley*, 1 Cal. 28. "The question then is, what is an order? It may be defined to be the judgment or conclusion of the court upon any motion or proceeding. It means cases where a court or judge grants affirmative relief, and cases where relief is denied." *Gilman v. Contra Costa County*, 8 Cal. 52.

See generally article ORDERS.

Under the code, an order is defined as the direction of a court or judge made or entered in writing, and not included in a judgment. See, for example, N. Y. Code of Procedure, § 400.

2. *Loring v. Illsley*, 1 Cal. 28. See also *supra*, II. 1. *Definition*; and *supra*, II. 2. *d. Definitiveness*.

"The distinguishing characteristic of a judgment is that it is final, while that of an order, when it relates to proceedings in an action, is that it is interlocutory." *Nolton v. Western R. Corp.*, 10 How. Pr. (N. Y. Supreme Ct.) 97.

The word "rule" may be construed to mean "judgment" where that meaning is clear from the context, as where the defendant is ruled to show cause why an award of arbitrators should not be made a rule of court. *Jacobs v. Moffatt*, 3 Blackf. (Ind.) 398.

"Our statute distinguishes between 'judgments' and 'orders.' The latter is defined to be 'every direction of a court or judge, made or entered in writing, and not included in a judgment' (Rev. Stat., § 3427); hence the statute of limitations must be interpreted in the light of this distinction, and the term 'judgment,' as there used, must be held to mean not 'orders' made by a court and entered in writing, as orders by the County Court allowing and approving claims against the estate of a deceased person and the like, but final judgments adjudicating the rights of parties in actions pending in the courts." *Smith v. Shawhan*, 37 Iowa 533.

The Words "Rule" or "Order" in the Code in no case mean a judgment, and therefore a motion to strike out the answer in the case on the ground of frivolousness, "and for such other or further order as the said justice shall deem proper to grant," does not authorize a judgment on account of the frivolousness of the answer. *Darrow v. Miller*, 5 How. Pr. (N. Y. Supreme Ct.) 247.

Order of Reversal. — An order of the general term of the Marine Court, reversing an order of the special term of that court denying a motion for a perpetual stay of execution on the judgment in the action and granting the

decision sustaining or overruling a demurrer is not a judgment under the code, but is an order.¹ But a decision of a cause upon

motion, is an order and not a judgment. *Bamberg v. Stern*, 76 N. Y. 555, *citing* *Monroe v. Upton*, 50 N. Y. 593.

Payment of Money into Court to Await Further Order. — In *Gray v. Cook*, 24 How. Pr. (N. Y. Super. Ct.) 432, it was insisted that a decision in the case was an order and not a judgment, because it required the defendant to pay certain moneys into court to await the further order of the court, and to be distributed according to law. But *Bosworth, C. J.*, held the decision to be a judgment. "It is the final determination of the rights of the parties in this action. (Code, § 245.) No questions, as between them, are reserved for further consideration or left open. * * * The decision made allows to the defendant his commissions on the moneys received, and he has no right in reference to the moneys to be paid, nor any duty to perform, except to pay the amount for which judgment is ordered. There is nothing in the allegation or proofs before me suggesting any matter affecting these moneys which can become a subject of litigation between these parties. The judgment itself neither in terms nor by the import of its provisions suggests the existence of any matter of further litigation. I therefore regard it a judgment within the meaning of the code."

An Order on a Rule Is a Judgment. — *Mauldin v. Gossett*, 15 S. Car. 565

Reference to Take an Account. — When an action is tried before the court, without a jury, and a decision is made disposing of the case, except that a reference is directed to take an account, and an order is entered in conformity to the decision, an appeal from such order, to review decisions made at the trial, will be dismissed; they can only be reviewed on an appeal from the judgment, which appeal cannot be brought until the account has been taken, and all questions arising upon it have been disposed of at special term. Until then the order entered on the final decision made after the trial does not become a judgment, within the meaning of that word as defined by the code. The "judgment" from which an appeal may be taken to the general term means the same thing as a judgment from which an appeal may be taken to the court of appeals. *Lawrence v.*

Farmers' L. & T. Co., 15 How. Pr. (N. Y. Super. Ct.) 57.

1. Decision on Demurrer Is an Order. — *Phipps v. Van Cott*, 4 Abb. Pr. (N. Y. Supreme Ct.) 90; *Ford v. David*, 3 Abb. Pr. (N. Y. Super. Ct.) 385; *Nolton v. Western R. Corp.*, 10 How. Pr. (N. Y. Supreme Ct.) 97; *Cook v. Pomeroy*, 10 How. Pr. (N. Y. Supreme Ct.) 105; *Bauman v. New York Cent. R. Co.*, 10 How. Pr. (N. Y. Supreme Ct.) 218; *Elwell v. Johnson*, 74 N. Y. 80; *Bode v. New England Invest. Co.*, 1 N. Dak. 121, holding that an order sustaining a demurrer and dismissing the action with cost unless the plaintiff should amend within the time limited was not a final judgment *in presenti*, but an order for a judgment to be entered *in futuro* upon a contingency. *Gage v. Eich*, 56 Ill. 297.

Where a demurrer to part only of a pleading is sustained or overruled, the order is clearly not a judgment. *Drummond v. Husson*, 1 Duer (N. Y.) 633. See also *Johnson v. Union Switch, etc., Co.*, 125 N. Y. 720, 35 N. Y. St. Rep. 282.

In *Nolton v. Western R. Corp.*, 10 How. Pr. (N. Y. Supreme Ct.) 97, the court, speaking of an order sustaining or overruling a demurrer, said: "The most that can be said of such a decision is that it is a conditional judgment. It is analogous to the old rule for judgment interlocutory. In my judgment, therefore, it is no very great misnomer to call such a decision an order."

A decision of the court, sustaining or overruling a demurrer, is an order, not an interlocutory judgment. *Cambridge Valley Nat. Bank v. Lynch*, 76 N. Y. 514.

Contrary View. — In *Bentley v. Jones*, 4 How. Pr. (N. Y. Supreme Ct.) 335, it was held that a decision upon a demurrer was a judgment; the court reasoned thus: "In the language of the code the argument of the demurrer was a trial. A trial is the judicial examination of issues, whether they be of law or of fact (§§ 252, 255). And issues of law must be first tried unless the court otherwise direct (§ 251). The adjudication on the demurrer was final, and after the expiration of the time for amending, if no amendment was made it would authorize the entry and perfecting of judgment. The dis-

the pleadings because of frivolousness is a judgment and not an order.¹

g. NATURE OF RELIEF AWARDED. — With few exceptions,² specific or equitable relief could not be recovered in an action at common law,³ but the sole remedy the court was competent to give was a judgment for money damages as a recompense for injury suffered.⁴

h. JUDGMENTS AS CONTRACTS — (1) *In General.* — Under the old classification of all obligations into two classes, viz., those arising *ex contractu* and those arising *ex delicto*, and the further division of obligations *ex contractu* into simple contracts, contracts under seal or specialties, and contracts of record, it has been usual to classify judgment obligations as contracts of record.⁵

inction clearly made in the code is this: An order is the decision of a motion. A judgment is the decision of a trial. It is plain, therefore, that the decision in question was a judgment and not an order, and that an appeal from it as an order could not be made." See also *Lewis v. Acker*, 8 How. Pr. (N. Y. Supreme Ct.) 414; *King v. Stafford*, 5 How. Pr. (N. Y. Supreme Ct.) 30. This reasoning does not seem very satisfactory, and the weight of authority is against it. See cases cited *supra*, this note.

1. Judgment on Pleadings for Frivolousness. — "Where there is a direction for a judgment by reason of the frivolousness of a pleading, there is a final determination of the rights of the parties within the meaning of the code, and it is nowhere reduced to the class of orders. This court was therefore right in characterizing the determination, in such cases, as a judgment, and not an order. *Bruce v. Pinckney*, 8 How. Pr. (N. Y. Supreme Ct.) 397." *Phipps v. Van Cott*, 4 Abb., Pr. (N. Y. Supreme Ct.) 90.

2. Specific Relief at Law. — Replevin, detinue, ejectment, common-law real actions, proceedings to recover dower, abatement of nuisances, quo warranto, mandamus, prohibition, habeas corpus, estrepment, and the obsolete *brevia anticipantia* are instances of specific relief at law.

3. Thus in an action for breach of a contract to deliver a certain number of shares of corporate stock, a court of law can only award damages for the failure to deliver such stock, and cannot render a judgment that the defendant shall deliver to plaintiff so many shares of stock. *Orange, etc., R. Co. v. Fulvey*, 17 Gratt. (Va.) 366.

In an action on the case for flooding plaintiff's land with water from defendant's millpond, it is not competent for the court to grant an order for the survey of the pond and adjacent lands, and that the defendant shall draw off the water from his pond to facilitate such survey. *Speer v. Duval*, 5 Rich. L. (S. Car.) 13.

Where a note is filed in set-off, the judgment cannot require it to be delivered up to the plaintiff. *Baird v. Foreman*, 3 N. J. L. 116.

Judgment at Law Adjusting Equities. — A judgment in an action at law, pure and simple, which undertakes to adjust the equities of the creditors of the judgment debtor by postponing the payment of the judgment to their claims, is erroneous. *Wilson v. Benedict*, 90 Mo. 208.

In an action under modern codes of procedure either legal or equitable relief may be granted, as forms of action and the distinction between actions at law and suits in equity are generally abolished. *Kirkwood v. Hastings First Nat. Bank*, 40 Neb. 484. See also article ACTIONS, vol. 1, p. 108.

4. *Hale on Damages*, p. 2.

5. *M'Guire v. Gallagher*, 2 Sandf. (N. Y.) 402; *Gebhard v. Garnier*, 12 Bush (Ky.) 324; *Henry v. Henry*, 11 Ind. 236.

Judgment Not a Specialty. — *Tyler v. Winslow*, 15 Ohio St. 364 (within the statute of limitations); *Kimball v. Whitney*, 15 Ind. 280. But see *Burnes v. Simpson*, 9 Kan. 658; and *Morse v. Toppan*, 3 Gray (Mass.) 411, wherein the court said: "A judgment is in the nature of a contract; it is a specialty and creates a debt; and to have that effect it must be taken against one capable of contracting a debt."

The cases are very numerous in which judgments have been declared to be contracts,¹ or debts of record.²

It is Only by a Legal Fiction, however, and for the purpose of enforcing the obligation by contractual remedies, that judgments can be considered as contracts.³ The essential elements of every true contract, such as competent parties and assent, are often wanting in judgments which perhaps usually are rendered *in invitum*, and often against infants, lunatics, or married women.⁴ Accordingly

Contract as Distinguished from Tort. —

A judgment is not a contract, in a narrow sense, and is not synonymous with agreement; but, in a broad sense, it is a contract as distinguished from a tort. *Johnson v. Butler*, 2 Iowa 535. See also *Moore v. Nowell*, 94 N. Car. 265; *McDonald v. Dickson*, 87 N. Car. 404.

1. Judgments Are Contracts. — See generally the cases cited more specifically throughout this section. And see *Weaver v. Lapsley*, 43 Ala. 224; *Reed v. Eldredge*, 27 Cal. 348; *Farmers', etc., Bank v. Mather*, 30 Iowa 283; *Morse v. Toppan*, 3 Gray (Mass.) 411; *Humphrey v. Persons*, 23 Barb. (N. Y.) 313; *M'Guire v. Gallagher*, 2 Sandf. (N. Y.) 402; *Sawyer v. Vilas*, 19 Vt. 43; *Childs v. Harris Mfg. Co.*, 68 Wis. 231.

2. Adams v. Hackett, 7 Cal. 187; *Hubbell v. Coudrey*, 5 Johns. (N. Y.) 132; *Burnes v. Simpson*, 9 Kan. 664; *Turner v. Wilson*, 49 Ind. 581; *State v. Hamilton*, 33 Ind. 502; *Ex p. Teague*, 41 Ind. 278; *Lower v. Wallick*, 25 Ind. 68.

A judgment rendered upon an unassignable cause of action for a tort is a debt. *Lawrence v. Martin*, 22 Cal. 173.

A judgment for costs in a criminal prosecution is a debt. *Gray v. Ferreby*, 36 Iowa 146.

A Verdict in a cause of action resting in tort does not convert the tort into a debt, but it must first be merged into a judgment. *Stauffer v. Remick*, 37 Kan. 456; *Thayer v. Southwick*, 8 Gray (Mass.) 229.

A Judgment in a Bastardy Proceeding is not a debt within a constitutional provision against imprisonment for debt. *Turner v. Wilson*, 49 Ind. 581; *State v. Hamilton*, 33 Ind. 502; *Ex p. Teague*, 41 Ind. 278; *Lower v. Wallick*, 25 Ind. 68.

Character as Evidence of Indebtedness.

— A judgment of a court of record is an evidence of indebtedness, in writing, of the highest dignity known to the law, but not of the same character, nature, or grade with notes, bonds, bills,

or written contracts. *Ambler v. Whipple*, 139 Ill. 311.

3. "A judgment for damages, estimated in money, is sometimes called by text writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. Chitty on Contracts (Perkins's ed.) 87. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by a court below, are imposed upon the losing party by a higher authority, against his will and protest." *Louisiana v. New Orleans*, 109 U. S. 288.

An Action on a Judgment is an action on a contract, irrespective of the nature of the original transaction on which the judgment was founded. *Mallory v. Leach*, 23 How. Pr. (N. Y. Supreme Ct.) 507; *Crane v. Crane* (City Ct.) 19 N. Y. Supp. 691; *Johnson v. Butler*, 2 Iowa 535; *Taylor v. Root*, 4 Keyes (N. Y.) 335.

Provisional Remedies. — A judgment is deemed a contract; and in an action on a binding judgment, whether foreign or domestic, plaintiff is entitled to the same provisional remedies as an action on an express contract. *Gutta Percha, etc., Co. v. Houston*, 20 Abb. N. Cas. (N. Y. Ct. App.) 218, 108 N. Y. 276, 14 Civ. Pro. Rep. (N. Y.) 19, reversing 46 Hun (N. Y.) 237.

4. Judicium redditur in invitum. *Jordan v. Robinson*, 15 Me. 168.

As to the validity of judgments against incompetent persons, see articles HUSBAND AND WIFE, vol. 10, p. 191; INFANTS, vol. 10, p. 981; INSANE PERSONS, vol. 10, p. 1169.

"In considering this question I have not overlooked the case of *Morse v. Toppan*, 3 Gray (Mass.) 411, in

a great number of cases have very properly declared that judgments are not contracts.¹

The True View is that judgment obligations occupy the middle ground between contracts and torts, which is now becoming known as quasi-contracts.²

(2) *Within Constitutional and Statutory Provisions.* — The question as to whether or not a judgment may be regarded as a contract, most frequently arises as a question of statutory construction. In such case the question is not whether a judgment is a contract in any sense of the term, but whether it is a contract within the meaning of that term as used in the statutory or constitutional provision under consideration.³

which the court says that 'a judgment is in the nature of a contract; it is a specialty, and creates a debt, and to have that effect it must be taken against one capable of contracting a debt.' A judgment is a contract in the sense that it may be sued upon in another judicial tribunal, but it is not a contract in that it can only be rendered against a party then capable of contracting a specialty debt. It is not true that a judgment rests either upon the will or the capacity to contract of the party against whom it is rendered. *Freem. Judgm.*, § 4. If a judgment is a contract, and can only be rendered against one who is then capable of contracting, by the laws of the forum there could not be a judgment on a contract made in another state, unless by the law of the forum that contract would be valid. This would destroy the rule of comity and international law which makes the validity of a contract and the capacity of the contractor depend on the place where the contract is made or is to be performed, or the domicil of the contractor, as the case may be, and not upon the law of the forum. The doctrine, as announced in *Morse v. Toppan*, 3 Gray (Mass.) 411, has been ignored in *Milliken v. Pratt*, 125 Mass. 374, where the court sustained a judgment against a married woman living in Massachusetts on a contract made in Maine, although at the time of making the contract she could not have made a similar one at the place of her domicil." *Wadsworth v. Henderson*, 16 Fed. Rep. 451.

1. **Judgments Are Not Contracts.** — See generally the cases cited to more specific points throughout this section, and see:

Alabama. — *Lovins v. Humphries*, 67

Ala. 437; *Masterson v. Gibson*, 56 *Ala.* 56; *Smith v. Harrison*, 33 *Ala.* 706; *Wolfe v. Eberlein*, 74 *Ala.* 99.

California. — *Larrabee v. Baldwin*, 35 *Cal.* 156.

Illinois. — *Belford v. Woodward*, 55 *Ill. App.* 308; *Williams v. Waldo*, 4 *Ill.* 264; *Rae v. Hulbert*, 17 *Ill.* 572. "The sentence 'a judgment is a contract' in *Sharpe v. Morgan*, 44 *Ill. App.* 346, was unnecessary to the decision." *Belford v. Woodward*, 55 *Ill. App.* 308.

Kentucky. — *U. S. Bank v. Dallam*, 4 *Dana (Ky.)* 574.

Maine. — *Jordan v. Robinson*, 15 *Me.* 168.

Missouri. — *Sheehan, etc., Transp. Co. v. Sims*, 28 *Mo. App.* 64.

New York. — *O'Brien v. Young*, 95 *N. Y.* 428; *Wyman v. Mitchell*, 1 *Cow. (N. Y.)* 321.

South Carolina. — *In re Kennedy*, 2 *S. Car.* 226.

United States. — *Chase v. Curtis*, 113 *U. S.* 452; *Freeland v. Williams*, 131 *U. S.* 405; *Louisiana v. New Orleans*, 109 *U. S.* 285; *Todd v. Crumb*, 5 *McLean (U. S.)* 172; *Wadsworth v. Henderson*, 16 *Fed. Rep.* 447.

England. — *Bidleston v. Whytel*, 3 *Burr.* 1545.

A judgment is not in fact a contract in itself, although it may be regarded as the result of a contract. *Sprott v. Reid*, 3 *Greene (Iowa)* 489.

"The order and decree of a court is not simply the record of an agreement. It establishes rights founded upon past transactions. The law and not the will of the parties determines its effect." *Mills v. Ralston*, 10 *Kan.* 206.

2. Keener, *Law of Quasi-Contracts*, c. 1.

3. *Sheehan, etc., Transp. Co. v. Sims*, 28 *Mo. App.* 64.

Impairing Obligation. — It has been held that a judgment is a contract within the constitutional provision prohibiting statutes impairing the obligation of contracts.¹ But the contrary has also been held,² and this view would seem to be undoubtedly the correct one where the judgment was founded upon a tort.³

Statutes Conferring or Limiting Jurisdiction. — A judgment is a contract within the meaning of a statute conferring⁴ or limiting⁵ the jurisdiction of a court in actions on contracts.

Statute of Limitations. — It has been held that judgments are contracts within the meaning of the statute of limitations.⁶ But more often it is held that judgments are not contracts within that clause of the statute of limitations limiting actions upon contracts; special provision being usually made with regard to judgments.⁷

Statute Requiring Real Party in Interest to Sue. — A judgment is not a contract within a statute requiring actions upon contracts to be brought in the name of the real party in interest.⁸

Assignment of Choses in Action Ex Delicto. — Under a statute prohibiting the assignment of choses in action not arising out of contract, a judgment is considered as a contract, and therefore assignable.⁹

Set-off and Counterclaim. — A judgment for a recovery of money in

1. *Weaver v. Lapsley*, 43 Ala. 224.

In *Scarborough v. Dugan*, 10 Cal. 305, it is said to be well settled that a judgment in one state and upon which suit is instituted in another state is a contract in the sense of the constitution.

2. "The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition. *Garrison v. New York*, 21 Wall. (U. S.) 203." *Louisiana v. New Orleans*, 109 U. S. 288.

In *Sprott v. Reid*, 3 Greene (Iowa) 489, it was held that a judgment is not within the terms of a constitutional provision prohibiting legislation that impairs the obligation of contracts in such a sense that the statute requiring appraisement on an execution sale cannot be made applicable to judgments for costs already in existence.

3. *McAfee v. Covington*, 71 Ga. 272; *Freeland v. Williams*, 131 U. S. 405; *Garrison v. New York*, 21 Wall. (U. S.) 196; *Louisiana v. New Orleans*, 109 U. S. 285.

4. *Wallace v. Eldredge*, 27 Cal. 498; *Stuart v. Lander*, 16 Cal. 372.

5. *Crane v. Crane*, (City Ct.) 19 N. Y. Supp. 691.

6. Foreign judgments are considered as simple contract debts. And the limitation of actions thereon is the same. *Hubbell v. Coudrey*, 5 Johns. (N. Y.) 132. Compare *Keith v. Estill*, 9 Port. (Ala.) 669.

7. *Keith v. Estill*, 9 Port. (Ala.) 669; *Niblack v. Goodman*, 67 Ind. 174; *Burnes v. Simpson*, 9 Kan. 658; *U. S. Bank v. Dallam*, 4 Dana (Ky.) 574; *Dudley v. Lindsey*, 9 B. Mon. (Ky.) 486; *Jordan v. Robinson*, 15 Me. 168; *Tyler v. Winslow*, 15 Ohio St. 365; *Todd v. Crumb*, 5 McLean (U. S.) 172.

In *Sheehan, etc., Transp. Co. v. Sims*, 28 Mo. App. 69, it was held that the word "contract" in the statute of limitations might or might not include judgments, according to the evident intent of the statute.

8. *Smith v. Harrison*, 33 Ala. 706.

Therefore an action upon a judgment must be brought in the name of the original plaintiff. *Lovins v. Humphries*, 67 Ala. 437; *Masterson v. Gibson*, 56 Ala. 56; *Wolfe v. Eberlein*, 74 Ala. 99; *Smith v. Harrison*, 33 Ala. 706. See also *infra*, XVIII. *Actions on Judgments*.

9. *Moore v. Nowell*, 94 N. Car. 265; *McDonald v. Dickson*, 87 N. Car. 404.

an action of tort is a contract within the provisions of the code allowing counterclaims.¹

Joinder of Parties. — A statute making joint contracts joint and several does not apply to judgments.²

Joinder of Actions. — A judgment is a contract within the rules as to joining causes of action.³

Contracts Express or Implied. — A statute referring generally to contracts express or implied for the payment of money does not apply to judgments.⁴

Execution Against Body. — Where process against the body cannot issue in an action upon a contract, it cannot issue in an action upon a judgment.⁵

Statutory Liability of Officers and Stockholders. — A judgment is not a debt by contract within the scope of a statute making trustees or stockholders of a corporation liable for its debt.⁶

i. **JUDGMENTS AS CONVEYANCES.** — A judgment is not effectual to pass the title to land if the decree fails to declare that it shall be regarded as a deed of conveyance.⁷

j. **JUDGMENTS AS ASSIGNMENTS.** — A judgment is not an assignment, even though it is entered by confession and has the same practical effect.⁸

k. **QUOD SIT IN MISERICORDIA.** — At common law it seems that regularly there was a fine or amercement in all actions, for if the plaintiff or demandant did not prevail it was thought reasonable that he should be punished for his unjust vexation, and therefore there was a judgment against him *quod sit in misericordia pro falso clamore*.⁹

1. Taylor v. Root, 4 Keyes (N. Y.) 335. But see Rae v. Hulbert, 17 Ill. 572, holding that a judgment is a contract within the meaning of the statute of set-offs.

2. A judgment is not a contract within the meaning of the statutory provision that all contracts which at common law are joint only shall be construed to be joint and several. Sheehan, etc., Transp. Co. v. Sims, 28 Mo. App. 64.

3. Barnes v. Smith, 16 Abb. Pr. (N. Y. Super. Ct.) 420; Mahaney v. Penman, 4 Duer (N. Y.) 603.

4. Smith v. Harrison, 33 Ala. 706.

A judgment is not included within the terms "a specialty or any agreement, contract, or promise in writing." Kimball v. Whitney, 15 Ind. 280.

5. An action on a judgment is founded on a "contract, express or implied," within Vermont Rev. Stat., c. 28, § 63, in force in 1846, and process against the body cannot issue therein, except on affidavit, etc. Sawyer v. Vilas, 19 Vt. 43.

The liability incurred by one who becomes bail for a defendant on mesne process, by indorsing his name upon the back of the writ, is a liability upon contract, within the meaning of section 63 of chapter 28 of the Revised Statutes; and an execution issued against the body of such bail, upon a judgment against him on *scire facias*, will be set aside on *audita querela*. Stoughton v. Barrett, 20 Vt. 385.

6. Chase v. Curtis, 113 U. S. 452; Larrabee v. Baldwin, 35 Cal. 156.

7. Morris v. White, 96 N. Car. 91, (under N. Car. Code, § 427).

8. Breeding v. Boggs, 20 Pa. St. 33, wherein the court said: "A judgment is not an assignment. One is the act of the party, the other the act of the law; in the one case the debtor surrenders the dominion to another; in the other he submits without opposition to the course prescribed by law."

9. Hence, when the plaintiff took out a writ, the sheriff, before the return of it, was obliged to take pledges of prosecution, which, when fines and amerce-

1. *CAPIATUR PRO FINE*. — In all cases where the judgment was against the defendant it was to be entered with a *miseri-cordia* or a *capiatur*, that is, the defendant was either amerced for his wilful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due, or he was taken up, *capiatur*, until he paid a fine to the king for the public misdemeanor which is coupled with the private injury in all cases of force, falsehood in denying his own deed, unjustly claiming property in replevin, or contempt by disobeying the command of the king's writ.¹

4. **Classification and Terminology** — *a*. IN GENERAL. — Three learned commentators upon the law of judgments have adopted different classifications of the various kinds of judgments.² The subject is not one of prime importance, the object being merely to secure an orderly enumeration of the various kinds of judgments.

ments were considerable, were real and responsible persons and answerable for those amercements, but being now so very inconsiderable that they are never levied, there are only formal pledges entered, viz., John Doe and Richard Roe. Bacon's Abr., tit. Fines and Amercements. See also 3 Black. Com. 399, also pp. 274, 275.

1. 3 Black. Com. 398.

If the action was debt or founded on a contract, the entry was *ideo in miseri-cordia*, without asserting any sum in certain, which was afterwards affeered by the coroners in the proper county; but if it were in an action of trespass, the court set the fine and levied it by a *capiatur*. And therefore in all actions *quare vi et armis* the defendant was fined. Bacon's Abr., tit. Fines and Amercements, C., and cases there cited.

Fines and Amercements Distinguished. — Anciently there was an important distinction between an "amercement" and a fine. A fine was a certain punishment, growing expressly out of some statute, and was always imposed and assessed by the court; an amercement was imposed by the court in general terms (*quod sit in miseri-cordia*, that the party be in mercy), and was afterwards assessed or affeered (that is, moderated, and reduced to a certain sum) by the peers or equals of the party, who were hence called "affeerors." Brook v. Hustler, 1 Salk. 56, 3 Salk. 33. The term "amercement" was also applied more particularly to pecuniary punishments imposed upon the officers of courts, as sheriffs and coroners, and the word is still used in this sense. See article SHERIFFS. In other respects, however, no essential distinction re-

mains between an amercement and a fine. Amercements, in their ancient technical sense, are entirely disused in modern practice. Burrill's Law Dict., *sub voce*.

2. **Blackstone's Classification.** — "Judgments are the sentence of the law pronounced by the court upon the matter contained in the record, and are of four sorts: first, where the facts are confessed by the parties and the law determined by the court, as in case of judgment upon demurrer; secondly, where the law is admitted by the parties and the facts disputed, as in case of judgment on a verdict; thirdly, where both the fact and the law arising thereon are admitted by the defendant, which is the case of judgments by confession or default; or, lastly, where the plaintiff is convinced that either fact or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution, which is the case in judgments upon a nonsuit or *retrahit*." 3 Black. Com. 395.

This classification has been stated and approved in Derby v. Jacques, 1 Cliff. (U. S.) 432, and in Blaikie v. Griswold, 10 Wis. 293. It has been criticised by Mr. Freeman as being neither accurately expressed nor correctly illustrated. Freeman on Judgments, § 5. Blackstone's classification will nevertheless be adopted here, as his distinctions are founded in substance and his meaning clear. It will be endeavored, however, both to express them accurately and to illustrate them correctly. Indeed, Mr. Freeman's own classification admittedly does not differ materially from Blackstone's, it

b. CLASSIFICATION WITH REFERENCE TO STATE OF PLEADINGS — (1) *Judgment on Issue of Law*. — When the pleadings terminate in a demurrer upon either side, an issue of law is presented, a judgment upon which comprises the first class of judgments under the classification here adopted. The various judgments which may be rendered upon issues of law, with their technical names, are explained below.¹

being merely an attempt to express the same ideas more simply and clearly. See Freeman on Judgments, § 6.

Freeman's Classification. — Mr. Freeman arranges the various kinds of judgments into four classes, as follows: "(1) The judgment rendered where the pleadings presented no other issue than an issue of law; (2) the judgment rendered upon the decision of a court or a jury upon the issue or issues of fact made by the pleadings; (3) the judgment given where no issue has been made by the party required to plead; (4) where, before or after the joining of an issue of law or of fact, the plaintiff abandons or withdraws his prosecution." Freeman on Judgments, § 6.

Black's Classification. — Mr. Black, in his recent treatise on judgments, abandoning Blackstone's classification as being too unwieldy, classifies judgments under four heads: (1) Judgments on an issue of law. (2) Judgments upon a verdict. (3) Judgments without a verdict. (4) Judgments against a verdict.

1. This is Blackstone's first class. See preceding note.

Quod Recuperet. — A judgment *quod recuperet* (i. e., that he do recover) is the ordinary form of judgment for the plaintiff. Anderson's Law Dict., tit. *Recuperare*.

The judgment for plaintiff upon a demurrer to his declaration is *quod recuperet*. Silver v. Rhodes, 2 Harr. (Del.) 369.

"When the demurrer is joined on any of the pleadings in chief, as on the declaration, plea in bar, or other pleading which goes to the action, the judgment is final, i. e., if for the plaintiff it is *quod recuperet*, if for the defendant it is *quod eat sine die*. So that on demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue in fact joined upon the same pleading, and found in favor of the same party." Hale v.

Lawrence, 22 N. J. L. 80, citing Gould's Pl. 477, § 42. See also *Ferrers v. Arden*, Cro. Eliz. 668, 6 Coke 7; *Hitchin v. Campbell*, 2 W. Bl. 831; *Bac. Abr.*, Pleas and Pleadings, I. 13; 2 Arch. Pr. 36; Arch. Prec. 298-9; *Silver v. Rhodes*, 2 Harr. (Del.) 369.

A judgment by default on sustaining a demurrer to a plea is error. If no leave be given to amend the plea, or to plead anew, there should be final judgment on the demurrer (i. e., *quod recuperet*). *Pettys v. Marsh*, 24 Fla. 44.

Plaintiff laid his damages at thirteen thousand dollars in his writ and at fourteen thousand in his declaration, for which variance the defendant pleaded in abatement. The plaintiff demurred to the plea, and, pending the demurrer, obtained leave to amend by making the damages laid in the writ and declaration correspond, whereupon the demurrer was overruled, and judgment of *quod recuperet* rendered. It was held that the judgment was erroneous, and should have been *respondeat ouster*. *Walker v. Walker*, 6 How. (Miss.) 500.

Quod Eat Sine Die. — A judgment for defendant upon a demurrer to any of the pleadings in chief. *Hale v. Lawrence*, 22 N. J. L. 72; *Silver v. Rhodes*, 2 Harr. (Del.) 369.

Where a demurrer to a replication is sustained, the judgment should be final (i. e., *quod eat sine die*) and not *respondeat ouster*. *Ross v. Sims*, 27 Miss. 359; *Memphis, etc., R. Co. v. Orr*, 52 Miss. 542.

But where leave to amend is asked, final judgment should not be entered. *Scharff v. Lisso*, 63 Miss. 213.

Generally where a demurrer is decided in favor of defendant it is now almost a matter of course to give plaintiff leave to amend, and therefore a judgment *quod eat sine die* should not be entered, unless plaintiff fails or refuses to amend. See article DEMURRERS, vol. 6, p. 353.

Respondeat Ouster is the name of a judgment upon demurrer to a dilatory plea where the demurrer is determined

(2) *Judgment on Issue of Fact.* — Where the pleadings do not terminate in a demurrer, they must regularly terminate in a joinder upon an issue of fact, and the judgment must be given for one party or the other according to the determination of this issue,¹ except where issue is joined upon an immaterial question of fact, in which case no judgment is given, but a replender is awarded, which means that the parties must recast their pleadings

in favor of the plaintiff. It requires the defendant to put in a better plea or answer, and is therefore not final. Anderson's Law Dict., tit. *Respondeat*.

"The authorities are clear, distinct, and uniform that the judgment for the plaintiff, in an issue of law, upon a demurrer to a plea in abatement, must be that the defendant answer over, and not that the plaintiff recover damages and costs. The reason is because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court." Trow v. Messer, 32 N. H. 362 [citing Howe's Practice 215; Foxwist v. Tremaine, 2 Saund. 210, g, note 3; Eichorn v. Le'maitre, 2 Wils. 367; Onslow v. Smith, 2 B. & P. 388]. See also article DEMURRERS, vol. 6, p. 354, note 4.

"The proper judgment upon a demurrer to a plea in abatement, when the demurrer is sustained, is one of *respondeat ouster*, but in point of practice with us, no formal judgment is, in general, entered; the mode generally is to notice the sustaining of the demurrer upon the judgment entry, as in this case. If the defendant wishes to plead over, he does so; if otherwise, there is no injury done. Here no formal judgment is rendered on the demurrer; the final judgment in this cause is only rendered upon the failure to plead further." Massey v. Walker, 8 Ala. 170.

When a demurrer to a plea has been overruled, the judgment of the court, instead of being final, must be *respondeat ouster*; and when entered final below, it will be reversed and remanded. Randolph v. Singleton, 12 Smed. & M. (Miss.) 439; Heyfron v. Mississippi Union Bank, 7 Smed. & M. (Miss.) 434.

In modern practice it is almost a matter of course to permit a defendant to answer over after his demurrer to the declaration is overruled. Therefore the judgment under such circumstances is *respondeat ouster*, instead of *quod recuperet*, as indicated above. See article DEMURRERS, vol. 6, p. 361. See

also Cooke v. Crawford, 1 Tex. 9, 46 Am. Dec. 93.

Quod Billa, or Breve, Cassetur is the judgment for the defendant where a dilatory plea has been determined sufficient in law. It means that the writ or declaration be quashed. See Anderson's Law Dict., tit. Abatement.

1. This corresponds to Blackstone's second division of judgments, disregarding however his limitation of it to cases where the "law is admitted," which is inaccurate. This was probably due to his love of a neat classification, and its inaccuracy is corrected by his illustration of the class as being judgments entered on a verdict.

Quod Recuperet. — A judgment for plaintiff upon an issue of fact is *quod recuperet*. See *supra*, this section, p. 837.

"The plaintiff in error here claims that, upon its plea in abatement being overruled, it was entitled to plead over to the merits. This is not in accordance with the well-settled rule of law in that regard. Where a plea in abatement has been filed which raises an issue of fact, and the issue thus formed is tried by a jury, or, as in this case, by the court, trial by jury being waived, if the verdict is against the truth of the plea, the proper judgment is *quod recuperet*, and not *respondeat ouster*." Texas, etc., R. Co. v. Saxton, 3 N. Mex. 282.

Nil Capiat Per Billam or Per Breve. — This is the name of a judgment for the defendant upon an issue of fact taken upon a declaration or peremptory plea, and means that the plaintiff take nothing by his writ or declaration. See Rap. & L. Law Dict., tit. *Nihil Capiat Per Breve*.

Cassetur Breve or Billa. — Where an issue of fact upon a plea in abatement is found in favor of the defendant, the judgment must be *cassetur breve* or *billa*, as where a demurrer to such a plea is decided in his favor. The judgment cannot be *nil capiat*, because the plea is not in bar of the action.

so as to form a material issue.¹

(3) *Judgment Where Pleadings Raise No Issue.*—The third class of judgments includes cases where judgment is given for one party or the other because of the failure of his adversary to interpose a proper or sufficient pleading or demurrer at the proper time, thus failing to raise an issue,² or where, instead of taking issue with his adversary upon a question of law or fact, he confesses the case made against him.³

(4) *Judgment on Abandonment of Suit by Plaintiff.*—The fourth and last class of judgments includes cases where the plaintiff either voluntarily or involuntarily abandons the prosecution of his suit.⁴

1. See 3 Black. Com. (Cooley's ed.) 395. And see article REPLEADER.

2. This corresponds to Blackstone's third class. See *supra*, p. 839.

Default and Nil Dicit Distinguished.—Under the code there is no substantial difference between judgments by default and judgments *nil dicit*. Lattimer v. Ryan, 20 Cal. 628.

"Bouvier says a 'judgment by default is a judgment rendered in consequence of the nonappearance of the defendant.' He also says: 'Judgment by *nil dicit* is one rendered against a defendant for want of a plea. * * * The name of a judgment rendered against a defendant who fails to put in a plea or answer to the plaintiff's declaration by the day assigned—in such a case, judgment is given against the defendant of course, as he says nothing why it should not. We are of opinion, however, that no distinction exists under the Civil Code between a judgment *nil dicit* and by default. Of the two the latter only is mentioned in the code, and the term default is applied as well to judgments rendered after appearance as to those rendered in cases wherein there had been no appearance.'" Wilbur v. Maynard, 6 Colo. 485.

3. See *infra*, IX. *Judgments by Confession*; X. *Judgments by Agreement or Consent*. See also article COGNOVIT, vol. 4, p. 560.

Relicta Verificatio.—This is a judgment entered against defendant, where, after pleading and before trial, he both confesses the plaintiff's cause of action to be just and true and withdraws his plea or other allegations. Upon this judgment is entered against him without proceeding to trial. Bouv. Law Dict., tit. Judgments.

Non Obstante Veredicto.—See *infra*, III. 10, b. *Non Obstante Veredicto*.

4. **Non Pros.**—"An abbreviation of *non prosequitur*, he does not pursue. Where the plaintiff at any stage of the proceedings fails to prosecute his action, or any part of it, in due time, the defendant enters *non prosequitur*, and signs final judgment, and obtains costs against the plaintiff, who is said to be *non pros'd*. 2 Archb. Pr. (Chitty ed.) 1409; 3 Black. Com. 296; 1 Tidd Pr. 458; 3 Chitty Pr. 10; Caines Pr. 102. The name *non pros.* is applied to the judgment so rendered against the plaintiff. 1 Sell. Pr., and authorities above cited." Bouvier's Law Dict., tit. *Non Pros.*

"'Judgment of *non pros.*' or *non prosequitur* is a judgment of the court on motion of the defendant in a civil action in case the plaintiff does not file his declaration or replication in due time, and is not to be confounded with a *nol. pros.* or *nolle prosequi*, by which the plaintiff or the attorney for the state voluntarily declares that he will not further prosecute a suit or indictment, or a particular count in either." Com. v. Casey, 12 Allen (Mass.) 218 [citing 1 Steph. Pl. (1st Am. ed.) 130, 131; Tidd's Pr. 458 *et seq.*; Philpot v. Muller, 1 Doug. 169, note; Com. v. Tuck, 20 Pick. (Mass.) 365].

Nolle Prosequi—*In Civil Practice.*—An acknowledgment or undertaking entered on record by the plaintiff in an action to forbear to proceed in the action, either wholly or partially. It has been superseded in most cases by the modern practice of discontinuance, but it seems to be still applicable in some cases. Arch. Pr. 1201; 2 Rap. & L. Law Dict., tit. *Nolle Prosequi*.

In Criminal Prosecutions.—See article

III. REQUISITES OF A VALID JUDGMENT — 1. What Law Governs. — The validity, force, and effect of a judgment must be determined by the laws in force at the time¹ and in the state² where it was rendered.

2. Maturity of Demand — a. STATEMENT OF RULE. — It is essential to the validity of a judgment that the demand whereon it is rendered shall have existed as a matured cause of action at the time the action was commenced,³ it being a general rule that

INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 556.

Stet Processus. — Let the process stand; let proceeding be stayed. An entry on a record, by leave of court, by which a plaintiff agreed that no further proceeding should be had. It prevented a defendant who became insolvent pending the action from obtaining a judgment as in case of nonsuit. Anderson's Law Dict., tit. *Stet Processus*.

Cassatur Billa. — An entry made on the record in a proceeding in the mayor's court when the plaintiff withdraws his action before the defendant demands the declaration or bill. Brand. For. Att. 109. It is so called from being a prayer by the plaintiff that the bill may be quashed. The proceeding was also used in actions in the superior courts commenced by bill, when the plaintiff found that his action was misconceived, and wished to commence a fresh one. Rap. & L. Law Dict., tit. *Cassatur Billa*, citing Tidd's Pr. 683.

Cassatur Breve. — Let the writ be quashed. In the old common-law practice, when the defendant in an action pleaded a sufficient plea in abatement, and the plaintiff could not deny it or demur, and did not wish to amend his declaration, he might enter on the roll a judgment that the writ be quashed, in order that he might be enabled to commence a new action. In practice the prayer of judgment that the writ be quashed, and award that it be so, were copied on paper and delivered to the defendant's attorney or agent, the same as pleading, and very often no entry was made on the roll or judgment signed. Chit. Pr. 1487; 1 Rapalje & Lawrence's L. Dict.

Nonsuit. — As to voluntary and involuntary nonsuits, see article DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823.

Retraxit. — See article RETRAXIT.

* 1. Anderson v. Hygeia Hotel Co., 92

Va. 687; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524.

2. Stark v. Ratcliff, 111 Ill. 75.

3. *Indiana*. — Skelton v. Ward, 51 Ind. 46; Thompson v. Davis, 29 Ind. 264; McPheeters v. Campbell, 5 Ind. 107; Allen v. Parker, 11 Ind. 504; Dale v. Bugh, 16 Ind. 233; Lacoss v. Keegan, 2 Ind. 406; Greenman v. Pattison, 8 Blackf. (Ind.) 465.

Louisiana. — Christen v. Rhulman, 24 La. Ann. 50.

Mississippi. — Black v. Pattison, 61 Miss. 599.

Missouri. — Tobin v. McCann, 17 Mo. App. 481.

New Hampshire. — Winnipiseogee Lake Co. v. Young, 40 N. H. 420.

United States. — Merrill v. Rokes, 12 U. S. App. 183.

An action to recover a judgment *in personam* cannot be maintained on a note till its maturity. Evans v. Thornburg, 77 Ind. 106; Collins v. Nelson, 81 Ind. 75; Joseph v. Kronenberger, 120 Ind. 495.

Declaring Future Rights. — In *England* the former practice of the court in refusing to declare the future rights of parties is altered in a case where the rights are vested, where all parties who can become interested are represented at the hearing, and when the number of classes of persons who can possibly become interested may be diminished, but cannot be increased. Curtis v. Sheffield, 21 Ch. Div. 1, 51 L. J. Ch. 535, 46 L. T. 177, 30 W. R. 581.

In an Attachment on an Unmatured Demand judgment cannot be rendered until the demand has matured. Hamilton v. McClelland, 33 Mo. 315.

In an action for a demand not due wherein property is attached, under c. 223, L. 1880, the proceedings are to be as in personal actions for matured demands, and the judgment may be for the whole amount which has matured. Rollins v. Kahn, 66 Wis. 658.

Where a garnishee answers that he

a party must recover according to his legal rights at the commencement of the action.¹

6. DEMANDS DUE IN INSTALMENTS. — Where an action is based on a contract for the payment of money in instalments, it has been held that judgment may be given for all instalments due at the time of trial, although some of them became due after the action was brought.² It has also been held that the judgment should be rendered for the whole amount, but with a stay of execution upon the undue instalments until the time when they respectively become due.³

owes a debt to defendant in attachment, judgment ought to be rendered for the debt with a stay of execution until the day its payment is due. *Fayette v. Buckner*, 1 Litt. (Ky.) 127.

1. *Tappan v. Tappan*, 30 N. H. 50.

Determination of Rights as of Time of Rendition. — "While a decree in equity generally operates upon the parties and subject-matter as they stood at the commencement of the proceedings, it only does so to subserve the ends of justice. When, as here, a radical change in the status has been brought about by the passing of time, under the very terms of the agreement, and knowledge of this change is, as here, judicially before the court, or is brought in by appropriate pleading, its decree should be addressed to the rights existing, not at the commencement, but at the time of the determination, of the action." *Southern Pac. R. Co. v. Allen* (Cal. 1895) 40 Pac. Rep. 752.

A decree must be rendered in accordance with the rights of the parties as they stand at that time, and not as they stood at any preceding time. *Randel v. Brown*, 2 How. (U. S.) 406.

Recovery on Cause Alleged in Petition, Not in Reply. — A plaintiff must recover, if at all, on the cause of action stated in his petition, and not upon one which first appears in the reply. But if his recovery is based upon facts which have developed since the commencement of the suit, and are set up in the reply, and which are within the general scope of the petition and the relief prayed for, there need be no reversal on account of the stage at which such facts were pleaded. In such a case the plaintiff's recovery of costs should be limited to those arising subsequently to the pleading of the new matter. *Crawford v. Spencer*, 36 Mo. App. 78.

2. *Butler v. Mutual Aid, etc., Co.*, 94 Ga. 562. Provided, of course, they are

embraced in the pleading and prayer for judgment, and subject to defenses raised by the answer.

3. *Outen v. Mitchels*, 1 Bibb (Ky.) 360, holding that upon a judgment so entered execution may, issue without suing out a *sci. fa.* upon each instalment as it becomes due.

In an action upon a bond conditioned for the payment of money by instalments, if the verdict be rendered before all the instalments are payable the jury should find how much was due upon each instalment, and when it is payable, or will become payable; and judgment should be entered for the whole amount, to be released upon payment of the amounts, and at the times as found by the jury. *Davidson v. Brown*, 1 Cranch (C. C.) 250.

Foreclosing Lien for Undue Instalments of Purchase-money. — A judgment for the sale of the whole of the land for undue instalments of the purchase-money, which were secured by a lien thereon, is erroneous, and even an allegation that a sale at once of the entire tract is necessary to prevent loss to the creditor will not authorize a sale to pay undue instalments, or require the debtor to anticipate payment before the agreed time. *Burton v. McKinney*, 6 Bush (Ky.) 428. See also *Emison v. Risque*, 9 Bush (Ky.) 24, holding that the decree should simply direct the sale of enough land to pay the amount due and the costs adjudged, leaving a second note for the remainder of the purchase-money to its lien on the remaining portion of the land.

In Kentucky, under the Civil Code, § 135, a plaintiff holding both matured and unmatured demands against a defendant, secured by a lien on property, may state both claims in his petition, and if the unmatured claims become due *pendente lite* he may suggest that fact on the record, where-

3. Jurisdiction — Statement of Rule. — It is absolutely essential to the validity of a judgment that the court wherein it was rendered had jurisdiction both of the subject-matter and of the person. In the absence of such jurisdiction the judgment is absolutely void, and may be attacked either directly or collaterally.¹

Error in Exercise of Jurisdiction. — Want of jurisdiction, however, must be carefully distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked.²

4. Parties — a. IN GENERAL. — It is a requisite of a valid final judgment that it must dispose of the case as to all of the parties.³ The court should pass on the cause as to all defendants, and it is error to render final judgment without rendering a judgment either against or in favor of one of the defendants.⁴

b. JUDGMENT AGAINST OR IN FAVOR OF ONE NOT A PARTY — Against One Not a Party. — It is a rule of universal application that the rights of no one shall be concluded by a judgment rendered in a suit to which he is not a party,⁵ and that a party can-

upon judgment may be rendered for a sale of the property to pay such demands. This statute only applies, however, where there is a lien on property to secure such demands, and in other cases a party cannot have a judgment for demands becoming due *pendente lite*. *Dant v. Head*, 90 Ky. 255.

1. See articles JURISDICTION, vol. 12, p. 114; PROCESS; PUBLICATION.

2. See article JURISDICTION. And see generally the titles *Judgments*; *Jurisdiction*, in the Am. and Eng. Encyc. of Law (2d ed.).

Retaining Jurisdiction to Do Complete Equity. — See article JURISDICTION, vol. 12, p. 114.

3. *Peck v. Vandenberg*, 30 Cal. 11; *Schultz v. McLean*, 76 Cal. 608; *Godding v. Decker*, 3 Colo. App. 198; *Delap v. Hunter*, 1 Sneed (Tenn.) 101; *Masterson v. Williams*, (Tex. 1889) 11 S. W. Rep. 531; *Scott v. Burton*, 6 Tex. 322; *International, etc., R. Co. v. Smith County*, 58 Tex. 76; *Whitaker v. Gee*, 61 Tex. 218; *Martin v. Crow*, 28 Tex. 614.

4. *Schultz v. McLean*, 76 Cal. 608.

In *Whitaker v. Gee*, 61 Tex. 217, it was held that when suit is instituted against two or more, in which judg-

ment is rendered in favor of all the defendants except one, who is not referred to in the judgment, the judgment is not a final judgment from which an appeal may be taken, no order having been entered dismissing the cause as to the defendant not mentioned in the judgment. See also *Godding v. Decker*, 3 Colo. App. 198.

5. See Am. and Eng. Encyc. of Law, title *Res Judicata*; and as to who are parties and privies, see article PARTIES, in this work.

Judgment Against One Not a Party a Mere Nullity. — In *Overstreet v. Davis*, 24 Miss. 393, it was held that the court below had no power to enter a judgment against one not a party to the suit, and that such judgment was therefore a mere nullity.

In *Cheek v. Pugh*, 19 Ark. 574, which was a suit upon a bond given by the defendant in attachment to obtain a return of the property attached, it appearing that the judgment in the original action was rendered against the sureties in the bond, who were not parties, as well as against the defendant in attachment, it was held that the judgment was a mere nullity as to the sureties, but that it was not void as to the defendants.

not be bound by a judgment without being allowed a day in court.¹ He must be cited or have made himself a party in order to authorize a personal judgment against him.² A judgment rendered against a party who is brought in by motion as a defendant after the trial is concluded is erroneous as to such party.³

In Favor of One Not a Party. — A court cannot render a valid judgment in favor of a party who is not before the court and is not represented in any manner in the action.⁴

c. DEATH OF PARTY — JUDGMENT FOR OR AGAINST A DECEASED PARTY — (1) Generally. — As to the validity of a judgment rendered for or against a party after his death the authorities seem to be hopelessly irreconcilable. Thus, according to numerous decisions, such judgments are utterly void and may be collaterally attacked.⁵ The decided weight of authority, however,

1. *Ford v. Doyle*, 37 Cal. 346; *Bracey v. Calderwood*, 36 La. Ann. 796; *Overstreet v. Davis*, 24 Miss. 393; *Armstrong v. Harshaw*, 1 Dev. L. (N. Car.) 187; *Williams v. Warren*, 82 Tex. 319.

2. *Turman v. Bell*, 54 Ark. 273; *Ford v. Doyle*, 37 Cal. 346; *Hawkins v. Abbott*, 40 Cal. 639; *McKinney v. Frankfort, etc., R. Co.*, 140 Ind. 95; *Bracey v. Calderwood*, 36 La. Ann. 796; *Overstreet v. Davis*, 24 Miss. 393; *Williams v. Warren*, 82 Tex. 319.

A judgment against a defendant named in the writ, but not made a party either by service, public notice, or attaching his estate, is merely void, and should be disregarded when produced on *nul tiel record*. *Armstrong v. Harshaw*, 1 Dev. L. (N. Car.) 187.

Mere Service of Citation. — Judgment cannot be rendered against a party who is not mentioned in the proceeding and who has not joined issue or made himself a party. A mere citation served on such party does not compel appearance or justify judgment in default. *Bracey v. Calderwood*, 36 La. Ann. 796.

If Persons Are Served with Summons Who Are Not Named in the Complaint, either by real or fictitious names, it is error to render judgment against them by default. *Lamping v. Hyatt*, 27 Cal. 102.

3. *Lawrence v. Ballou*, 50 Cal. 258.

4. *Buchman v. Sepulveda*, 39 Cal. 688; *Williams v. Hamilton*, (Ky. 1895) 29 S. W. Rep. 873; *Leverich v. Toby*, 7 La. Ann. 445; *Swain v. Gilder*, 61 Miss. 667; *Knell v. Buffalo*, 54 Hun (N. Y.) 80; *Dunlap v. Southerlin*, 63 Tex. 38.

"A judgment rendered against a person not before the court would be void, and it is not perceived that a judgment against a defendant in court at the suit of named plaintiffs, upon a cause of action accruing to them alone, in favor of a person in no manner a party to the action, can stand upon any higher ground. Courts have no more power, until their action is called into exercise by some kind of pleading, to render a judgment in favor of any person than they have to render judgment against a person until he has been brought within the jurisdiction of the court in some method recognized by law as sufficient; and it never will be presumed, in the face of a record which shows that certain named plaintiffs were seeking and entitled to a judgment, that the court rendered a judgment in favor of some person not shown to be before it seeking relief." *Dunlap v. Southerlin*, 63 Tex. 38.

Not Validated by Lapse of Time. — In *Dunlap v. Southerlin*, 63 Tex. 38, it was held that no lapse of time can make that a judgment in favor of a person not a party to a suit which was not a judgment at the time it was entered.

5. *Alabama.* — *Ex p. Swan*, 23 Ala. 192; *Meyer v. Hearst*, 75 Ala. 390; *Swink v. Snodgrass*, 17 Ala. 653; *Hood v. Branch of State Bank*, 9 Ala. 335; *Stewart v. Nuckols*, 15 Ala. 225.

Arkansas. — *Jacobson v. Campbell*, (Ark. 1890) 12 S. W. Rep. 784; *Greenstreet v. Thornton*, 60 Ark. 369; *Jennings v. Ashley*, 5 Ark. 128.

California. — *McCreery v. Everding*, 44 Cal. 284; *Ewald v. Corbett*, 32 Cal. 493.

seems to be that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after his death, the judgment is not for that reason void.¹ Such a judgment,

Delaware. — *Lynch v. Tunnell*, 4 Harr. (Del.) 284.

Illinois. — *Life Assoc. of America v. Fassett*, 102 Ill. 315.

Iowa. — *District Tp. v. Independent Dist.*, 63 Iowa 188.

Louisiana. — *New Orleans, etc., Co. v. Bosworth*, 8 La. Ann. 80; *McCloskey v. Wingfield*, 29 La. Ann. 141; *Edwards v. Whited*, 29 La. Ann. 647; *New Orleans, etc., Co. v. Bosworth*, 8 La. Ann. 80; *Norton v. Jamison*, 23 La. Ann. 102.

Missouri. — *Wittenburgh v. Wittenburgh*, 1 Mo. 226; *Cockrill v. Owen*, 10 Mo. 290.

North Carolina. — *Colson v. Wade*, 1 Murph. (N. Car.) 43; *Burke v. Stokely*, 65 N. Car. 569.

Pennsylvania. — *Greenough v. Patton*, 7 Watts (Pa.) 336.

South Carolina. — *Bragg v. Thompson*, 19 S. Car. 576.

"As a general rule, it is undoubtedly true that a judgment for or against a dead man is a nullity." *Per* Gibbons, J., in *Ex p. Swan*, 23 Ala. 192.

In *Life Assoc. of America v. Fassett*, 102 Ill. 315, the court said: "A careful examination of the authorities clearly shows that a judgment by the common law, in the absence of any statutory provisions on the subject, against a dead person, either natural or artificial, is absolutely void, and the fact that service may have been obtained or the suit commenced before the death of the party makes no difference in this respect; and this was unquestionably the rule from the earliest period of the common law down to the seventeenth year of the reign of Charles II., when the British Parliament passed the first act somewhat modifying the common law on the subject. *Randal's Case*, 2 Mod. 308; 1 Salk. 8; 2 Saund. 72, note *m*. The rule of the civil law was the same. * * * Where a suit is being prosecuted in the name of a dead plaintiff, the defendant may well plead the fact in abatement, and there is no great hardship in holding that if he does not so take advantage of it, the judgment shall bind him when collaterally drawn in question. In the nature of things the

deceased defendant cannot plead in abatement, or otherwise interpose, the fact of his own death, and his legal representatives, until brought into court by the plaintiff, as contemplated by the statute, are not supposed to be present or to know anything about the pendency of the suit; and to hold a judgment obtained under such circumstances binding upon them would seem not only inconsistent with well-settled principles, but would probably lead to the perpetration of great frauds. We are, therefore, clearly of opinion such judgments are, as already stated, absolutely void."

Extinct Corporation. — Upon the expiration of the term of the existence of a corporation as limited by its charter it becomes extinct. No formal decree of dissolution is necessary, and a judgment thereafter rendered in an action then pending is void, unless the action be continued by order of the court. *Sturges v. Vanderbilt*, 73 N. Y. 384.

In *District Tp. v. Independent Dist.*, 63 Iowa 188, it was held that where a district township was dissolved by its sub-districts organizing as independent districts, a judgment obtained in an action begun against the original township after its dissolution was void for want of jurisdiction of the court to render it.

Void Though Executor Was Also Defendant. — A judgment rendered against a party at the time deceased is void even though his sole executor was a defendant in the same action, but in his individual capacity. *Bragg v. Thompson*, 19 S. Car. 576.

Death of Party After Obtaining Order of Appeal. — An order or judgment rescinding an order of appeal previously obtained by a party to the suit will be annulled and set aside if it appears that the rescinding order was rendered after the death of the party who had obtained the appeal. *Hoggatt's Succession*, 36 La. Ann. 337.

1. *Arkansas.* — *Samuel v. Cravens*, 10 Ark. 381.

California. — *Phelan v. Tyler*, 64 Cal. 80; *Wallace v. Center*, 67 Cal. 133.

Florida. — *Collins v. Mitchell*, 5 Fla. 364.

while erroneous and voidable when properly assailed in a direct

Illinois. — *Camden v. Robertson*, 3 Ill. 508; *Stoetzell v. Fullerton*, 44 Ill. 108; *Davies v. Coryell*, 37 Ill. App. 505; *Clafin v. Dunne*, 129 Ill. 241.

Iowa. — *Gilman v. Donovan*, 53 Iowa 362.

Kentucky. — *Case v. Ribelin*, 1 J. J. Marsh. (Ky.) 30; *Spalding v. Wathen*, 7 Bush (Ky.) 659.

Maine. — *West v. Jordan*, 62 Me. 484; *Merrill v. Suffolk Bank*, 31 Me. 57.

Massachusetts. — *Loring v. Folger*, 7 Gray (Mass.) 505; *Reid v. Holmes*, 127 Mass. 326.

Michigan. — *Webber v. Stanton*, 1 Mich. N. P. 97.

Minnesota. — *Hayes v. Shaw*, 20 Minn. 405; *Berkey v. Judd*, 27 Minn. 475; *Stocking v. Hanson*, 22 Minn. 542.

Missouri. — *Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229; *Crosley v. Hutton*, 98 Mo. 196.

Nebraska. — *Jennings v. Simpson*, 12 Neb. 558; *McCormick v. Paddock*, 20 Neb. 486; *McAlister v. Lancaster County Bank*, 15 Neb. 295.

New York. — *Livingston v. Rendall*, 59 Barb. (N. Y.) 493; *Griswold v. Stewart*, 4 Cow. (N. Y.) 457.

North Carolina. — *Knott v. Taylor*, 99 N. Car. 511; *Wood v. Watson*, 107 N. Car. 52; *Lynn v. Lowe*, 88 N. Car. 478.

Ohio. — *Swasey v. Antram*, 24 Ohio St. 87; *Dows v. Harper*, 6 Ohio 518.

Oklahoma. — *Mosely v. Southern Mfg. Co.*, 4 Okla. 492.

Oregon. — *Mitchell v. Schoonover*, 16 Oregon 211.

Pennsylvania. — *Yaple v. Titus*, 41 Pa. St. 195, 80 Am. Dec. 604; *Carr v. Townsend*, 63 Pa. St. 202; *Warder v. Tainter*, 4 Watts (Pa.) 270.

Texas. — *Milam County v. Robertson*, 47 Tex. 222; *McClelland v. Moore*, 48 Tex. 355; *Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 336; *Fleming v. Seeligson*, 57 Tex. 524; *Best v. Nix*, 6 Tex. Civ. App. 349; *Harrison v. McMurray*, 71 Tex. 122; *Ledbetter v. Higbee*, (Tex. Civ. App. 1896) 35 S. W. Rep. 80; *Holman v. G. A. Stowers Furniture Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1120.

Utah. — *Elliott v. Bastian*, 11 Utah 452.

Vermont. — *Holt v. Thacher*, 52 Vt. 592.

Virginia. — *Hooe v. Barber*, 4 Hen.

& M. (Va.) 439; *Neale v. Utz*, 75 Va. 480.

West Virginia. — *Watt v. Brookover*, 35 W. Va. 323.

United States. — *New Orleans v. Gaines*, 138 U. S. 595; *Coughlin v. District of Columbia*, 106 U. S. 7; *Mitchell v. Overman*, 103 U. S. 62.

England. — *Green v. Cobden*, 4 Scott 486, 36 E. C. L. 392.

"We think the better rule to be that when a court has acquired jurisdiction of the subject-matter and the person during his lifetime, and a hearing is had and judgment rendered, and the judgment roll does not disclose the death of either party to the controversy, then such a judgment is not void because one of the parties may have died prior to its rendition. Such judgment, while erroneous, is not void." *Per King, J.*, in *Elliott v. Bastian*, 11 Utah 452.

In *Jennings v. Simpson*, 12 Neb. 558, the court said: "While the authorities applicable to this point are by no means uniform or free from conflict, yet we consider the weight of authority to be as laid down by the Supreme Court of Pennsylvania, in *Yaple v. Titus*, 41 Pa. St. 195, in the following words: 'A judgment rendered against a person (and equally so of one rendered in his favor) after his death is reversible, if the fact and time of death appear on the record, or in error *coram nobis*, if the fact must be shown *aliunde*; it is voidable, and not void, and cannot be impeached collaterally.'"

"The court, having acquired jurisdiction of the parties, possesses the power to proceed to the final disposition of the action; and while the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the action in which the error occurs, and the judgment, though erroneous, is not on that account to be attacked in a collateral action. In other words, the judgment is voidable when properly assailed, but not void." *Hayes v. Shaw*, 20 Minn. 405. See also *Stocking v. Hanson*, 22 Minn. 542.

Jurisdiction Must Be Acquired Before the Death of the party against whom the judgment is rendered, for a judgment rendered in an action originally

proceeding for that purpose,¹ is valid until reversed by some appropriate proceeding, and may not be collaterally attacked.² Where the death of the plaintiff occurs after the verdict, judgment may nevertheless be properly entered in his favor,³ but such judgment should be entered as of the term in which the verdict was returned.⁴

brought against a person already dead is void, since in such case the court never acquired jurisdiction. *Loring v. Folger*, 7 Gray (Mass.) 505; *Reid v. Holmes*, 127 Mass. 327; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen (Mass.) 87; *Clafin v. Dunne*, 129 Ill. 241; *Crosley v. Hutton*, 98 Mo. 196.

1. *Stocking v. Hanson*, 22 Minn. 542; *Hayes v. Shaw*, 20 Minn. 405; *Mitchell v. Schoonover*, 16 Oregon 211; *Taylor v. Snow*, 47 Tex. 462; *Mills v. Alexander*, 21 Tex. 154.

Representative Must Have Opportunity to Resist Recovery. — In *Lynn v. Lowe*, 88 N. Car. 478, it was held that judgment rendered against a party after his death is irregular where there was service of process on attorneys, but no suggestion of the death; and the same will be set aside in a direct proceeding for that purpose, so that the representative may have an opportunity to resist a recovery. The court said: "It is the clear right of every person to be heard before any action is invoked and had before a judicial tribunal affecting his rights of person or property. If no opportunity has been offered, and such prejudicial action has been taken, as well when he was never made a party as when by death he has ceased to be, in either case, the severance being equally effectual and absolute, the court will at once, when judicially informed of the error, correct it, and relieve him and his estate from the wrong, not because injustice is done in the particular case, but because it may have been done. * * * In such case the court does not investigate the merits of the matter in dispute, but sets aside the judgment, and reopens the otherwise concluded matter, to afford the representative the opportunity, not open to his intestate and which the law accords to all, of being heard in opposition."

2. *Case v. Ribelin*, 1 J. J. Marsh. (Ky.) 29; *Stocking v. Hanson*, 22 Minn. 542; *Mitchell v. Schoonover*, 16 Oregon 211; *Mills v. Alexander*, 21 Tex. 154; *Beard v. Roth*, 35 Fed. Rep. 397.

A judgment cannot be impeached in a collateral action by proof that the person for or against whom it was rendered died before its rendition. *Mills v. Alexander*, 21 Tex. 154.

In *Beard v. Roth*, 35 Fed. Rep. 397, it was held that a judgment of the court fixing the amount due from an administrator on his settlement, which was rendered after his death, was not void for that reason where the accounts were filed during the administrator's lifetime, since the court had thereby acquired jurisdiction of his person during his lifetime.

Error to Be Corrected by Court Rendering Judgment. — In *Case v. Ribelin*, 1 J. J. Marsh. (Ky.) 29, the Court of Appeals of Kentucky, in holding that the rendition of judgment for or against a dead person is error in fact, only to be corrected by writ of error *coram vobis*, said: "If, for instance, a judgment be rendered in favor of or against a *feme covert* suing or defending as a *feme sole*, or in favor of or against a dead man, which would be manifestly erroneous as soon as the fact shall appear, the error could be corrected only by the court which rendered the judgment."

3. *Goddard v. Bolster*, 6 Me. 427; *Horner v. Nicholson*, 56 Mo. 220; *Wood v. Boyle*, 177 Pa. St. 620; *Fowler v. Burdett*, 20 Tex. 34.

4. *Goddard v. Bolster*, 6 Me. 427; *Horner v. Nicholson*, 56 Mo. 220, where the court said: "As to rendering judgment on a verdict found before the death of the plaintiff, our statute (Wagn. Stat. 1050, § 7) expressly authorizes it, notwithstanding his subsequent death." See also, as to the application of this rule where the plaintiff dies between the trial by the court and the judgment, *Webber v. Stanton*, 1 Mich. N. P. 97; *Gilman v. Donovan*, 53 Iowa 362.

Entry as of Actual Date of Rendition. — Although the proper procedure is as indicated in the text, it would seem that a judgment entered after the death of the plaintiff as of the actual

(2) *Error, How Corrected.* — The manner in which the error of rendering a judgment for or against a party after his death is to be corrected depends upon whether the fact and time of death appear on the record or whether they must be shown *aliunde*.¹ In the first case, the judgment is reversible on error.² If, however, the fact of death must be shown *dehors* the record, the remedy is by writ of error *coram nobis*.³

d. JOINDER OF PARTIES—EFFECT ON JUDGMENT—(1) *Against Joint Defendants* — (a) **Common-law Rule** — *aa.* ON CONTRACT — **General Rule.** — At common law, where several defendants are sued jointly in an action *ex contractu*, the plaintiff must have judgment against

date when rendered is not void, and a suit by the personal representatives of the deceased plaintiff may be brought on it, and it will be held as conclusive as though it had been entered *nunc pro tunc* as of the date of the trial. *Webber v. Stanton*, 1 Mich. N. P. 97.

In *Broas v. Mersereau*, 18 Wend. (N. Y.) 653, the court, in holding that a verdict may be taken after the death of a sole plaintiff where the death happens on the first day of a circuit, said: "The statute * * * allows the entry of judgment within two terms from the verdict, though either party may die in the intermediate time. The whole time of the circuit relates to the first day, so that if the party die on any day during the circuit, though before the trial, this is regarded as a death after verdict, and may be followed by a judgment within the two terms. It is not denied that such would be the law of this case were it not for section 5, which forbids the entry of judgment on a verdict against any party who dies before a verdict actually rendered. The verdict here is not against, but in favor of, the party deceased. It is plain, to my mind, that the statute intended to qualify the old rule of relation no farther than it respected the party against whom the verdict passed, but to leave it entirely operative in a case like this."

Remedy by Petition in Nature of Bill of Review. — Where the parties are both dead at the rendition of the judgment, and the record does not show such fact, relief can only be had by petition in the nature of a bill of review, or for a new trial, or by motion to set aside the judgment. *McClelland v. Moore*, 48 Tex. 355, where the court said: "The error in the judgment, however, is not exhibited by the record. It is an error in fact, and not in law. It

could not, therefore, be corrected, under our system of judicature, on appeal or writ of error to this court. Relief must be sought in such case by a petition in the nature of a bill of review, or for a new trial, or by a motion in the court in which it is rendered to set aside the judgment; which seems to have been recognized by this court, in cases of this kind, as a substitute in modern practice for writ of error *coram nobis*." See also *Milam County v. Robertson*, 47 Tex. 222.

1. *Phelan v. Tyler*, 64 Cal. 80.

2. *Phelan v. Tyler*, 64 Cal. 80; *Collins v. Mitchell*, 5 Fla. 364; *Jennings v. Simpson*, 12 Neb. 558; *McCormick v. Paddock*, 20 Neb. 486; *Yaple v. Titus*, 41 Pa. St. 195. See also *Stoetzel v. Fullerton*, 44 Ill. 108; *Clafin v. Dunne*, 129 Ill. 241; *Case v. Ribelin*, 1 J. J. Marsh. (Ky.) 30.

3. *Phelan v. Tyler*, 64 Cal. 80; *Dows v. Harper*, 6 Ohio 518; *Yaple v. Titus*, 41 Pa. St. 195; *Martel v. Hershheim*, 9 Tex. 294; *Giddings v. Steele*, 28 Tex. 732; *Pullen v. Baker*, 41 Tex. 419; *Holman v. G. A. Stowers Furniture Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1120.

Remedy by Motion. — In *Clafin v. Dunne*, 129 Ill. 241, it is held that a judgment rendered against a person after his death "may be reversed on error, if the fact of the defendant's death appears from the record; if not, the judgment may be vacated by motion in the court where the judgment was rendered. It is an error of fact, which may now be reached by motion, but which was formerly reached by writ of error *coram nobis*. * * * When the motion is made under the statute, the question does not arise collaterally, as is supposed, but the motion to vacate, like a writ of error in a proper case, is a direct proceeding, and calls in ques-

all of the defendants who are before the court, either by service of process or by appearance, or he can have judgment against none.¹ Under a declaration against two charging a joint liability

tion the legality of the judgment." See also, to the same effect, *McClelland v. Moore*, 48 Tex. 355.

1. *Alabama*. — *Park v. Edge*, 42 Ala. 631; *Sadler v. Houston*, 5 Stew. & P. (Ala.) 205.

Arkansas. — *Hutchings v. Real Estate Bank*, 4 Ark. 517; *Murphree v. State Bank*, 4 Ark. 448.

California. — *Curry v. Roundtree*, 51 Cal. 184; *Long v. Serrano*, 55 Cal. 20.

Colorado. — *Bissell v. Cushman*, 5 Colo. 76.

Florida. — *Hale v. Crowell*, 2 Fla. 534.

Georgia. — *Norris v. Pollard*, 75 Ga. 358.

Illinois. — *Ritchie v. Gibbs*, 7 Ill. App. 149; *Aten v. Brown*, 14 Ill. App. 451; *Enterprise Distilling Co. v. Bradley*, 17 Ill. App. 509; *Brewer v. Christian*, 9 Ill. App. 57; *Russell v. Hogan*, 2 Ill. 552; *Freeland v. Jasper County*, 27 Ill. 303; *People v. Organ*, 27 Ill. 27; *Griffith v. Furry*, 30 Ill. 251; *Flake v. Carson*, 33 Ill. 518; *Goodale v. Cooper*, 6 Ill. App. 81; *Howell v. Barrett*, 8 Ill. 433; *Kimmel v. Shultz*, 1 Ill. 169; *McConnell v. Swailes*, 3 Ill. 571; *Frink v. Jones*, 5 Ill. 170; *Wight v. Meredith*, 5 Ill. 360; *Wight v. Hoffman*, 5 Ill. 362; *Davidson v. Bond*, 12 Ill. 84; *Dow v. Rattle*, 12 Ill. 373; *Gribbin v. Thompson*, 28 Ill. 61; *Briggs v. Adams*, 31 Ill. 486; *Faulk v. Kellums*, 54 Ill. 188; *Page v. De Leuw*, 58 Ill. 85; *Byers v. Vincennes First Nat. Bank*, 85 Ill. 423; *Felstenthal v. Durand*, 86 Ill. 230; *Potter v. Gronbeck*, 117 Ill. 404; *Dally v. Young*, 3 Ill. App. 39; *Waugh v. Suter*, 3 Ill. App. 271; *Hartley v. Lybarger*, 3 Ill. App. 524; *Fulford v. Block*, 8 Ill. App. 284; *People v. McFarland*, 9 Ill. App. 275; *Brown v. Tuttle*, 27 Ill. App. 389; *Kingsland v. Koeppe*, 137 Ill. 344; *Reynolds v. Barnard*, 36 Ill. App. 218; *Ward v. Stanley*, 41 Ill. App. 417; *People v. Zingraf*, 43 Ill. App. 337; *Cooper v. McNeil*, 43 Ill. App. 350; *Stein v. Stein*, 44 Ill. App. 107; *Columbian Hard Wood Lumber Co. v. Langley*, 51 Ill. App. 100; *Claffin v. Dunne*, 129 Ill. 248; *Anthony v. Ward*, 22 Ill. 181; *Ladd v. Edwards*, 1 Ill. 182; *Fuller v. Robb*, 26 Ill. 246; *Fender v. Stiles*, 31 Ill. 460; *Morrow v. People*, 25 Ill. 330; *Barbour v. White*, 37 Ill. 164; *Garretson v. Strawn*, 54 Ill. 402; *Gould v.*

Sternburg, 69 Ill. 531; *Stewart v. Peters*, 33 Ill. 384; *Davis v. Johnson*, 41 Ill. App. 22; *West Chicago St. R. Co. v. Annis*, 62 Ill. App. 180; *Supreme Lodge, etc. v. Zuhlke*, 129 Ill. 298; *Tolman v. Spaulding*, 4 Ill. 13; *Benjamin v. McConnell*, 9 Ill. 536; *Goit v. Joyce*, 61 Ill. 489; *Davison v. Hill*, 1 Ill. App. 70; *Chicago Electric Light Renting Co. v. Hutchinson*, 25 Ill. App. 476; *McLean v. Griswold*, 22 Ill. 218; *Coursen v. Browning*, 86 Ill. 57; *Brady v. Madden*, 67 Ill. App. 637.

Indiana. — *Heim v. Van Vleet*, 1 Blackf. (Ind.) 342, 12 Am. Dec. 248; *Conklin v. Conklin*, 54 Ind. 289; *Archer v. Heiman*, 21 Ind. 29; *Erwin v. Scotten*, 40 Ind. 389; *Morris v. Knight*, 1 Blackf. (Ind.) 106; *Palmer v. Crosby*, 1 Blackf. (Ind.) 139; *Gibbons v. Surber*, 4 Blackf. (Ind.) 155.

Kentucky. — *O'Hara v. Lannier*, 1 B. Mon. (Ky.) 100; *Warren v. Lewis*, 1 B. Mon. (Ky.) 119; *Lockart v. Roberts*, 3 Bibb (Ky.) 361.

Louisiana. — *Kuhn v. Embry*, 35 La. Ann. 488.

Maryland. — *Barker v. Ayers*, 5 Md. 202; *Bowie v. Munroe*, 82 Md. 642.

Massachusetts. — *Tuttle v. Cooper*, 10 Pick. (Mass.) 281; *Woodward v. Newhall*, 1 Pick. (Mass.) 500.

Michigan. — *Winslow v. Herrick*, 9 Mich. 380; *Ballou v. Hill*, 23 Mich. 60; *Larkin v. Butterfield*, 29 Mich. 254; *Anderson v. White*, 39 Mich. 130; *Detroit v. Houghton*, 42 Mich. 459; *Munn v. Haynes*, 46 Mich. 140; *Post v. Shafer*, 63 Mich. 85; *Seligman v. Gray*, 66 Mich. 341; *Maynard v. Penniman*, 10 Mich. 153; *Mace v. Page*, 33 Mich. 38; *Proctor v. Lewis*, 50 Mich. 329.

Minnesota. — *Fetz v. Clark*, 7 Minn. 217, 8 Minn. 86; *Carlton v. Choteau*, 1 Minn. 102.

Mississippi. — *Prewett v. Caruthers*, 7 How. (Miss.) 304; *Jones v. M'Gahey*, 1 How. (Miss.) 128.

Missouri. — *Hempstead v. Stone*, 2 Mo. 65.

New Hampshire. — *Probate Judge v. Webster*, 46 N. H. 518.

New Mexico. — *Rupe v. New Mexico Lumber Assoc.*, 3 N. Mex. 261.

New York. — *Platner v. Johnson*, 3 Hill (N. Y.) 476; *Miller v. M'Cagg*, 4 Hill (N. Y.) 35; *Catlin v. Latson*, 4 Abb. Pr. (N. Y. Supreme Ct.) 248;

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and a joint plea, the plaintiff cannot recover without establishing the joint liability; and the most conclusive proof or unqualified

Dauchy v. Van Alstyne, 3 How. Pr. (N. Y. Supreme Ct.) 100; *Rich v. Husson*, 4 Sandf. (N. Y.) 115; *Jacques v. Greenwood*, 1 Abb. Pr. (N. Y. C. Pl.) 230.

Oregon. — *Fisk v. Henarie*, 14 Oregon 29.

Pennsylvania. — *Murdy v. McCutcheon*, 95 Pa. St. 435; *Latshaw v. Steinman*, 11 S. & R. (Pa.) 357; *Hall v. Law*, 2 W. & S. (Pa.) 121; *Nelson v. Lloyd*, 9 Watts (Pa.) 22; *Waverly First Nat. Bank v. Furman*, 4 Pa. Super. Ct. Rep. 415; *Burgess v. Sherman*, 1 Pa. Advanced Rep. 290, 147 Pa. St. 254.

Tennessee. — *Hutchins v. Sims*, 7 Humph. (Tenn.) 236.

Texas. — *Phipps v. Willis*, 11 Tex. Civ. App. 186; *Willis v. Morrison*, 44 Tex. 27; *Wootters v. Kauffman*, 67 Tex. 488.

Vermont. — *Metropolitan Washing Mach. Co. v. Morris*, 39 Vt. 393.

Virginia. — *Jenkins v. Hurt*, 2 Rand. (Va.) 446; *Taylor v. Beck*, 3 Rand. (Va.) 316; *Rohr v. Davis*, 9 Leigh (Va.) 30; *Steptoe v. Read*, 19 Gratt. (Va.) 1; *Beazley v. Sims*, 81 Va. 644; *Cole v. Pennell*, 2 Rand. (Va.) 174; *Baber v. Cook*, 11 Leigh (Va.) 635.

West Virginia. — *Hoffman v. Bircher*, 22 W. Va. 537.

Wisconsin. — *Hibbard v. Bell*, 3 Chand. (Wis.) 206; *Bacon v. Bicknell*, 17 Wis. 523; *Blackburn v. Sweet*, 38 Wis. 578.

United States. — *Edmondson v. Barrell*, 2 Cranch (C. C.) 228; *Nicholls v. Fearson*, 2 Cranch (C. C.) 526; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46.

Contra — As to Joint and Several Contracts. — In at least one state it has been held that in a suit on a joint and several contract the plaintiff may enter a *nolle prosequi* as to some of the defendants and proceed to judgment against others. *Peyton v. Scott*, 2 How. (Miss.) 870, where the court said: "It is urged for the plaintiffs in error that the court erred in permitting the *nolle prosequi* to be entered as to Hall and in afterwards proceeding to judgment against the others on the ground that the *nolle prosequi* was a discontinuance as to all the defendants. This appears to be the settled law when the contract on which the action is

founded is joint, but there is a marked difference when the contract is joint and several; for in such cases any or either of the obligors may be sued separately and no advantage can be taken of the nonjoinder of the co-obligors, whereas if the contract were purely joint the nonjoinder would be fatal on a plea in abatement. If a party can sue the makers of a note separately, there can be no reason why he may not discontinue as to part of them after suit brought." See also *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46.

In Actions Before a Justice of the Peace. — The rule laid down in the text applies in actions begun before a justice of the peace as well as in other courts. *Briggs v. Adams*, 31 Ill. 486.

Confession by One Joint Defendant After Action Brought. — "Where all the joint defendants are before the court, and the action as to any of them is not barred by any defense personal to any of such defendants, and one of such joint defendants in court confesses judgment in the action, and the action is further proceeded in against the other joint defendants, the court cannot enter a final judgment upon such confession, and if it does in fact enter up a formal judgment thereon, such formal judgment entered under such circumstances is a nullity; nor does such formal entry of such judgment acquire any validity because the plaintiff agreed to accept the same, unless at the same time he discontinues his action against the other defendants. As such *cognovit actionem* has none of the force or effect of a judgment while the action is waiting the trial of the issues as to the other joint defendants, it is wholly immaterial whether the issues be tried at the same term at which such confession of judgment is entered, or at any subsequent term, for until the trial of the issues as to the other defendants the confession awaits the final judgment upon the verdict, jointly against all the defendants, or none, notwithstanding such *cognovit actionem* and the formal judgment thereon against the defendant who confessed said judgment. When such confession has been made and the issues are tried as to the other defendants, it is the duty of the court to enter judgment upon the verdict jointly against all the defendants or against

admission of the liability of one defendant will not entitle the plaintiff to a verdict and judgment against him alone.¹

Exception to the Rule. — Although the foregoing rule has been long and well established, it is not, however, universal; a notable exception thereto being that whenever a defendant pleads matter which goes to his personal discharge, or any matter that does not go to the nature of the writ, or pleads or gives in evidence a matter which is a bar to the action against himself only, and of which the others could not take advantage, judgment may be for such defendant and against the rest.² Thus, for instance, the defend-

none of them." *Hoffman v. Bircher*, 22 W. Va. 537.

1. *Barker v. Ayers*, 5 Md. 202.

Administrators and Executors Sued as Such. — The general rule which requires a plaintiff in an action *ex contractu* against several to show the liability of all the defendants, to entitle him to a judgment against a less number, does not apply where the defendants are sued as executors or administrators upon a contract made with their testator or intestate; in such case the plaintiff is entitled to a judgment against such of the defendants as may be shown to sustain the character, in relation to the estate of the deceased, in which they are charged. *Gray v. White*, 5 Ala. 490. See also *Ivey v. Gamble*, 7 Port. (Ala.) 545.

2. *Arkansas*. — *State v. Williams*, 17 Ark. 371; *Bruton v. Gregory*, 8 Ark. 180, note.

Illinois. — *Fuller v. Robb*, 26 Ill. 246; *Aten v. Brown*, 14 Ill. App. 451; *Frink v. Jones*, 5 Ill. 170; *Wight v. Meredith*, 5 Ill. 360; *Morrow v. People*, 25 Ill. 330; *Griffith v. Furry*, 30 Ill. 251; *Robinson v. Brown*, 82 Ill. 279; *Kimmel v. Shultz*, 1 Ill. 169; *Stein v. Stein*, 44 Ill. App. 107; *Smith v. Lozano*, 1 Ill. App. 171.

Iowa. — *Coe v. Hamilton*, 1 Morr. (Iowa) 319.

Massachusetts. — *Goodnow v. Hill*, 125 Mass. 587; *Woodward v. Newhall*, 1 Pick. (Mass.) 500; *Hathaway v. Crocker*, 7 Met. (Mass.) 262.

Michigan. — *Post v. Shafer*, 63 Mich. 85; *Reading v. Beardsley*, 41 Mich. 123; *Beekman v. Sylvester*, (Mich. 1896) 66 N. W. Rep. 1093.

New Hampshire. — *Peebles v. Rand*, 43 N. H. 337.

New York. — *Barker v. Cocks*, 50 N. Y. 689; *Robertson v. Smith*, 18 Johns. (N. Y.) 459; *McGuire v. Johnson*, 2 Lans. (N. Y.) 385.

Virginia. — *Taylor v. Beck*, 3 Rand. (Va.) 316; *Bush v. Campbell*, 26 Gratt. (Va.) 403; *Steptoe v. Read*, 19 Gratt. (Va.) 1.

West Virginia. — *Snyder v. Snyder*, 9 W. Va. 415; *Hoffman v. Bircher*, 22 W. Va. 537.

Reason for Exception. — In *Hathaway v. Crocker*, 7 Met. (Mass.) 262, the court, in commenting on this exception to the general common-law rule, said: "Formerly the rule undoubtedly was, that in assumpsit on a joint promise, if there was a verdict on the general issue in favor of one, it falsified the averment of a joint promise, and no judgment could be had against the others, though defaulted. *Tuttle v. Cooper*, 10 Pick. (Mass.) 281. But that rule was always adopted with this exception: that when one defendant pleaded in his discharge some matter personal to himself, as a discharge under a bankrupt act or insolvent law, and upon such plea had a verdict, the other defendants were still liable. * * * The reason of the distinction is obvious, and it is this: that such a special personal defense does not falsify the averment of an original joint promise, but admitting it, avoids it by the averment of matter subsequent. And now, by the law (Stat. 1836, c. 273) discontinuing the use of special pleading, the general issue with notice of the special matter of avoidance must have the same effect."

Effect of Failure to Discontinue. — Where one of several defendants pleads a personal defense, the plaintiff may discontinue or enter a *nolle prosequi* as to such defendant, and may proceed against the others. *Woodward v. Newhall*, 1 Pick. (Mass.) 500. But according to *Beekman v. Sylvester*, (Mich. 1896) 66 N. W. Rep. 1093, where the action is against three joint defendants, and two of such defendants show

ant may plead bankruptcy,¹ or inability to contract, as infancy,² coverture,³ lunacy, and the like.⁴ It is essential, however, to the operation of this exception, that a defense insisted upon by one of several joint debtors be personal to him, and it should not go to the discharge of all.⁵

Default by Some, Successful Defense by Others. — Where, in an action *ex contractu*, one of several defendants makes default, and his co-defendants interpose pleas in bar to the whole action, a finding in their favor inures to the benefit of such defaulted defendant;⁶ and a final judgment by default against a portion of the defend-

a valid discharge, if the plaintiff does not take a discontinuance as to them a judgment in his favor against the third defendant will not be sustained.

1. Fuller v. Robb, 26 Ill. 246; Kimmel v. Shultz, 1 Ill. 169; Smith v. Lozano, 1 Ill. App. 171; Coe v. Hamilton, 1 Morr. (Iowa) 319; Goodnow v. Hill, 125 Mass. 587; Hathaway v. Crocker, 7 Met. (Mass.) 262; Robertson v. Smith, 18 Johns. (N. Y.) 459; Steptoe v. Read, 19 Gratt. (Va.) 1; Snyder v. Snyder, 9 W. Va. 415.

2. Fuller v. Robb, 26 Ill. 246; Aten v. Brown, 14 Ill. App. 451; Kimmel v. Shultz, 1 Ill. 169; Coe v. Hamilton, 1 Morr. (Iowa) 319; Woodward v. Newhall, 1 Pick. (Mass.) 500; Reading v. Beardsley, 41 Mich. 123; Robertson v. Smith, 18 Johns. (N. Y.) 459; Taylor v. Beck, 3 Rand. (Va.) 316; Steptoe v. Read, 19 Gratt. (Va.) 1; Snyder v. Snyder, 9 W. Va. 415.

3. Aten v. Brown, 14 Ill. App. 451.

4. Aten v. Brown, 14 Ill. App. 451.

Illustrations. — Where A, B, and C are sued on a joint contract, and a general verdict is returned for A on his pleading the general issue and giving in evidence a discharge under the insolvent law, and B is defaulted, and a verdict is returned against C, the plaintiff is entitled to a judgment against B and C. Hathaway v. Crocker, 7 Met. (Mass.) 262.

A finding by the court that one of several defendants has been adjudged a bankrupt, and rendering judgment against the other defendants and not against him, is virtually a judgment in his favor. Robinson v. Brown, 82 Ill. 279.

Where a note is executed by A, B, and C jointly, and B sustains his plea of infancy in an action brought against them jointly, a judgment may be rendered against A and C without compelling the payee to commence *de*

novi. Coe v. Hamilton, 1 Morr. (Iowa) 319.

5. Smith v. Riddell, 87 Ill. 165; Tuttle v. Cooper, 10 Pick. (Mass.) 281; Steptoe v. Read, 19 Gratt. (Va.) 1.

"Where several are sued upon an obligation, a successful plea by one discharges the other defendants, unless the nature of the plea is of a character going to the personal discharge of the pleader, of which the others could take no advantage, as infancy, bankruptcy, etc. This, we believe, is a universal principle, recognized and acted upon in the administration of the law in all courts where the practice of the English common-law courts is pursued or adhered to." *Per* Hanly, J., in State v. Williams, 17 Ark. 371. See also Bruton v. Gregory, 8 Ark. 180, note.

Defenses Held Not Personal. — A plea by one that he and another contracted as sureties, and that the payee has without their consent and by the valid contract extended the time, is not a personal defense within the meaning of the doctrine. Ritchie v. Gibbs, 7 Ill. App. 149.

Effect of Recovery Against One Without Embracing the Others. — As to the effect of a recovery against one of the several makers of a note without embracing the others in the proceeding, the court, in Mitchell v. Brewster, 28 Ill. 163, said: "It has been repeatedly held by this court that a recovery against one of the several persons jointly liable releases the others and forms a complete bar to a recovery against them." See also, to the same effect, Wann v. McNulty, 7 Ill. 355; Thompson v. Emmert, 15 Ill. 415; Moore v. Rogers, 19 Ill. 347.

6. State v. Gibson, 21 Ark. 140; Campbell v. McHarg, 9 Iowa 354; Bowman v. Noyes, 12 N. H. 302; Rich v. Husson, 4 Sandf. (N. Y.) 115; Brigs v. Greinfeld, Ld. Raym. 1372, 1 Stra. 610; Marler v. Ayliffe, Cro. Jac. 134.

ants on a joint obligation, coupled with a judgment in favor of the defendants who answer, is reversible on appeal.¹

bb. ON TORTS. — The common-law rule laid down in the preceding section, that final judgment against part of the defendants, without disposing of the case, is error, applies only to actions *ex contractu*, and has no application to actions arising out of a tort,² since there is no contribution among wrongdoers.³ In an action for tort against several defendants the plaintiff may recover against so many of the defendants as the proof shows were guilty of the wrong,⁴ but the proof failing as to any of the defendants, those against whom there is no evidence are entitled to a

1. See article DEFAULTS, vol. 6, p. 22; and for analogy, see article DECREES, vol. 5, p. 994 *et seq.*

2. *Harris v. Preston*, 10 Ark. 201; *Davis v. Taylor*, 41 Ill. 405; *Winslow v. Newlan*, 45 Ill. 145; *Jansen v. Varnum*, 89 Ill. 100.

In *Davis v. Taylor*, 41 Ill. 405, the court said: "It was held in *Dow v. Rattle*, 12 Ill. 373, which was an action of assumpsit, to be error to render final judgment against part of the defendants without disposing of the case as to the others. On the authority of this case the same thing was said in an action of replevin in the case of *Barbour v. White*, 37 Ill. 164. There were, however, other grounds for reversing the last-named case, and on further considering this point we are of opinion that the rule should not be applied to actions of tort. There is no reason for thus applying it, because there is no contribution among wrongdoers. Taking a judgment against a portion of the defendants amounts to a dismissal of the case as to the residue, and in actions *ex delicto* this may be done. If the mode of doing it is irregular, it is an irregularity which works no prejudice to those defendants against whom the judgment is taken. They should not, therefore, be permitted to assign it for error." See also *Vieths v. Skinner*, 47 Ill. App. 325, in which the above opinion is quoted.

3. *Davis v. Taylor*, 41 Ill. 405.

4. *Alabama*. — *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501; *Pounds v. Richards*, 21 Ala. 424.
Arkansas. — *Harris v. Preston*, 10 Ark. 201.

Georgia. — *Howard v. Snelling*, 28 Ga. 469; *Howard v. Dayton Coal, etc., Co.*, 94 Ga. 416.

Illinois. — *Davis v. Taylor*, 41 Ill. 405; *Jansen v. Varnum*, 89 Ill. 100.

Indiana. — *Jeffersonville v. Myers*, 2 Ind. App. 532.

Iowa. — *Boswell v. Gates*, 56 Iowa 143; *Carothers v. Van Hagan*, 2 Greene (Iowa) 481.

Minnesota. — *Huot v. Wise*, 27 Minn. 68.

Nebraska. — *Hayden v. Woods*, 16 Neb. 306.

New Jersey. — *Matthews v. Delaware, etc., R. Co.*, 56 N. J. L. 34; *Van Horn v. Van Horn*, 56 N. J. L. 318.

New York. — *Woodburn v. Chamberlin*, 17 Barb. (N. Y.) 446; *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun (N. Y.) 153; *Keit v. Wyman*, 67 Hun (N. Y.) 337; *Griffing v. Diller*, (Supreme Ct.) 21 N. Y. Supp. 407.

Ohio. — *Mead v. McGraw*, 19 Ohio St. 55; *Reugler v. Lilly*, 26 Ohio St. 48.

Pennsylvania. — *Lare v. Westmoreland Specialty Co.*, 155 Pa. St. 33.

Texas. — *Taylor Water Co. v. Dillard*, 9 Tex. Civ. App. 667.

Washington. — *Reutgen v. Kanowrs*, 1 Wash. (U. S.) 168.

West Virginia. — *Jones v. Grimmet*, 4 W. Va. 104.

United States. — *Conner v. Cockerill*, 4 Cranch (C. C.) 3; *Milne v. Huber*, 3 McLean (U. S.) 212.

"The rule undoubtedly is that where a verdict for damages for tort is rendered against one defendant only, judgment may be rendered thereon although other persons may have been joined as defendants under an averment that the tort was committed by all the defendants jointly." *Boswell v. Gates*, 56 Iowa 143.

In *Jones v. Grimmet*, 4 W. Va. 104, which was an action of trespass for false imprisonment against eleven persons, all of the defendants pleaded the statute of limitation and not guilty. Upon issue being joined eight were found guilty jointly, two not guilty, but

verdict.¹ In actions of tort against several defendants, a judgment by default may be taken against a portion of the defendants though the rest make sufficient plea.² And the court may, after the verdict, grant a new trial to one or more of several defendants if satisfied that they were wrongly convicted, and may render judgment upon the verdict as to the remainder.³

(b) **Under Statute.** — The common-law rule in respect of judgments in actions *ex contractu* against joint defendants⁴ has been

no verdict was found as to the other; and joint judgment was rendered against the eight for damages according to the verdict. It was held that as the defendants against whom the verdict was rendered were not prejudiced by the omission as to one against whom no verdict was found, the verdict and entry of judgment thereon were right.

In an action of replevin against joint defendants judgment may be rendered against one although the plaintiff be not entitled to judgment against the other. *Carothers v. Van Hagan*, 2 Greene (Iowa) 481, where it was held error to instruct the jury that if either of the defendants was not guilty they must find for both; that one alone could not be found guilty, since replevin is founded in tort.

Judgment Against Some a Dismissal As to Others. — In *Davis v. Taylor*, 41 Ill. 405, it was held that a judgment against a portion of the defendants in actions *ex delicto* amounts to a dismissal of the cause as to the others.

Recovery as to One No Bar as to Others. — In *Blann v. Crocheron*, 19 Ala. 647, it was held that the mere recovery of a judgment against one of several joint trespassers will not preclude the plaintiff from proceeding to judgment against the others. "The liability of all must continue until there has been a satisfaction, and judgment without payment cannot be a satisfaction."

1. *Jansen v. Varnum*, 89 Ill. 100; *Hambleton v. McGee*, 19 Md. 43.

Acquittal at Conclusion of Plaintiff's Case. — "In actions for tort against several defendants, if, at the conclusion of the plaintiff's case, there is no evidence against one of the defendants, he is entitled to be acquitted, so that all defendants not fixed by the plaintiff's evidence are to be acquitted before any part of the defense is gone into." *Hambleton v. McGee*, 19 Md. 43, quoting *Parke, J.*, in *Child v. Chamberlain*, 6 C. & P. 213, 25 E. C. L. 362, and

holding that such practice is conformable to reason and necessary for the furtherance of justice; for otherwise it would be in the power of a plaintiff to deprive a defendant of the benefit of material and competent witnesses by joining them in the action [citing *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Van Deusen v. Van Slyck*, 15 Johns. (N. Y.) 223; *Beasley v. Bradley*, 2 Swan (Tenn.) 180].

The rule on this subject, as stated by Thompson, C. J., in *Brown v. Howard*, 14 Johns. (N. Y.) 119, is, that if there is even the slightest evidence against a party defendant he cannot be discharged as a party and received as a witness. "The want of evidence against a party in order to entitle him to be a witness should be so glaring and obvious as to afford strong grounds of belief that he was arbitrarily made a defendant to prevent his testimony."

"In actions of tort, it is competent for the jury to find one of the parties guilty and another not guilty. It may turn out also that there may be no evidence conducing to show the guilt of one of the codefendants, while as to the others there may be a strong case made out. In all such cases, should the jury find a verdict of not guilty as to all, and the court should think a new trial ought to be granted, it would be doing great injustice to the innocent party, as against whom there was no evidence, to order a new trial as to him. Indeed, it would have been regular, if the plaintiff had introduced no proof whatever of the guilt of one of the defendants, to have directed his acquittal before the jury passed upon the guilt of the others, had any reason appeared for ordering such discharge, as that the other defendants desired to examine him as a witness." *Pounds v. Richards*, 21 Ala. 424.

2. See article **DEFAULTS**, vol. 6, p. 22.

3. *Terpenning v. Gallup*, 8 Iowa 74.

4. See *supra*, III. 4. d. (1) (a) *aa. On Contract*.

changed by statute in most, if not all, of the states, so that in actions against several upon contract, the plaintiff may have judgment against one or more of the defendants if he shall make out a good cause of action against them, although he may fail as to the others,¹ whether the contract be joint or several, or joint

1. *Alabama*. — Renfro *v.* Willis, 67 Ala. 488; Longstreet *v.* Rea, 52 Ala. 195.

Arkansas. — Parke *v.* Meyer, 27 Ark. 551.

California. — Lewis *v.* Clarkin, 18 Cal. 399; Morgan *v.* Righetti, (Cal. 1896) 45 Pac. Rep. 260; Rowe *v.* Chandler, 1 Cal. 167; People *v.* Frisbie, 18 Cal. 402; Rutenberg *v.* Main, 47 Cal. 213; Shain *v.* Forbes, 82 Cal. 577; Acquital *v.* Crowell, 1 Cal. 191; Bailey Loan Co. *v.* Hall, 110 Cal. 490; Gruhn *v.* Stanley, 92 Cal. 86; Stoddard *v.* Van Dyke, 12 Cal. 437.

Colorado. — Irwine *v.* Wood, 7 Colo. 477.

Connecticut. — Dean *v.* Savage, 28 Conn. 359; Benedict *v.* Stevens, 25 Conn. 392; Salomon *v.* Hopkins, 61 Conn. 47.

District of Columbia. — Presbrey *v.* Thomas, 1 App. Cas. (D. C.) 171.

Idaho. — Bloomingdale *v.* Du Rell, 1 Idaho 33; Gaffney *v.* Hoyt, 2 Idaho 184.

Illinois. — Marine Bank *v.* Ferry, 40 Ill. 255.

Indiana. — Stafford *v.* Nutt, 51 Ind. 535; Murray *v.* Ebright, 50 Ind. 362; Hunt *v.* Standart, 15 Ind. 33; Richardson *v.* Jones, 58 Ind. 240; Beatty *v.* O'Connor, 2 Ind. App. 337; Valentine *v.* Duff, 7 Ind. App. 196; Stapp *v.* Davis, 78 Ind. 128; Lee *v.* Basey, 85 Ind. 543; Lower *v.* Franks, 115 Ind. 334; Louisville, etc., R. Co. *v.* Lange, 13 Ind. App. 337; Nicodemus *v.* Simons, 121 Ind. 564; Rush *v.* Thompson, 112 Ind. 158; Hamilton *v.* Browning, 94 Ind. 242; Graham *v.* Henderson, 35 Ind. 195; Fitzgerald *v.* Genter, 26 Ind. 238; Carmien *v.* Whitaker, 36 Ind. 509; Draper *v.* Vanhorn, 12 Ind. 352; Douglass *v.* Howland, 11 Ind. 554; Hubbell *v.* Woolf, 15 Ind. 204; Erwin *v.* Scotten, 40 Ind. 389; Maiden *v.* Webster, 30 Ind. 317; Pollock *v.* Glazier, 20 Ind. 262.

Iowa. — Poole *v.* Hintrager, 60 Iowa 180; Eyre *v.* Cook, 9 Iowa 185, 10 Iowa 586; Wilford *v.* Miller, 1 Morr. (Iowa) 405; Smith *v.* Coopers, 9 Iowa 376; Boswell *v.* Gates, 56 Iowa 143.

Kentucky. — Patton *v.* Shanklin, 14 B. Mon. (Ky.) 13; Monroe *v.* Wilson, 6

T. B. Mon. (Ky.) 126; Dinwiddie *v.* Marshall, 2 A. K. Marsh. (Ky.) 342; Moore *v.* Estes, 79 Ky. 282.

Maine. — Smith *v.* Loomis, 72 Me. 51.

Maryland. — Westheimer *v.* Craig, 76

Md. 399; Thomas *v.* Mohler, 25 Md. 36.

Michigan. — People's Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186; Roberts *v.* Pepple, 55 Mich. 367.

Minnesota. — Huot *v.* Wise, 27 Minn. 68; Keigher *v.* Dowlan, 47 Minn. 574; Reed *v.* Pixley, 22 Minn. 540.

Mississippi. — Lamar *v.* Williams, 39 Miss. 342; Mhoon *v.* Colment, 51 Miss. 60.

Missouri. — Crews *v.* Lackland, 67 Mo. 619; McCoy *v.* Green, 83 Mo. 626; National Ins. Co. *v.* Bowman, 60 Mo. 252; Jefferson *v.* Curry, 77 Mo. 230.

Montana. — Conklin *v.* Fox, 3 Mont. 208; Knatz *v.* Wise, 16 Mont. 555.

Nebraska. — Long *v.* Clapp, 15 Neb.

417; Hoke *v.* Halverstadt, 22 Neb. 421;

Hayden *v.* Woods, 16 Neb. 306; Roggenkamp *v.* Hargreaves, 39 Neb. 540.

New York. — Brumskill *v.* James, 11 N. Y. 294; Marquat *v.* Marquat, 12 N. Y. 336; Parker *v.* Jackson, 16 Barb. (N. Y.) 33; Blodget *v.* Morris, 14 N. Y. 482; Niles *v.* Battershall, 27 How. Pr. (N. Y. Super. Ct.) 381; Harrington *v.* Higham, 15 Barb. (N. Y.) 524; Crandall *v.* Beach, 7 How. Pr. (N. Y. Supreme Ct.) 271; Claflin *v.* Butterly, 5 Duer (N. Y.) 327; Stedeker *v.* Bernard, 102 N. Y. 327; McIntosh *v.* Ensign, 28 N. Y. 169; Fielden *v.* Lahens, 2 Abb. App. Dec. (N. Y.) 111; Moss *v.* Jerome, 10 Bosw. (N. Y.) 220; Hand *v.* Rogers, 11 Misc. Rep. (N. Y. City Ct.) 623; Stimson *v.* Van Pelt, 66 Barb. (N. Y.) 151; Catlin *v.* Latson, 4 Abb. Pr. (N. Y. Supreme Ct.) 248; Pruyn *v.* Black, 21 N. Y. 300; McKenzie *v.* Farrell, 4 Bosw. (N. Y.) 192; Bonsteel *v.* Vanderbilt, 21 Barb. (N. Y.) 26; People *v.* Cram, 8 How. Pr. (N. Y. Supreme Ct.) 151; Witherhead *v.* Allen, 28 Barb. (N. Y.) 661; Merrifield *v.* Cooley, 4 How. Pr. (N. Y. Supreme Ct.) 272; Owen *v.* Conner, (N. Y. City Ct.) 11 N. Y. Supp. 352; Orleans County Nat. Bank *v.* Spencer, 19 Hun (N. Y.) 569; Levi *v.* Haas, 25 Hun (N. Y.) 266; Morenus *v.* Crawford, 51 Hun (N. Y.) 89; Spey-

only.¹ These statutes usually provide that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants,² leaving the action to proceed against the others, whenever a several judgment is proper.³ It is the intent of such statutes to apply to all actions

ers *v. Fisk*, 3 Hun (N. Y.) 706; *Barker v. Cocks*, 50 N. Y. 689.

Ohio. — *Hempy v. Ransom*, 33 Ohio St. 312; *Bussing v. Scott*, 2 Cinc. Wkly. L. Bul. 18; *Humphries v. Huffman*, 33 Ohio St. 395; *Lampkin v. Chisom*, 10 Ohio St. 450; *Roby v. Rainsberger*, 27 Ohio St. 676; *Aucker v. Adams*, 23 Ohio St. 543; *Smetters v. Rainey*, 14 Ohio St. 287; *Smith v. Exchange Bank*, 26 Ohio St. 141.

Oregon. — *Fisk v. Henarie*, 14 Oregon 29; *Ah Lep v. Gong Choy*, 13 Oregon 205; *Hamm v. Basche*, 22 Oregon 513; *Wilson v. Blakeslee*, 16 Oregon 43.

Texas. — *Willis v. Morrison*, 44 Tex. 27; *Kuykendall v. Coulter*, 7 Tex. Civ. App. 399; *Forbes v. Davis*, 18 Tex. 274; *Wooters v. Smith*, 56 Tex. 198; *Cleveland v. Harding*, 67 Tex. 396; *Kiethley v. Seydell*, 60 Tex. 78; *Stevens v. Gainesville Nat. Bank*, 62 Tex. 499.

Utah. — *Ruffatti v. Société, etc.*, 10 Utah 386.

Vermont. — *Hurlburt v. Hendy*, 27 Vt. 245.

Virginia. — *Gray v. Stuart*, 33 Gratt. (Va.) 351; *Beazley v. Sims*, 81 Va. 644.

West Virginia. — *Hoffman v. Bircher*, 22 W. Va. 537.

Wisconsin. — *Van Ness v. Corkins*, 12 Wis. 186; *Smith v. Cassell*, 70 Wis. 567.

United States. — *Humboldt Min. Co. v. Variety Iron Works Co.*, 22 U. S. App. 334; *Sawin v. Kenny*, 93 U. S. 289; *Atlantic, etc., R. Co. v. Laird*, 164 U. S. 393; *Allen v. Clayton*, 11 Fed. Rep. 73.

Illustrations. — Thus, where two persons are sued on an alleged partnership debt, and it is found that they are not partners, but that the debt is the individual debt of one, the plaintiff may have judgment against him. *Morgan v. Righetti*, (Cal. 1896) 45 Pac. Rep. 260. And where three persons are sued as partners, and a cause of action is proved against two, but not against the other, a judgment may properly be rendered against the two. *Keigher v. Dowlan*, 47 Minn. 574. See also *Salomon v. Hopkins*, 61 Conn. 47.

In an action upon a contract against two persons, recovery may be had

against one alone where it appears that the other was only his agent. *Ruffatti v. Société, etc.*, 10 Utah 386.

In an action against the makers and indorsers of a note, the plaintiff may take judgment against the makers alone. *Van Ness v. Corkins*, 12 Wis. 186.

1. *Stafford v. Nutt*, 51 Ind. 535; *Hubbell v. Woolf*, 15 Ind. 204; *Carmien v. Whitaker*, 36 Ind. 509; *Fitzgerald v. Genter*, 26 Ind. 238.

2. *Parke v. Meyer*, 27 Ark. 551; *Lewis v. Clarkin*, 18 Cal. 399; *Louisville, etc., R. Co. v. Lange*, 13 Ind. App. 337; *Nicodemus v. Simons*, 121 Ind. 564; *Rush v. Thompson*, 112 Ind. 158; *Hamilton v. Browning*, 94 Ind. 242; *Lower v. Franks*, 115 Ind. 334.

See, for illustration, *New York Code Civ. Pro.*, §§ 1204, 1205; *California Code Civ. Pro.*, §§ 578, 579.

3. *Iowa*. — *Smith v. Coopers*, 9 Iowa 376.

Kentucky. — *Patton v. Shanklin*, 14 B. Mon. (Ky.) 13.

Montana. — *Conklin v. Fox*, 3 Mont. 208.

New York. — *Levin v. Haas*, 25 Hun (N. Y.) 266.

Ohio. — *Hempy v. Ransom*, 33 Ohio St. 312; *Humphries v. Huffman*, 33 Ohio St. 395; *Lampkin v. Chisom*, 10 Ohio St. 450; *Roby v. Rainsberger*, 27 Ohio St. 676; *Aucker v. Adams*, 23 Ohio St. 543.

Oregon. — *Hamm v. Basche*, 22 Oregon 513; *Fisk v. Henarie*, 14 Oregon 29; *Wilson v. Blakeslee*, 16 Oregon 43.

Wisconsin. — *Decker v. Trilling*, 24 Wis. 610.

In *Hempy v. Ransom*, 33 Ohio St. 312, it was held that, in an action against two defendants to recover a sum of money alleged to be due from them on account, where it appears either from the pleadings or during the progress of the case that a several judgment is proper against one, the court may, in its discretion, render a judgment against him for the amount for which he is liable, leaving the action to proceed against his codefendant. The effect of such severance and judgment is to leave the action to be

founded on contract the same rule with regard to the right of recovery against a part of the defendants which prevails at common law in the case of actions founded on torts.¹

(c) **Judgment When Joint.** — Where a joint action is brought against several defendants who plead jointly, a joint judgment is proper.²

tried as a several action against the remaining defendant upon the issues joined, as fully as if he had been sued separately on the same cause of action. On the trial of these issues, judgment may be rendered for or against the remaining defendant as if he had been sued alone, without regard to the amount of the former judgment against his codefendant.

In *Smith v. Coopers*, 9 Iowa 376, it was held that a judgment may be rendered against one of the makers of a joint and several promissory note, and the cause continued as to the others, against whom the plaintiff may still recover when the cause is ripe for disposition as to them.

Limitation of Rule. — In an action against several upon a joint obligation, where all of the defendants have been served, judgment may be had against any or either of them severally, where the plaintiff would be entitled to such judgment, if such defendant or defendants had been sued alone. But the rule does not authorize a recovery against a part of the defendants in such case where the others are also liable. *Fisk v. Henarie*, 14 Oregon 29. See also, to the same effect, *Wilson v. Blakeslee*, 16 Oregon 43.

Judgment Ignoring One Defendant Bad on Objection. — A judgment against one defendant only, ignoring the other, in an action against two defendants jointly, cannot be upheld against the objection of the judgment defendant. *Miller v. Bryden*, 34 Mo. App. 602. See also *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Eichelmann v. Weiss*, 7 Mo. App. 87.

Test as to Whether Several Judgment Is Proper. — The true test as to whether a separate judgment may be had is, whether a separate action could have been maintained.

Arkansas. — *Parke v. Meyer*, 27 Ark. 551.

California. — *Rowe v. Chandler*, 1 Cal. 167.

Colorado. — *Irwine v. Wood*, 7 Colo. 477.

Indiana. — *Stapp v. Davis*, 78 Ind. 128; *Murray v. Ebricht*, 50 Ind. 362.

Iowa. — *Boswell v. Gates*, 56 Iowa 143.

Kentucky. — *Moore v. Estes*, 79 Ky. 282.

Michigan. — *Roberts v. Pepple*, 55 Mich. 367.

Minnesota. — *Huot v. Wise*, 27 Minn. 68.

New York. — *Speyers v. Fisk*, 3 Hun (N. Y.) 706; *Morenus v. Crawford*, 51 Hun (N. Y.) 89; *Stimson v. Van Pelt*, 66 Barb. (N. Y.) 151; *Parker v. Jackson*, 16 Barb. (N. Y.) 33; *Harrington v. Higham*, 15 Barb. (N. Y.) 524; *Crandall v. Beach*, 7 How. Pr. (N. Y. Supreme Ct.) 271.

Ohio. — *Smith v. Exchange Bank*, 26 Ohio St. 141.

West Virginia. — *Hoffman v. Bircher*, 22 W. Va. 537.

Wisconsin. — *Van Ness v. Corkins*, 12 Wis. 186.

1. *Dean v. Savage*, 28 Conn. 359; *Brumskill v. James*, 11 N. Y. 294; *Marquat v. Marquat*, 12 N. Y. 336. As to the common-law rule in actions of tort, see *supra*, III. 4. d. (1) (a) 66. On Torts.

2. *California.* — *Pierce v. Minturn*, 1 Cal. 470; *Myers v. Moulton*, 71 Cal. 498; *Boys v. Shawhan*, 88 Cal. 111; *Neale v. Depot R. Co.*, 94 Cal. 425.

Connecticut. — *Sanford v. Button*, 4 Day (Conn.) 312.

Illinois. — *Howell v. Barrett*, 8 Ill. 433.

Indiana. — *Wheeler v. Hawkins*, 116 Ind. 515.

Kansas. — *Hurd v. Simpson*, 47 Kan. 372.

Kentucky. — *Rochester v. Anderson*, 1 Bibb (Ky.) 439; *Holmes v. Gay*, 6 Bush (Ky.) 51; *Elledge v. Bowman*, 5 J. J. Marsh. (Ky.) 593.

Michigan. — *Post v. Shafer*, 63 Mich. 85.

New York. — *Judd Linseed, etc.*, Oil Co. v. Hubbell, 76 N. Y. 543; *Jacques v. Greenwood*, 1 Abb. Pr. (N. Y. C. Pl.) 230; *Sager v. Nichols*, 1 Daly (N. Y.) 1; *Robertson v. Smith*, 18 Johns. (N. Y.) 459.

Ohio. — *Wilson v. Lead, etc.*, Co., 1 Cinc. Wkly. L. Bul. 314; *Voss v. Loomis*, 13 Cinc. Wkly. L. Bul. 293.

In an action of tort against several defendants, if the jury return a joint verdict against them, judgment should be rendered against them jointly.¹ Where it is clear that two or more defendants are not jointly liable, a joint judgment against both cannot be sustained although each may be severally liable,² nor can a joint judgment be rendered in favor of several defendants where there is no community of interest or ownership in the property in question.³

(d) **Judgment When Several.** — Where an action is upon a contract joint and several, a several judgment is proper,⁴ since the defendants might have been sued severally,⁵ and judgment may be rendered against one or more without awaiting the final trial.⁶

Tennessee. — *Worley v. Waldran*, 3 Sneed (Tenn.) 548.

Texas. — *Murphy v. Gage*, (Tex. Civ. App. 1893) 21 S. W. Rep. 396; *Gwinn v. O'Daniel*, (Tex. Civ. App. 1893) 22 S. W. Rep. 754.

United States. — *Gilman v. Rives*, 10 Pet. (U. S.) 298.

England. — *Max v. Roberts*, 2 B. & P. N. R. 454.

The right to take judgment against one defendant on default before the other has answered or made default applies only to cases where a several judgment is proper, and cannot authorize a judgment against both defendants, even so far as to affect only partnership property. But where the liability is only a joint liability there can be only a joint recovery and judgment, and no judgment can be entered up until all the parties served have had the full time to answer. *Jacques v. Greenwood*, 1 Abb. Pr. (N. Y. C. Pl.) 230.

Entry of Separate Judgment Against Each Partner. — In *Judd Linseed, etc., Oil Co. v. Hubbell*, 76 N. Y. 543, it was held that in an action against a partnership, the entry of a separate judgment against each partnership, instead of a joint one against all, is an irregularity only, since it does not change the partner's liability, and such judgment cannot be set aside on a motion unless made within a year.

1. *Eames v. Stevens*, 26 N. H. 117; *Pickle v. Byers*, 16 Ind. 383; *O'Shea v. Kirker*, 4 Bosw. (N. Y.) 120; *Ft. Worth, etc., R. Co. v. Enos*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1095; *Chils v. Gronlund*, 41 Fed. Rep. 505.

Judgment Against Joint Trespassers. — In a suit against joint trespassers, the damages must be assessed jointly against all who are found guilty; they

cannot be severally assessed, as a satisfaction to one is a satisfaction to all. *Perine v. Deans*, *Tappan* (Ohio) 236. See also *Fields v. Williams*, 91 Ala. 502; *Thompson v. Albright*, (Tex. App. 1889) 14 S. W. Rep. 1020.

Each Must Be Liable to Extent of Verdict. — Where the items of damage are distinct, joint judgment cannot be entered against several defendants unless each is liable to the full extent of the verdict. *Chambers v. Upton*, 34 Fed. Rep. 473.

2. Thus in an action by a lessor against two subtenants of his lessee, a joint judgment was held improper where it appeared that the subtenants did not occupy any portion of the premises jointly. *Pierce v. Minturn*, 1 Cal. 470; *Farmers' Bank v. Bayliss*, 41 Mo. 274.

3. *Page v. Fowler*, 39 Cal. 412.

4. *True v. Clark*, 3 Bibb (Ky.) 295; *Peyton v. Scott*, 2 How. (Miss.) 870; *Sears v. McGrew*, 10 Oregon 48; *Hamm v. Basche*, 22 Oregon 518; *Croasdell v. Tallant*, 83 Pa. St. 193; *Decker v. Trilling*, 24 Wis. 610.

When the foundation of an action is joint and several, it is not error to enter one judgment against one defendant on default and another against other defendants on a verdict. *Peyton v. Scott*, 2 How. (Miss.) 870.

Joint Judgment Not Void. — In *Decker v. Trilling*, 24 Wis. 610, it was held that in an action against part of the defendants jointly and severally liable on the same instrument, while strictly there should be several judgments, a joint judgment will not be void.

5. *Sears v. McGrew*, 10 Oregon 48; *Hempy v. Ransom*, 33 Ohio St. 313; *True v. Clark*, 3 Bibb (Ky.) 295.

6. *Smith v. Coopers*, 9 Iowa 378; *Bank of Commerce v. Smith*, 57 Minn.

(e) **Judgment as an Entirety** — *aa*. **GENERALLY.** — On the ground that a judgment against two or more parties jointly is an entirety, it is held in a number of decisions that if the court rendering such judgment has not jurisdiction over one of the defendants the judgment as to all will be merely a nullity,¹ as, for instance, where one party was not served,² or where one defendant dies

374; *Peyton v. Scott*, 2 How. (Miss.) 870; *Ely v. Clute*, 19 Hun (N. Y.) 35; *Hempy v. Ransom*, 33 Ohio St. 313; *Sears v. McGrew*, 10 Oregon 48.

Against Maker and Guarantor of Note. — In an action on a note against its maker and the guarantors thereon, the plaintiff may enter several judgments on a verdict against the maker, and need not await the trial of the issues against the other. *Bank of Commerce v. Smith*, 57 Minn. 374.

Against Heirs. — In *Ransdell v. Threlkeld*, 4 Bush (Ky.) 347, it was held that in a suit to subject assets descended to several heirs, it was error to render a joint judgment against them. The Circuit Court should have ascertained the amount each heir had received by descent, and a several judgment should have been rendered against each one for an amount not exceeding the amount so received, and not exceeding the amount to which the plaintiff was entitled.

In *Low v. Felton*, 84 Tex. 378, it was held that a judgment against heirs which makes each one liable for the entire sum due from an ancestor's estates will not be sustained on a finding that they jointly received sufficient assets to pay it.

Against Defendants Liable in Different Capacities. — Where one defendant is liable individually and the other in a representative character, judgment against them should be not joint, but several. *Gray v. M'Dowell*, 5 T. B. Mon. (Ky.) 501.

Judgment Itself a Joint and Several Obligation. — A personal judgment against two parties is a joint and several obligation, and an action can be maintained upon it against either of the judgment debtors separately, and it can in like manner be used as a set-off against either. *Read v. Jeffries*, 16 Kan. 534. See also *Turner v. Crawford*, 14 Kan. 499.

1. *Alabama.* — *Williams v. Lewis*, 2 Stew. (Ala.) 41.

Arkansas. — *Hughes v. Lindsey*, 10 Ark. 555.

District of Columbia. — *Jackson v. Hulse*, 6 Mackey (D. C.) 548.

Illinois. — *Brockman v. McDonald*, 16 Ill. 112; *Thomas v. Lowy*, 60 Ill. 512; *Grace v. Casey-Grimshaw Marble Co.*, 62 Ill. App. 149; *Williams v. Chalfant*, 82 Ill. 218.

Kentucky. — *Joyes v. Hamilton*, 10 Bush (Ky.) 548.

Louisiana. — *McCloskey v. Wingfield*, 29 La. Ann. 141.

Maine. — *Buffon v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589.

Maryland. — *Hanley v. Donoghue*, 59 Md. 239, 43 Am. Rep. 554.

Massachusetts. — *Hall v. Williams*, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; *Whiting v. Cochran*, 9 Mass. 532; *Knapp v. Abell*, 10 Allen (Mass.) 485; *Wright v. Andrews*, 130 Mass. 149.

Michigan. — *Van Renselaer v. Whit- ing*, 12 Mich. 449.

Missouri. — *Voorhis v. Gamble*, 6 Mo. App. 1; *St. Louis v. Gleason*, 15 Mo. App. 25; *Smith v. Rollins*, 25 Mo. 408; *Dickerson v. Chrisman*, 28 Mo. 134; *Covenant Mut. L. Ins. Co. v. Clover*, 36 Mo. 392; *Hulett v. Nugent*, 71 Mo. 131; *St. Louis v. Lanigan*, 97 Mo. 175.

New Hampshire. — *Rangely v. Webster*, 11 N. H. 299; *Burt v. Stevens*, 22 N. H. 229.

New York. — *Holbrook v. Murray*, 5 Wend. (N. Y.) 161.

North Carolina. — *Ramsour v. Raper*, 7 Ired. L. (N. Car.) 346.

Ohio. — *Blanchard v. Gregory*, 14 Ohio 413.

Pennsylvania. — *Donnelly v. Graham*, 77 Pa. St. 274.

Tennessee. — *Trousdale v. Donnell*, 4 Humph. (Tenn.) 273.

Texas. — *Hulme v. Janes*, 6 Tex. 242, 55 Am. Dec. 774; *Long v. Garnett*, 45 Tex. 400.

Virginia. — *Gray v. Stuart*, 33 Gratt. (Va.) 351.

United States. — *Meyer v. Kuhn*, 65 Fed. Rep. 705, 25 U. S. App. 174; *Shuford v. Cain*, 1 Abb. (U. S.) 302.

2. *Williams v. Lewis*, 2 Stew. (Ala.) 41; *Buffon v. Ramsdell*, 55 Me. 252;

before the rendition of the judgment.¹ According to other decisions such a judgment, while void against one defendant, may be, at the most, only voidable as against the others, and not liable to collateral attack;² and where this is the case a judgment against a party deceased at the time of its rendition is not void against the other defendants, but merely voidable.³

bb. REVERSAL AS AN ENTIRETY. — According to the weight of authority it seems that whether a judgment void for want of jurisdiction over one of several defendants is void against all or is merely voidable, yet upon appeal such a judgment is an entirety, and must be reversed as to all or none, whether it be in favor of or against such joint defendants.⁴ There are, however, several

Hanley v. Donoghue, 59 Md. 239; *Wright v. Andrews*, 130 Mass. 149; *Holbrook v. Murray*, 5 Wend. (N. Y.) 161.

In *Hanley v. Donoghue*, 59 Md. 239, it was held that on a judgment recovered in Pennsylvania against two defendants, only one of whom was summoned, there could be no recovery in Maryland against the defendant who was summoned; the judgment, being a nullity as to the party not summoned, was a nullity as to both.

1. *McCloskey v. Wingfield*, 29 La. Ann. 141; *Lewis v. Ash*, 2 Miles (Pa.) 110.

2. *Arkansas*. — *Cheek v. Pugh*, 19 Ark. 574.

Georgia. — *Tedlie v. Dill*, 3 Ga. 104; *Kitchens v. Hutchins*, 44 Ga. 620.

Illinois. — *Burton v. Perry*, 146 Ill. 71; *Murphy v. Orr*, 32 Ill. 489.

Indiana. — *Boor v. Lowrey*, 103 Ind. 468.

Iowa. — *North v. Mudge*, 13 Iowa 498, 81 Am. Dec. 441.

Kansas. — *School Dist. No. 63 v. Chicago Lumber Co.*, 41 Kan. 618.

Kentucky. — *Joyes v. Hamilton*, 10 Bush (Ky.) 547.

Mississippi. — *Moody v. Harper*, 38 Miss. 599; *Smith v. Tupper*, 4 Smed. & M. (Miss.) 261, 43 Am. Dec. 483; *Wise v. Hyatt*, 68 Miss. 714.

Missouri. — *State v. Finn*, 19 Mo. App. 560; *Bailey v. McGinniss*, 57 Mo. 362; *Holton v. Towner*, 81 Mo. 360.

Nebraska. — *Mercer v. James*, 6 Neb. 406.

New Hampshire. — *Lamprey v. Nudd*, 29 N. H. 303.

New York. — *Green v. Beals*, 2 Cai. (N. Y.) 254; *Crane v. French*, 1 Wend. (N. Y.) 311; *Brittin v. Wilder*, 6 Hill (N. Y.) 242; *St. John v. Holmes*, 20 Wend. (N. Y.) 609, 32 Am. Dec. 603.

North Carolina. — *Burke v. Stokely*, 65 N. Car. 569.

Ohio. — *Douglass v. Massie*, 16 Ohio 271, 47 Am. Dec. 375; *Ash v. McCabe*, 21 Ohio St. 181; *Newburg v. Munshower*, 29 Ohio St. 617, 23 Am. Rep. 769; *Johnson v. Pomeroy*, 31 Ohio St. 248.

Pennsylvania. — *Jamieson v. Pomeroy*, 9 Pa. St. 230; *York Bank's Appeal*, 36 Pa. St. 460; *Wood v. Bayard*, 63 Pa. St. 321; *Shallcross v. Smith*, 81 Pa. St. 132.

Tennessee. — *Crank v. Flowers*, 4 Heisk. (Tenn.) 629; *Grubb v. Browder*, 11 Heisk. (Tenn.) 299; *Sherrell v. Goodrum*, 3 Humph. (Tenn.) 419; *Union Bank v. McClung*, 9 Humph. (Tenn.) 98; *Hutchins v. Sims*, 7 Humph. (Tenn.) 236; *Winchester v. Beardin*, 10 Humph. (Tenn.) 249; *Bently v. Hurxthal*, 3 Head (Tenn.) 378; *Bogges v. Gamble*, 3 Coldw. (Tenn.) 148; *Webbs v. State*, 4 Coldw. (Tenn.) 199; *Ouly v. Dickinson*, 5 Coldw. (Tenn.) 486; *Collins v. Knight*, 3 Tenn. Ch. 183; *Valentine v. Cooley*, *Meigs* (Tenn.) 618, 33 Am. Dec. 166.

Texas. — *Ewing v. Wilson*, 63 Tex. 88.

Vermont. — *Downer v. Dana*, 22 Vt. 22.

West Virginia. — *King v. Burdett*, 28 W. Va. 601, 57 Am. Rep. 687.

Wisconsin. — *Remington v. Cummings*, 5 Wis. 138; *Keith v. Stiles*, 92 Wis. 15.

3. *Tedlie v. Dill*, 3 Ga. 104; *Collins v. Knight*, 3 Tenn. Ch. 183.

Even in those cases holding that a judgment which is void as to one joint defendant is void as to all, the rule is held to apply only to judgments at law. *Voorhis v. Gamble*, 6 Mo. App. 1.

4. *Alabama*. — *Ellison v. State*, 8 Ala. 273.

cases which hold that a judgment erroneous as to one defendant may be reversed as to him and affirmed as to the others.¹

(2) *Relief Between Codefendants* — **Generally.** — The court, having the facts before it, may determine by its judgment not only

Arkansas. — *English v. Watkins*, 4 Ark. 199.

Colorado. — *Langley v. Grill*, 1 Colo. 71; *Streeter v. Marshall Silver Min. Co.*, 4 Colo. 535, *affirmed* in 5 Colo. 77; *Gargan v. School Dist. No. 15*, 4 Colo. 54, *affirmed* in 4 Colo. 540.

Connecticut. — *Gaylord v. Payne*, 4 Conn. 190.

Delaware. — *Hickman v. Branson*, 1 Houst. (Del.) 429.

Illinois. — *Hays v. Thomas*, 1 Ill. 180; *Rider v. Alleyne*, 3 Ill. 474; *Brockman v. McDonald*, 16 Ill. 112; *Earp v. Lee*, 71 Ill. 193; *Williams v. Chalfant*, 82 Ill. 218; *Claffin v. Dunne*, 129 Ill. 241; *Tetzner v. Naughton*, 12 Ill. App. 148; *Goit v. Joyce*, 61 Ill. 489; *Ragor v. Kendall*, 70 Ill. 95; *Jansen v. Varnum*, 89 Ill. 100; *McDonald v. Wilkie*, 13 Ill. 22, 54 Am. Dec. 423; *Kimball v. Tanner*, 63 Ill. 519; *Fuller v. Robb*, 26 Ill. 246.

Iowa. — *Cavender v. Smith*, 5 Iowa 157.

Kentucky. — *Beasley v. Doty*, 3 Dana (Ky.) 32; *Cook v. Conway*, 3 Dana (Ky.) 454; *Horine v. Woods*, *Sneed* (Ky.) 236; *Joyes v. Hamilton*, 10 Bush (Ky.) 547; *Burris v. Johnson*, 1 J. J. Marsh. (Ky.) 196; *Shields v. Craig*, 1 T. B. Mon. (Ky.) 72; *Murphy v. O'Reiley*, 78 Ky. 263.

Maine. — *Benner v. Welt*, 45 Me. 483; *Buffum v. Ramsdell*, 55 Me. 252.

Michigan. — *Powers v. Irish*, 23 Mich. 429.

Mississippi. — *Graves v. Williams*, 2 Smed. & M. (Miss.) 286; *Demoss v. Camp*, 5 How. (Miss.) 516; *Ayer v. Bailey*, 5 How. (Miss.) 688.

Missouri. — *Hemelreich v. Carlos*, 24 Mo. App. 265; *Pomeroy v. Betts*, 31 Mo. 419; *Holt County v. Harmon*, 59 Mo. 165; *Smith v. Rollins*, 25 Mo. 408; *Covenant Mut. L. Ins. Co. v. Clover*, 36 Mo. 392.

Nevada. — *Bullion Min. Co. v. Croesus Gold, etc.*, Min. Co., 3 Nev. 336.

New Hampshire. — *Burt v. Stevens*, 22 N. H. 229; *Merrill v. Elliot*, *cited* in *Burt v. Stevens*, 22 N. H. 233; *Whitmore v. Delano*, 6 N. H. 543; *Beckley v. Newcomb*, 24 N. H. 359; *Sargeant v. French*, 10 N. H. 444.

New York. — *Harman v. Brotherson*, 1 Den. (N. Y.) 537; *Cruikshank v. Gard-*

ner, 2 Hill (N. Y.) 333; *Sheldon v. Quinlen*, 5 Hill (N. Y.) 441; *Camp v. Bennett*, 16 Wend. (N. Y.) 48.

Ohio. — *Frazier v. Williams*, 24 Ohio St. 625.

Pennsylvania. — *Lewis v. Ash*, 2 Miles (Pa.) 110; *Hartman v. Hesserich*, 8 W. N. C. (Pa.) 483.

Tennessee. — *Ouly v. Dickinson*, 5 Coldw. (Tenn.) 486; *Draper v. State*, 1 Head (Tenn.) 262; *Trousdale v. Donnell*, 4 Humph. (Tenn.) 273; *Hutchins v. Sims*, 7 Humph. (Tenn.) 236; *Winchester v. Beardin*, 10 Humph. (Tenn.) 247.

Texas. — *Wood v. Smith*, 11 Tex. 367; *Dickson v. Burke*, 28 Tex. 117.

Virginia. — *Gregory v. Marks*, 1 Rand. (Va.) 386.

West Virginia. — *Vandiver v. Roberts*, 4 W. Va. 493.

1. *Ricketson v. Richardson*, 26 Cal. 149; *Belkin v. Hill*, 53 Mo. 492; *Wood v. Olney*, 7 Nev. 109; *Houston v. Ward*, 8 Tex. 124; *Bayless v. Daniels*, 8 Tex. 140; *Saffold v. Navarro*, 15 Tex. 76.

In *Virginia* it has been held that where the judgment against one joint defendant was not merely erroneous, but a void judgment and a nullity, the joint judgment need not be reversed as to all. *Gray v. Stuart*, 33 Gratt. (Va.) 351, where the court said: "Where * * * a judgment is erroneous as to one and is reversed as to one, when the judgment is joint it must be reversed as to all. * * * This is undoubtedly the common-law rule. * * * There is a manifest distinction between an erroneous judgment and a void judgment. The first is a valid judgment, though erroneous, until reversed, provided it is the judgment of a court of competent jurisdiction. The latter is no judgment at all; it is a mere nullity. The first cannot be assailed in any other court but an appellate court. The latter may be assailed in any court, anywhere, whenever any claim is made or rights asserted under it."

Reversal Only as to Party Appealing. — In *California* it was held that where only one of several defendants against whom a judgment has been rendered appeals to the Supreme Court, the appellate court, if it reverses a judgment,

the rights between plaintiffs and defendants, but also those between defendants as among themselves, when required by the answer of one of them.¹

Causes of Action Must Be Connected. — The right of a defendant to have a controversy between himself and a codefendant settled applies only to causes of action connected with the one upon which the action is brought.²

Service of Answer on Codefendant. — In order that one defendant may obtain relief against a codefendant, he must serve a copy of his answer upon such codefendant and give him notice of trial.³

5. Pleadings and Issues — *a.* **IN GENERAL.** — A judgment in a court of record must be based upon certain definite and regular proceedings, which the record must disclose.⁴

b. **DECLARATION, PETITION, OR COMPLAINT** — (1) *Necessity.* — A declaration, petition, or complaint is essential to the regularity of a judgment in a court of record,⁵ but its absence will render the judgment merely voidable, and not void.⁶

may reverse or modify it as to any or all of the parties defendant. Where in such case the error assigned affects only the party appealing, the court will not presume error as to parties not appealing, and will reverse the judgment only as to the party appealing. *Ricketson v. Richardson*, 26 Cal. 149.

1. *Derham v. Lee*, 87 N. Y. 599; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Norbury v. Seeley*, 4 How. Pr. (N. Y. Supreme Ct.) 73; *Mechanics', etc., Sav. Inst. v. Roberts*, 1 Abb. Pr. (N. Y. Supreme Ct.) 382; *Woodworth v. Belows*, 4 How. Pr. (N. Y. Supreme Ct.) 24; *Kay v. Whittaker*, 44 N. Y. 565; *McNeill v. Hodges*, 105 N. Car. 52; *Beattie v. Latimer*, 42 S. Car. 313.

2. *Rafferty v. Williams*, 34 Hun (N. Y.) 544; *Smith v. Hilton*, 50 Hun (N. Y.) 236.

The relief which the defendants may have as against each other must be based upon the facts involved in the litigation of the plaintiff's claim and as a part of the adjustment of that claim, and not upon claims with which the plaintiff has nothing to do, and which are properly the subject of an independent litigation between such defendants. *Kay v. Whittaker*, 44 N. Y. 565; *Smart v. Bement*, 4 Abb. App. Dec. (N. Y.) 253.

3. *Edwards v. Woodruff*, 90 N. Y. 396.

4. *Ayres v. Dobson*, 5 Stew. & P. (Ala.) 441.

Where Pleadings Are Lost, judgment should not be rendered until they have been restored. *Grimison v. Russell*, 11

Neb. 469. See also *Halliburton v. Jackson*, 11 Lea (Tenn.) 471.

5. *Ringgold v. Elliot*, 2 Cranch (C. C.) 462, holding that a judgment for a defendant in replevin without a declaration is irregular, and will on motion be set aside, even at a subsequent term; *Beckett v. Cuenin*, 15 Colo. 281, holding that a judgment of a court of record will be set aside where there is no complaint or written statement of the cause of action.

Filing. — The declaration must be filed before judgment. *Gallup v. Wilder*, 1 Colo. 264; *Haskins v. Tucker*, 1 Colo. 263.

A Judgment Without Formal Pleadings may be rendered by confession, agreement, or consent. *Peoples v. Norwood*, 94 N. Car. 167; *Stancill v. Gay*, 92 N. Car. 455; *Gay v. Grant*, 101 N. Car. 206. See also *infra*, IX. *Judgments by Confession*; X. *Judgments by Agreement or Consent*.

6. *Leach v. Western North Carolina R. Co.*, 65 N. Car. 486.

The judgment is not void though no declaration was filed in the cause, and can only be avoided by the proper proceedings taken in due season in the court which rendered the judgment. *Terry v. Dickinson*, 75 Va. 475.

On Appeal, it will not be presumed that a judgment, though rendered without any complaint, was irregular. *Stancill v. Gay*, 92 N. Car. 455, stating the reason as follows: "No complaint appears in the record, nor is it certain one was filed. The clerk finds as a fact

(2) *Sufficiency*. — Where the declaration upon which a judgment is rendered does not state facts sufficient to constitute a cause of action, a judgment for the plaintiff cannot be supported; ¹ and such defect may be taken advantage of by a motion in arrest of judgment. ²

that there was one, and that it was lost. The judge finds that the only evidence of this was the recitals in the judgment. These recitals were evidence, but not conclusive. But if there was no complaint filed, this fault alone did not render the judgment void. The court having jurisdiction of the subject of the action and the parties to it, the latter might consent to the entry of a judgment by express agreement, or, one having been entered, they might assent to it. There is a presumption in favor of the regularity of the judgment — that the court gave it in the course of procedure, or that the parties consented to it. *Vick v. Pope*, 81 N. Car. 22, *reaffirmed* in *Gay v. Grant*, 101 N. Car. 206.

1. *Lowe v. Turner*, 1 Idaho 107; *Dean v. Boyd*, 9 Dana (Ky.) 171; *Knudson v. Curley*, 30 Minn. 433; *Winans v. Denman*, 2 N. J. L. 116; *Neusbaum v. Keim*, 1 Hilt. (N. Y.) 520; *Marquat v. Marquat*, 12 N. Y. 330; *Harris v. Harris*, 10 Wis. 467.

Under the *Colorado Code*, § 60, the claim after judgment that a complaint is insufficient can only be sustained on the ground that the facts contained therein, even if well stated, constitute no cause of action. *Rhodes v. Hutchins*, 10 Colo. 258.

A court is not authorized to stay the execution of a judgment rendered upon default, upon the ground of an infirmity in the judgment by reason of a defective complaint, as the remedy of the party against whom the judgment is rendered in such case is by appeal. *Edwards v. Hellings*, 103 Cal. 204. See generally article STAY OF PROCEEDINGS.

Collateral Attack. — A judgment cannot be collaterally attacked on the ground that the petition did not state a cause of action. *Marion County v. Welch*, 40 Kan. 767; *Head v. Daniels*, 38 Kan. 1.

Making New Parties Defendant — Amending Complaint. — Where a complaint is filed against a defendant, and afterwards other defendants are brought in, the complaint must be amended or another complaint filed as

to them, unless they waive it by answering to the original complaint; and a judgment for want of an answer will be irregular if entered when no such new or amended complaint has been filed. *Vass v. People's Bldg., etc., Assoc.*, 91 N. Car. 55.

The Omission of a Plaintiff's Christian Name in a complaint will not render the judgment void for uncertainty. *Boyd v. Platner*, 5 Mont. 226, *disapproving* a contrary dictum in *Wiebold v. Hermann*, 2 Mont. 609.

The Objection Is Waived if not taken until after answer, as the defendant thereby recognizes the plaintiff by the name in which the action is brought. *Nichols v. Dobbins*, 2 Mont. 540.

Where the Verification of a Petition, required by statute, is made by a wrong party, the judgment is not void. *Castleman v. Relfe*, 50 Mo. 583.

A Default Judgment will not cure a defective declaration in an action on the case. *Hoyt v. Macon*, 2 Colo. 113.

In cases of judgment by default, the plaintiff is bound to see to the regularity of his judgment, and that his declaration and pleadings are correct at law, so as to entitle him to such judgment upon an inspection of the record. *Wood v. Georgia Bank*, 1 Fla. 424. See generally article DEFAULTS, vol. 6, p. 1.

2. See article ARREST OF JUDGMENT, vol. 2 p. 799. See also *Low v. Tilton*, 19 N. H. 271; *Edgerley v. Swain*, 32 N. H. 478; *Sawyer v. Whittier*, 2 N. H. 315; *Bedell v. Stevens*, 28 N. H. 118; *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Addington v. Allen*, 11 Wend. (N. Y.) 374; *Mann v. Eckford*, 15 Wend. (N. Y.) 502; *Zantinger v. Weightman*, 2 Cranch (C. C.) 478.

Waiver or Loss of Right to Object. — "Having demurred generally below, the plaintiff in error was, it seems, precluded from moving in arrest of judgment for defects in the declaration. *Freeman v. Camden*, 7 Mo. 298; 2 *Tidd's Pr.* 740, 918; *Rouse v. Peoria County*, 7 Ill. 106; *Graham's Pr.* 641. And having pleaded matter of fact after the overruling of his demurrer, he is precluded now from assigning error upon

Where the Complaint Contains Several Counts or paragraphs, if one of such counts is sufficient to sustain the judgment it will not be reversed because of insufficiency of the other paragraphs.¹ But the rule at common law was that where the verdict was general, and one of the counts was bad, the judgment must be arrested or reversed.²

that decision. We have searched in vain for authority which will relieve from this absurd dilemma. The declaration, whatever it may contain, is, so far as any inquisition of error is concerned, a sealed book. The plaintiff in error, by the inconsiderate course pursued in pleading in the court below, has rendered it impossible for us to entertain the interesting questions which were principally discussed at the bar." *Freas v. Engelbrecht*, 3 Colo. 377.

An objection to a pleading that it does not state facts sufficient to constitute a cause of action, presented for the first time on appeal, is good only when there is a total failure to allege some matter essential to the relief sought, and is not good when the allegations are simply indefinite or statements of legal conclusion. *Laithe v. McDonald*, 7 Kan. 254; *Moody v. Arthur*, 16 Kan. 419. See also *Rhodes v. Hutchins*, 10 Colo. 258.

The fact that the complaint in a foreclosure suit does not set out, as is usual, the conditions of the mortgage, is a mere irregularity, which is waived if not objected to, and does not render the decree void where the court has jurisdiction of the parties and subject-matter. *Berry v. King*, 15 Oregon 165.

Three Insufficient Petitions — Judgment on Merits. — *Missouri* Rev. Stat. (1889), § 2068, providing that when three petitions have been adjudged insufficient, judgment shall be rendered for treble costs, applies to a will contest proceeding, but authorizes judgment only for such costs, and not a judgment on the merits. *Gordon v. Burris*, 125 Mo. 39.

1. *Gordon v. Downey*, 1 Gill (Md.) 41; *Kelsey v. Henry*, 48 Ind. 37; *Dice v. Morris*, 32 Ind. 283; *Binns v. Waddill*, 32 Gratt. (Va.) 588; *Ford v. Baird*, 1 Chand. (Wis.) 212, 2 Pin. (Wis.) 242. See also *Wisner v. Rohnert*, 46 La. Ann. 1234. See generally article COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS, vol. 5, p. 302.

A judgment cannot be arrested for bad counts in the declaration if there is

any good count in it. *Western Stone Co. v. Whalen*, 51 Ill. App. 512, *affirmed* in 151 Ill. 472.

If all the counts disclose a good cause of action, but it results from the evidence that the plaintiff is not entitled to recover on some of them, a general verdict and judgment are good. *Stuart v. Blum*, 28 Pa. St. 225.

But One Recovery Can Be Had where the same cause of action is set out in the different counts in the complaint. *Spurlock v. Missouri Pac. R. Co.*, 93 Mo. 530. Compare *Swift v. Applebone*, 23 Mich. 252, where upon a construction of the complaint it was held that the several counts were not for the same cause of action.

2. *New Hampshire.* — *Blanchard v. Fisk*, 2 N. H. 398; *Atkinson v. Scammon*, 22 N. H. 40; *Peabody v. Kinsley*, 40 N. H. 416; *Small v. Rogers*, 46 N. H. 176; *Glines v. Smith*, 48 N. H. 259.

New York. — *Garr v. Gomez*, 9 Wend. (N. Y.) 649; *Candler v. Rossiter*, 10 Wend. (N. Y.) 487; *Pike v. Gandall*, 9 Wend. (N. Y.) 149; *Backus v. Richardson*, 5 Johns. (N. Y.) 476; *Cheetham v. Tillotson*, 5 Johns. (N. Y.) 430.

Wisconsin. — *Du Bay v. Uline*, 6 Wis. 588; *Dewey v. Fifield*, 2 Wis. 73.

United States. — *Fenwick v. Grimes*, 5 Cranch (C. C.) 439; *Mandeville v. Cookenderfer*, 3 Cranch (C. C.) 257.

In Mississippi this rule of the common law has been changed by a statute providing that where there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good. *Scott v. Peebles*, 2 Smed. & M. (Miss.) 546.

What Record Must Show on Appeal. —

If a complaint contains two paragraphs, one of which is fatally defective, and a demurrer to the defective paragraph is overruled and an exception saved, a judgment for the plaintiff must be reversed on appeal, where the record does not show upon which paragraph it was rendered. *Cook v. Hopkins*, 66 Ind. 208; *Evansville, etc., Steam Packet Co. v. Wildman*, 63 Ind. 370.

c. **ISSUES.** — The pleadings in a cause must evolve an issue of law or fact before a judgment can be rendered; ¹ and a judgment rendered without issue joined is at least erroneous, if not void. ²

6. Verdict or Findings. — The issues raised by the pleadings, whether of law or fact, must be determined in favor of one party or the other before judgment can be entered. In other words, there must be either findings by the court ³ or the verdict of a

1. *Armstrong v. Barton*, 42 Miss. 506; *Paul v. People*, 82 Ill. 82.

Thus it is irregular to render final judgment against a defendant while the plea remains unanswered; but by going to trial the defendant waives the objection. *Robinson v. Brown*, 82 Ill. 279. Compare *Richeson v. Ryan*, 15 Ill. 13; *Bunker v. Green*, 48 Ill. 243.

A judgment for the plaintiff must be rendered either upon plea, default, or *nihil dicit*. *Boardman v. Stewart*, 1 Root (Conn.) 474.

2. *Stevens v. Taliaferro*, 1 Wash. (Va.) 155; *Baltimore, etc., R. Co. v. Faulkner*, 4 W. Va. 180; *Du Bay v. Uline*, 6 Wis. 588; *Braunsdorff v. Fay*, 18 La. Ann. 187.

In *Doyle v. Smith*, 1 Coldw. (Tenn.) 15, it was distinctly held that a judgment without issue joined was erroneous, but not void. But in several *Mississippi* cases it is said that judgments without issue joined are nullities. See *Porterfield v. Butler*, 47 Miss. 165; *Armstrong v. Barton*, 42 Miss. 506; *Steele v. Palmer*, 41 Miss. 88. Mr. Freeman, in his work on judgments, argues with much reason that such judgments are voidable, but not void. *Freeman on Judgments*, § 135 *a*. Mr. Black, in his work on judgments, intimates a contrary view. *Black on Judgments*, § 184.

Similiter. — The omission to enter the *similiter* is informal and not error. *Adams v. Bradshaw*, Hard. (Ky.) 564.

Immaterial Issue. — A judgment for the defendant on an affirmative plea where the issue is immaterial cannot be sustained. *Stucker v. Miller*, 5 Litt. (Ky.) 236.

If the issue joined to the court be immaterial, judgment may be given according to the right of the cause on the whole record, in view of what has been alleged on the one side and not denied on the other. *Barber v. Gordon*, 2 Root (Conn.) 97. See also *Osborne v. Johnson*, 35 Minn. 300, wherein the complaint stated no cause of action,

and the answer stated no counterclaim, and neither party introduced any evidence, and it was held that the action should have been dismissed with costs, but that a judgment for the defendant for nominal damages on the counterclaim attempted to be set up was harmless error.

Agreed Case. — Cases are often submitted to the court upon an agreed statement of facts, and without any other pleading than the declaration. Issues are seldom or never framed in such submissions, except so far as they arise out of the statement of the case. Judgments so rendered are perfectly valid and may be pleaded in bar of a new action for the same cause. *Derby v. Jacques*, 1 Cliff. (U. S.) 433.

3. Findings Necessary — *California*. — *McKeon v. McDermott*, 22 Cal. 667; *Mace v. O'Reilly*, 70 Cal. 231.

Connecticut. — *Whittlesey v. Hartford, etc., R. Co.*, 23 Conn. 436; *Samson v. Hunt*, 1 Root (Conn.) 207; *Knapp v. White*, 23 Conn. 536; *Goodrich v. Stanley*, 23 Conn. 83.

Indiana. — *Haxton v. McClaren*, 132 Ind. 235.

Michigan. — *Stansell v. Corning*, 21 Mich. 242; *Wiley v. Lovely*, 46 Mich. 83.

Missouri. — *Ferguson v. Seawell*, 1 Mo. 256; *Lee v. Collins*, 1 Mo. 587; *Bates v. Bower*, 17 Mo. 550.

Nebraska. — *Maryott v. Gardner*, 50 Neb. 320.

New York. — *Watson v. Manhattan R. Co.*, 17 Abb. N. Cas. (N. Y. Super. Ct.) 289, 53 N. Y. Super. Ct. 137.

Oregon. — *Merchants' Nat. Bank v. Pope*, 19 Oregon 35.

Wisconsin. — *Stahl v. Gotzenberger*, 45 Wis. 121.

In *Texas*, under Hart's Dig., art. 782, the failure of the court to make out and incorporate with the record of the case the statement of the facts proved therein constitutes reversible error. *Pierpont v. Pierpont*, 19 Tex. 227; *Chrisman v. Miller*, 15 Tex. 159.

jury,¹ and a judgment rendered without either verdict or findings is fatally erroneous,² though not absolutely void.³ A finding by the court has the same effect as the verdict of a jury,⁴ and therefore findings are unnecessary where there is a verdict.⁵

7. Determination of All Issues. — A judgment without a trial and determination of all the issues properly raised is erroneous.⁶

Vacating Judgment. — Where the term of office of the judge who tried the case expires after an order for judgment has been entered, but before the findings have been filed, no valid judgment can be entered in the action without a new trial being had, unless agreed findings are filed or waived by both sides. If no agreed findings are filed or waived, a judgment entered in conformity with the order after the expiration of the term of office of the trial judge may be set aside for want of findings on the motion of the party in whose favor the judgment is entered, without notice to the opposite party, notwithstanding the latter offers to waive findings, or to have them made by the successor of the judge who tried the case, and tenders to the prevailing party the amount of the judgment. Such a motion may be made after the expiration of six months from the date of the order for judgment, and after the termination of the session of the court at which it was made. *Mace v. O'Reilly*, 70 Cal. 231.

Immaterial Findings. — The decree is not necessarily erroneous because predicated on a finding in which some matter is inserted which is immaterial. *Treat v. Richardson*, 47 Conn. 588.

1. *Haxton v. McClaren*, 132 Ind. 235.

Where issue of fact has been joined, a verdict is essential to a judgment, and if the record does not properly show a verdict, the judgment will be erroneous. *Gray v. Thomas*, 12 Smed. & M. (Miss.) 111.

A judgment rendered in an action triable by jury, which was not waived, is invalid, where the court directed a verdict but upon the jury being polled two of the jurors refused to follow the directions of the court, since there was no verdict upon which to predicate a judgment. *Bowman v. Wheaton*, 2 Kan. App. 581. See generally article DIRECTING VERDICT, vol. 6, p. 667.

Judgment on Void Verdict. — A judgment purporting to be founded on a verdict may be good although the verdict is void, provided it is a case where

the law requires no verdict. *Lockett v. Usry*, 28 Ga. 345.

2. See cases cited in preceding notes; articles DECISIONS, vol. 5, p. 936; FINDINGS OF COURT, vol. 8, p. 931; VERDICT.

3. *Maryott v. Gardner*, 50 Neb. 320; *Connelly v. Edgerton*, 22 Neb. 82; *Swanstrom v. Marvin*, 38 Minn. 359; *Garner v. State*, 28 Kan. 790. But see *Stansell v. Corning*, 21 Mich. 242; *O'Blinskie v. Judge*, 34 Mich. 62.

4. *Murphy v. Cunningham*, 1 Colo. 467; *Denver Fire-Brick Co. v. Platt*, 11 Colo. 510; *Southern L. Ins., etc., Co. v. Gray*, 3 Fla. 262.

5. *Dye v. Russell*, 24 Neb. 829.

6. *Arkansas*. — *Hammond v. Freeman*, 9 Ark. 62; *Mandel v. Peet*, 18 Ark. 236.

Florida. — *Miller v. Hoc*, 1 Fla. 221.

Illinois. — *Bradshaw v. Hoblett*, 5 Ill. 53; *Dow v. Rattle*, 12 Ill. 373.

Indiana. — *Ewing v. Coddling*, 5 Blackf. (Ind.) 433; *Cook v. Brown*, 6 Blackf. (Ind.) 220; *Barker v. M'Clure*, 2 Blackf. (Ind.) 14; *Buford v. Ganson*, 5 Blackf. (Ind.) 585; *Barret v. Thompson*, 5 Ind. 457.

Iowa. — *Arbuckle v. Bowman*, 6 Iowa 70; *Conrad v. Baldwin*, 3 Iowa 207.

Kentucky. — *Jackson v. Motley*, Sneed (Ky.) 133; *Gray v. Gorin*, 3 A. K. Marsh. (Ky.) 556.

Maryland. — *Souder v. Home Friendly Soc.*, 72 Md. 511.

Michigan. — *Bosman v. Akeley*, 39 Mich. 710.

Mississippi. — *Heyfron v. Mississippi Union Bank*, 7 Smed. & M. (Miss.) 434; *Rodgers v. Hunter*, 8 Smed. & M. (Miss.) 640.

Missouri. — *Ferguson v. Sewell*, 1 Mo. 256; *Manifee v. D'Lashmutt*, 1 Mo. 258.

New York. — *Aymar v. Chase*, 12 Barb. (N. Y.) 301.

Informal Issue. — It is error to render judgment against a defendant without trying the issue, where he has a plea filed and an issue formed thereon, though the issue be informal, if it be not immaterial. *Thomas v. Commonwealth Bank*, 5 J. J. Marsh. (Ky.) 666.

And it is a general rule that the verdict, findings, and judgment must be as broad as the issues and must respond to all the issues.¹ Accordingly, it is error to enter a judgment against a defendant without disposing of all of his pleas,² unless the determination of the issue upon which the judgment is based is necessarily decisive of the whole case.³ So where there are several defendants the verdict and judgment should embrace and dispose of the case as to all.⁴ So also a plea of

1. *Connecticut*. — *Dickinson v. Hayes*, 31 Conn. 423; *Allen v. Vining*, 1 Root (Conn.) 313; *Humes v. Day*, 1 Root (Conn.) 466; *Sampson v. Hunt*, 1 Root (Conn.) 521; *Woodworth v. Clark*, 1 Root (Conn.) 542; *Russell v. Cornwell*, 2 Root (Conn.) 68; *Cook v. Atwater*, 1 Root (Conn.) 435; *Scot v. Turner*, 1 Root (Conn.) 163; *Foot v. Cady*, 1 Root (Conn.) 174; *Smith v. Bellamy*, 1 Root (Conn.) 200.

Illinois. — *Semple v. Hailman*, 8 Ill. 131.

Ohio. — *Draper v. Moore*, 2 Cinc. Super. Ct. Rep. 167.

Virginia. — *Butler v. Parks*, 1 Wash. (Va.) 76.

See *Bayha v. Kessler*, 79 Mo. 555, where the objection was raised that a decree in partition did not dispose of all the issues made by the pleadings, but it was held that the finding in the case was upon the ultimate issue between the parties and necessarily involved and settled all the rest.

A judgment in ejectment is not vitiated because it contains no direction as to the count for mesne profits claimed in the declaration. "The plaintiff has either waived that or may come in yet and ask for that judgment. So far as it goes, the judgment is correct." *Anderson v. Tinney*, 5 Mackey (D. C.) 335.

Objection Not Raised Below. — When no objection is made to the form and character of a judgment when announced, nor any motion made after the entry of judgment to correct it or set it aside, error for failure to embrace all the issues is not available on appeal. *Miles v. Buchanan*, 36 Ind. 490.

2. *Arkansas*. — *Finn v. Crabtree*, 12 Ark. 597.

Indiana. — *Fischli v. Cowan*, 1 Blackf. (Ind.) 350; *Richardson v. Adkins*, 6 Blackf. (Ind.) 141.

North Carolina. — *Nesbitt v. Ballew*, 3 Hawks (N. Car.) 57.

Pennsylvania. — *Beale v. Buchanan*, 9 Pa. St. 123.

Tennessee. — *Gatewood v. Palmer*, 10 Humph. (Tenn.) 466.

Where the general issue and infancy are both pleaded, a judgment for the plaintiff on a verdict on the general issue alone is erroneous, *Bay v. Gunn*, 1 Den. (N. Y.) 108; unless, perhaps, the intent of the jury to pass upon all issues was clear. *Thompson v. Button*, 14 Johns. (N. Y.) 84; *Hawks v. Crofton*, 2 Burr. 698; *Hodges v. Raymond*, 9 Mass. 316.

3. Where *nil debet* and *nul tiel record* are both pleaded, a finding as to the former involves a finding on the latter, and therefore mere silence as to the plea of *nul tiel record* is not error. *Swank v. State*, 3 Ohio St. 429.

When the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is determined in favor of the plea, judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact; because, upon the whole, it appears that the plaintiff had no cause of action. *Clearwater v. Meredith*, 1 Wall. (U. S.) 25.

Where the general issue and several special pleas are pleaded, and the jury do not find for the plaintiff on the general issue, and one of the special pleas remains undisposed of, a judgment for the plaintiff is erroneous. *Richardson v. Adkins*, 6 Blackf. (Ind.) 141.

4. *Colorado*. — *Bissell v. Cushman*, 5 Colo. 76.

Illinois. — *Ward v. Stanley*, 41 Ill. App. 417.

Mississippi. — *Duncan v. Scott County*, 64 Miss. 38.

Missouri. — *McCord v. McCord*, 77 Mo. 166; *Ferguson v. Thacher*, 79 Mo. 511; *McMahon v. Turney*, 45 Mo. App. 103.

Under *Mississippi Code*, § 1433, error in rendering a judgment *nil dicit* against one alone of several joint defendants is not available on appeal in the absence of an exception in the

set-off,¹ or the issues raised by a cross-bill,² or by demurrers to pleadings,³ must be disposed of before or at the rendition of judgment.

A Failure to Pass upon a Motion, however, is immaterial, as the entry of judgment is in effect a final disposition of motions previously filed.⁴

8. Conformity to Process. — A judgment should conform to the writ or process served.⁵

lower court. *Duncan v. Scott County*, 64 Miss. 38.

A judgment is not erroneous which omits to dispose of the claims of a party who, as shown by the pleadings, has no interest in the proceedings. *Miller v. Rogers*, 49 Tex. 398.

1. *Sientes v. Odier*, 17 La. Ann. 153.

But the judgment need not show specifically the disposition of the defendant's set-off. "It is urged that the judgment should show specifically what disposition was made of appellant's set-offs. This is not the function of a judgment. If a party to a suit wishes the court, trying the issues without a jury, to show what evidence is acted upon and what disregarded, or to disclose the factors which enter into the finding or judgment, he may do so by properly framed propositions of law, which the court is required to mark 'held' or 'refused.' The judgment itself should give the answer to the problem, and not the process by which the answer has been obtained." *Coats v. Barrett*, 49 Ill. App. 275.

A failure to decide specifically on a counterclaim, where it is practically decided, is no error. *Essex v. Day*, 52 Conn. 499.

2. It is erroneous to render a decree disregarding unanswered allegations of a cross-bill which, if true, would entitle the defendant to relief. *Lash v. Hardin*, 6 J. J. Marsh. (Ky.) 451.

3. Rendition Before Disposal of Demurrers. — *Clark v. People*, 15 Ill. 213; *Bradshaw v. Hoblett*, 5 Ill. 53; *Hatch v. Roberts*, 41 Miss. 92.

It is irregular to enter judgment against a defendant on whose behalf a demurrer is on file without disposing of the demurrer, and a judgment so entered will be reversed on appeal. *Hestres v. Clements*, 21 Cal. 425.

Where a demurrer is filed to the defendant's answer it is irregular for the plaintiff to take judgment before some disposition is made of the demurrer. And where the record on appeal dis-

closes this state of facts, and nothing more from which an abandonment of the demurrer can be inferred, the judgment will be reversed. *Huse v. Moore*, 20 Cal. 115.

Where the general issue and two special pleas were pleaded, and the plaintiff joined issue on the first and demurred to the special pleas, and there were a verdict and judgment generally for the plaintiff, the record not showing a disposition of the demurrer, the High Court of Errors and Appeals of *Mississippi*, being of the opinion that the special pleas set out a good defense in bar, gave final judgment for the defendant. *Bailey v. Gaskins*, 6 How. (Miss.) 519.

4. *Washington Park Club v. Baldwin*, 59 Ill. App. 61.

The rendition of judgment without formally passing upon a motion to set aside the verdict is a mere informality, as the entry of judgment is in effect an overruling of the motion. *Ferris v. Commercial Nat. Bank*, 158 Ill. 237.

A judgment is not invalidated by failure until after it is entered to pass upon a motion for security for costs. *Trenton Rubber Co. v. Small*, 39 W. N. C. (Pa.) 281, 3 Pa. Super. Ct. Rep. 8.

5. *Bradley v. Baldwin*, 5 Conn. 291.

Where the summons was not in the usual form, but was a summons to plead, answer, or demur to an attachment, no judgment can be awarded for the amount of the debt and costs of summons. *Nashville v. Wilson*, 88 Tenn. 407.

Variance Between Process and Declaration. — In foreclosure, where the summons was for a judgment for a specific sum, but the complaint prayed only for a sale and payment out of the proceeds, it was held that the judgment must be denied, but without prejudice to a motion for an amendment. *Wyant v. Reeves*, 1 Code Rep. (N. Y.) 49.

A variance between the *capias ad respondendum* and the declaration is not a

9. Conformity to Pleadings and Proof—*a. SUMMARY STATEMENT OF RULES*—(1) *Secundum Allegata et Probata*—**Conformity to Pleadings.**—A court cannot properly put upon its record a judgment which is not a proper sequence to the pleadings.¹ It is a general rule that the judgment must conform to and be supported by the pleadings in the case.² A recovery must be had, if at

ground for arresting the judgment. *Wilson v. Berry*, 2 Cranch (C. C.) 707.

Although the Summons Is in the Wrong Form, judgment may be awarded on proof of the material or issuable allegations of the complaint. *Graves v. Waite*, 59 N. Y. 156.

A Judgment by Default for lands not described in the copy of the petition served with the writ is erroneous. *Simon v. Day*, 84 Tex. 520.

1. *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (U. S. Supreme Ct.) 132, note.

2. *Arizona*.—*Cole v. Bean*, 1 Arizona 364.

California.—*Kennedy, etc., Lumber Co. v. Priet*, 115 Cal. 98; *White v. Douglass*, 71 Cal. 115; *Gregory v. Nelson*, 41 Cal. 278; *Putnam v. Lamphier*, 36 Cal. 151; *Silvey v. Neary*, 59 Cal. 97; *Rosenkranz v. Wagner*, 62 Cal. 151.

Indiana.—*Gaff v. Hutchinson*, 38 Ind. 341; *Searle v. Whipperman*, 79 Ind. 424.

Iowa.—*Walker v. Walker*, 93 Iowa 643.

Kentucky.—*Withers v. Thompson*, 4 T. B. Mon. (Ky.) 333; *Price v. Boyd*, 1 Dana (Ky.) 436; *Ashbrook v. Roberts*, 82 Ky. 298.

Louisiana.—*Bateman v. Dazy*, 11 Rob. (La.) 484; *Brigot v. Brigot*, 49 La. Ann. 1428.

Massachusetts.—*Boston, etc., R. Corp. v. Nashua, etc., R. Corp.*, 157 Mass. 258.

Michigan.—*Allis v. Voight*, 83 Mich. 537; *Barton v. Gray*, 57 Mich. 622.

New York.—*A. F. Englehardt Co. v. Benjamin*, 5 N. Y. App. Div. 475; *Romeyn v. Sickles*, 108 N. Y. 650, 13 N. Y. St. Rep. 864; *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (U. S. Supreme Ct.) 132, note.

Ohio.—*Williams v. School Dist. No. 6, Wright (Ohio)* 578.

Texas.—*Menard v. Sydnor*, 29 Tex. 257; *Osborne v. Barnett*, 1 Tex. App. Civ. Cas., § 131; *McKey v. Welch*, 22 Tex. 390; *Hall v. Jackson*, 3 Tex. 305; *Denison v. League*, 16 Tex. 399; *Chris-*

man v. Miller, 15 Tex. 160; *Galveston, etc., R. Co. v. Pfeuffer*, 56 Tex. 66; *Jones v. Brazile*, 1 Tex. App. Civ. Cas., § 299; *Gammage v. Alexander*, 14 Tex. 414; *Lemmon v. Hanley*, 28 Tex. 219; *Rogers v. Harrison*, 1 Tex. App. Civ. Cas., § 495; *Mims v. Mitchell*, 1 Tex. 443; *Coles v. Kelsey*, 2 Tex. 541; *Caldwell v. Haley*, 3 Tex. 317; *Paul v. Perez*, 7 Tex. 345; *McArnis v. McIntyre*, 1 Tex. App. Civ. Cas., § 514; *Wright v. Wright*, 3 Tex. 168; *Guess v. Lubbock*, 5 Tex. 535; *Blum v. Ferguson*, 1 Tex. App. Civ. Cas., § 581; *Pinchain v. Collard*, 13 Tex. 335; *Moore v. Guest*, 8 Tex. 119; *Peet v. Hereford*, 1 Tex. App. Civ. Cas., § 871; *Gay v. Raines*, 21 Tex. 460; *Jackson v. State*, 21 Tex. 668; *Claiborne v. Tanner*, 18 Tex. 68; *Bledsoe v. Wills*, 22 Tex. 650; *May v. Taylor*, 22 Tex. 348; *Morrison v. Van Bibber*, 25 Tex. Supp. 153; *Porcheler v. Bronson*, 50 Tex. 555; *Storey v. Nichols*, 22 Tex. 87; *Lynch v. Elkes*, 21 Tex. 229; *Patterson v. Goodrich*, 3 Tex. 335; *Borden v. Houston*, 2 Tex. 594; *Clendenning v. Matthews*, 1 Tex. App. Civ. Cas., § 904; *Cooper v. Conerty*, 83 Tex. 133; *Groesbeeck v. Crow*, 85 Tex. 200; *Avant v. State*, 33 Tex. Crim. Rep. 312; *Flores v. Smith*, 66 Tex. 115.

Wisconsin.—*Wisconsin River Lumber Co. v. Plumer*, 49 Wis. 666.

A judgment that is not supported by pleadings is as fatally defective as one that is not sustained by the evidence. *Bachman v. Sepulveda*, 39 Cal. 688.

A judgment cannot be rendered which will settle rights between litigants, unless the pleadings are framed to support it. *Northern R. Co. v. Jordan*, 87 Cal. 23.

After judgment, upon a question whether it is supported by the petition, the pleading will be construed most favorably to the judgment. *Kansas City, etc., R. Co. v. Farnsworth*, 39 Kan. 356.

Illustrations.—The court cannot decree a liability where the facts as conceded by the parties do not establish

all, upon the facts alleged,¹ and facts proved but not pleaded will not support the judgment.²

a legal liability, although the party against whom the decree is sought did not in his pleadings point out the want of legal sequence. *City Sav. Bank v. Kensington Land Co.*, (Tenn. 1896) 37 S. W. Rep. 1037.

Under a complaint for services rendered, alleging in one count a contract for a year at a fixed price per month, and claiming in another count the reasonable value of the services, it is error to find the value of the work as though there were no contract, and then deduct damages as though a contract had been made and broken by plaintiff. *Feith v. Johnson*, (Conn. 1891) 21 Atl. Rep. 923.

The judgment in an action in which no relief is prayed other than the granting of an injunction to restrain the leasing of a railroad, may settle the title of one of the defendants to specified shares of stock, and the legality of certain certificates allotted by the *de facto* board of directors, where the bill and answer squarely raise such issues, and it appears that it was the intention of the parties to determine such questions. *Shellenberger v. Patterson*, 168 Pa. St. 30.

Judgment Inconsistent with Admissions in Pleadings.—A finding or judgment of the court repugnant to facts admitted by the pleadings is erroneous. *Gregory v. Nelson*, 41 Cal. 278; *White v. Douglass*, 71 Cal. 115.

It is error to render judgment for a less sum than that which is admitted to be due by the pleadings. *Nunan v. San Francisco*, 38 Cal. 689.

Presumption.—The presumption is that the relief granted is authorized by the pleadings; and the burden is upon him who attacks the judgment to show that it was not. *American Emigrant Co. v. Fuller*, 83 Iowa 599.

1. *Colorado.*—*Greer v. Heiser*, 16 Colo. 306.

Connecticut.—*Atwood v. Welton*, 57 Conn. 522.

Illinois.—*Gutsch Brewing Co. v. Fischbeck*, 41 Ill. App. 400; *Quinn v. McMahon*, 40 Ill. App. 593; *Detroit Stove Works v. Koch*, 30 Ill. App. 328.

Missouri.—*Paddock v. Lance*, 94 Mo. 283.

Nebraska.—*McGavock v. Omaha*, 40 Neb. 64.

New York.—*Rutty v. Consolidated Fruit Jar Co.*, 52 Hun (N. Y.) 492.

Texas.—*Western Union Tel. Co. v. Smith*, (Tex. Civ. App. 1894) 26 S. W. Rep. 216; *Smith v. McGehee*, 1 Tex. App. Civ. Cas., § 940; *Parker v. Beavers*, 19 Tex. 410; *Denison v. League*, 16 Tex. 408; *Paul v. Perez*, 7 Tex. 345; *Hall v. Jackson*, 3 Tex. 309; *McKey v. Welch*, 22 Tex. 390; *Chrisman v. Miller*, 15 Tex. 159.

A want of allegation to sustain the relief sought is as fatal as the lack of proof. *Gutsch Brewing Co. v. Fischbeck*, 41 Ill. App. 400; *Quinn v. McMahon*, 40 Ill. App. 593; *Detroit Stove Works v. Koch*, 30 Ill. App. 328; *Rutty v. Consolidated Fruit Jar Co.*, 52 Hun (N. Y.) 492.

Recovery cannot be had from a street-railway company for injuries to a passenger from negligence of a watchman at a crossing, in the absence of any allegation of such negligence in the petition. *Jacquin v. Grand Ave. Cable Co.*, 57 Mo. App. 320.

Special Damages Must Be Pleaded.—Insurance and expenditures for insurance, not alleged or claimed in the declaration on a bond requiring the property to be insured, cannot be recovered. *Butler v. Mutual Aid, etc., Co.*, 94 Ga. 562. As to the necessity of pleading items of special damages, see article DAMAGES, vol. 5, p. 719.

2. *California.*—*Brown v. Rouse*, 93 Cal. 237.

New Jersey.—*Wills v. Shinn*, 42 N. J. L. 138.

New York.—*Hallenbeck v. Phelps*, 2 N. Y. Wkly. Dig. 587.

Texas.—*Burnett v. Harrington*, 58 Tex. 359; *Chrisman v. Miller*, 15 Tex. 159; *Hall v. Jackson*, 3 Tex. 305; *Lemmon v. Hanley*, 28 Tex. 219.

Virginia.—*Welfley v. Shenandoah Iron, etc., Co.*, 83 Va. 768; *Edichal Bullion Co. v. Columbia Gold Min. Co.*, 87 Va. 641; *Kent v. Kent*, 82 Va. 205.

West Virginia.—*Riley v. Jarvis*, (W. Va. 1896) 26 S. E. Rep. 366.

A judgment cannot be rendered in the plaintiff's favor for a claim which was not set up in the complaint or bill of particulars served, without an amendment, although the defendant had not objected to the evidence. Hal-

Conformity to Proof. — A judgment must also conform to and be sustained by the evidence or proofs adduced.¹ Facts pleaded

lenbeck v. Phelps, 2 N. Y. Wkly. Dig. 587.

Where a bill to foreclose a trust deed contains no allegation of facts making the wife of the grantor personally liable for the debts secured, it is improper to render a decree against her for the deficiency, even though the evidence shows such personal liability. Brown v. Kennicott, 30 Ill. App. 89.

A judgment should not be entered upon a verdict not sustained by the pleadings. Wills v. Shinn, 42 N. J. L. 138; Burnett v. Harrington, 58 Tex. 359.

1. *Colorado.* — Tiger v. Lincoln, 1 Colo. 394; La Crosse Gold Min. Co. v. Scudder, 4 Colo. 44; Denver, etc., R. Co. v. Reed, 6 Colo. 330.

Georgia. — Sanner v. Sayne, 78 Ga. 467.

Illinois. — McGrath v. Miller, 61 Ill. App. 497.

Iowa. — Oliver v. Riley, 91 Iowa 740, 92 Iowa 23.

Kansas. — Root v. Topeka Water Supply Co., 46 Kan. 183; Randall v. Shaw, 28 Kan. 419.

Kentucky. — Mulholland v. Samuels, 8 Bush (Ky.) 66; Pittsburgh, etc., R. Co. v. Woolley, 12 Bush (Ky.) 451; Fraley v. Peters, 12 Bush (Ky.) 469; McDaniel v. Watson, 4 Bush (Ky.) 235.

Minnesota. — Anderson v. Ege, 44 Minn. 216.

Texas. — James v. Brooks, 5 Tex. Civ. App. 59; Donnebaum v. Tinsley, 54 Tex. 362; Cross v. Huffaker, 1 Tex. App. Civ. Cas., § 136; Jones v. Brazile, 1 Tex. App. Civ. Cas., § 299; Gam-mage v. Alexander, 14 Tex. 414; Chrisman v. Miller, 15 Tex. 160; Denison v. League, 16 Tex. 406; Lemmon v. Han-ley, 28 Tex. 219; Hall v. Jackson, 3 Tex. 305; Marsalis v. Brown, 1 Tex. App. Civ. Cas., § 456; McArniss v. Mc-Intyre, 1 Tex. App. Civ. Cas., § 514; Wright v. Wright, 3 Tex. 168; Guess v. Lubbock, 5 Tex. 535; Galveston, etc., R. Co. v. Buckley, 1 Tex. App. Civ. Cas., § 687; La Rue v. Bower, 1 Tex. App. Civ. Cas., § 1284; Collins v. Cook, 40 Tex. 249; Newcomb v. Babb, 2 Tex. App. Civ. Cas., § 761; Zapp v. Michaelis, 58 Tex. 270.

Wisconsin. — Blewett v. Gaynor, 77 Wis. 378.

A judgment in an action is founded upon the facts admitted by the plead-

ings and those found by the court, jury, or referee, taken together, and it is not necessary that either alone should be sufficient to sustain the judgment. Brookover v. Esterly, 12 Kan. 153.

Judgment Against Weight of Evidence.

— When the law and facts of an ordinary action are submitted to the court without a jury, the judgment cannot be set aside on the ground that it is contrary to the weight of evidence for any less reason than would authorize the setting aside of the verdict of a jury. Mulholland v. Samuels, 8 Bush (Ky.) 63; Pittsburgh, etc., R. Co. v. Woolley, 12 Bush (Ky.) 451; Fraley v. Peters, 12 Bush (Ky.) 469.

The judgment will not ordinarily be set aside as being against the weight of the evidence where it is supported by any competent evidence. See article APPEALS, vol. 2, p. 391.

But where a plaintiff proves a *prima facie* case, and there is no evidence on the part of the defendant rebutting such *prima facie* case, a judgment in favor of the defendant is erroneous as being against the evidence. Root v. Topeka Water Supply Co., 46 Kan. 183.

Incompetent Evidence in Support of. —

On a motion by a principal against his deputy and securities for a failure to account for part of the revenue, an objection to evidence as incompetent to authorize judgment cannot vitiate the judgment if there is sufficient evidence to support it. Johnson v. Thompson, 4 Bibb (Ky.) 294.

Failure of Proof — Nonsuit or Judgment on Merits. — A dismissal of the complaint at the close of the plaintiff's case, in a common-law action, for failure of proof, is not a dismissal upon the merits, and should not be so stated in the clerk's minutes or in the judgment. In such actions there is no decision upon the merits unless the questions are submitted to the jury or a verdict is directed by the court. Man-nion v. Broadway, etc., R. Co., 18 Civ. Pro. Rep. (N. Y. Supreme Ct.) 40.

A judgment for the defendants upon the merits is erroneous where the plaintiffs produced no evidence under their complaint, and no evidence in relation thereto is offered by the defendants, and there are no findings by the jury. Gage v. Allen, 89 Wis. 98.

but not proved or admitted on the trial will not support a judgment.¹

Pleadings and Proofs. — In other words, the judgment must conform to both the pleadings and the proofs.² Where the facts pleaded and proved by the plaintiff constitute a cause of action, he is entitled to a judgment in his favor;³ but where the com-

A judgment for the defendant, in a suit to recover the unpaid balance of the purchase price of lands upon the ground that plaintiff has not reconveyed other lands for which she has accepted deeds, should be one of nonsuit, and not generally in favor of the defendant upon his pleas. *Wilson v. Breyfogle*, 24 U. S. App. 1, 63 Fed. Rep. 379.

See generally article DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823.

1. *Illinois*. — *Fuqua v. Robinson*, 10 Ill. 128.

Tennessee. — *Humphreys v. McCloud*, 3 Head (Tenn.) 235.

Vermont. — *Burdick v. Champlain Glass Co.*, 11 Vt. 19.

Superfluous Allegations Need Not Be Proved. — *Chorn v. Merrill*, 9 La. Ann. 533; *Vail v. Hammond*, 60 Conn. 380.

Where the plaintiff states as a cause of action more than is necessary to the gist of the action, so much may be found proved and so much not proved, and if the facts proved constitute a cause of action, judgment may be rendered for the plaintiff. *School Directors v. Crews*, 23 Ill. App. 367.

In an action for tort where the averments of the declaration are divisible, the plaintiff may recover upon proof of enough to make a cause of action. *Lake Erie, etc., R. Co. v. Christison*, 39 Ill. App. 495.

A recovery for injury by fire caused by a locomotive, without proof of negligence, will not be prevented, where the statute authorizes such recovery, by the mere fact that negligence is alleged in the petition. *Campbell v. Missouri Pac. R. Co.*, 121 Mo. 340.

2. *Alabama*. — *Bozman v. Draughan*, 3 Stew. (Ala.) 243; *Langdon v. Roane*, 6 Ala. 518; *Morgan v. Crabb*, 3 Port. (Ala.) 470; *Mauzy v. Mason*, 8 Port. (Ala.) 211; *Graham v. Tankersley*, 15 Ala. 634; *Ansley v. Robinson*, 16 Ala. 793; *Evans v. Battle*, 19 Ala. 398; *Paulding v. Lee*, 20 Ala. 753; *Sandford v. Ochdalomi*, 23 Ala. 669; *Spoor v. Phillips*, 27 Ala. 193; *Flanagan v. State*

Bank, 32 Ala. 508; *Burns v. Hudson*, 37 Ala. 62.

Arkansas. — *Maulding v. Scott*, 13 Ark. 88.

Delaware. — *Cloud v. Whiteman*, 2 Harr. (Del.) 401.

Georgia. — *Wilson v. Wilkinson*, 97 Ga. 814.

Idaho. — *Lowe v. Turner*, 1 Idaho 107.

Illinois. — *Morrison v. Smith*, 130 Ill. 304; *Ohling v. Luitjens*, 32 Ill. 23.

Kentucky. — *Walker v. Montgomery*, 2 Bibb (Ky.) 253; *Handley v. Young*, 4 Bibb (Ky.) 376; *Dickerson v. Morgan*, 8 Dana (Ky.) 130.

Louisiana. — *Smith v. Amacker*, 15 La. Ann. 299.

Maryland. — *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11.

Michigan. — *Peckham v. Buffam*, 11 Mich. 529.

Missouri. — *Dougherty v. Adkins*, 81 Mo. 411.

New Jersey. — *Vansciver v. Bryan*, 13 N. J. Eq. 434.

New York. — *Day v. New Lots*, 107 N. Y. 148; *Miller v. Campbell*, 2 Misc. Rep. (N. Y. Super. Ct.) 518; *Stuart v. Mechanics*, etc., Bank, 19 Johns. (N. Y.) 496.

North Carolina. — *Smith v. Smith*, 1 Ired. Eq. (N. Car.) 83.

Ohio. — *Bougher v. Miller*, Wright (Ohio) 328.

Oregon. — *Bender v. Bender*, 14 Oregon 353; *Weber v. Weber*, 16 Oregon 165; *Woodward v. Oregon R., etc., Co.*, 18 Oregon 299.

Texas. — *Cotton v. Coit*, 88 Tex. 414.

Virginia. — *Pigg v. Corder*, 12 Leigh (Va.) 69; *Mundy v. Vawter*, 3 Gratt. (Va.) 518.

United States. — *Crocket v. Lee*, 7 Wheat. (U. S.) 522; *Carneal v. Banks*, 10 Wheat. (U. S.) 181.

Improper Evidence, in a trial by the court, may be disregarded in the judgment. *Central v. Wilcoxon*, 3 Colo. 566.

3. *Crosby v. McDermitt*, 7 Cal. 146; *Johnson v. Clarkson*, (Tex. Civ. App. 1894) 29 S. W. Rep. 178.

plaint does not state a cause of action, a judgment for the plaintiff cannot be sustained even though the allegations of the complaint be found true.¹

Amending Pleadings to Conform to Proof. — At the present day, in the case of a mere variance between the pleadings and the proof, a party would ordinarily be permitted to amend his pleading so as to conform to the proofs, unless such amendment would operate as a surprise upon the other party or would amount to setting up an entirely different cause of action from that sued upon.²

Extent of Rule. — This rule is of universal application, and whether the action or suit be at law, in equity, or under the code, the judgment must be *secundum allegata et probata*.³

1. *Barron v. Frink*, 30 Cal. 486; *Brown v. Cunningham*, 82 Iowa 512; *Knudson v. Curley*, 30 Minn. 433. See also *Rosenkranz v. Wagner*, 62 Cal. 151.

Complaint Must State Cause of Action. — No recovery can be had on a complaint which does not state a substantial cause of action, although no demurrer is taken thereto, *St. Clair County v. Smith*, 112 Ala. 347; or even though a demurrer to the petition has been overruled and the defendant has answered over denying the allegations, *Brown v. Cunningham*, 82 Iowa 512.

In *Reynolds v. Harris*, 9 Cal. 338, the court did not deem it necessary to decide whether, in all cases where a judgment is based upon a complaint which does not state facts sufficient to constitute a cause of action, the judgment itself may be treated as an absolute nullity.

A judgment that the defendant is the owner in fee simple of all the land set forth in the complaint is unauthorized upon the dismissal of a complaint because it does not state a cause of action. *Leinenweber v. Brown*, 24 Oregon 553.

See also *supra*, III. 5. *Pleadings and Issues*.

2. See article AMENDMENTS, vol. I, p. 458. See also the following cases:

Colorado. — *Faust v. Goodnow*, 4 Colo. App. 352.

Indiana. — *Carpenter v. Sheldon*, 22 Ind. 259; *Webb v. Thompson*, 23 Ind. 428; *Numbers v. Bowser*, 29 Ind. 491; *Robinson v. Jamison*, 33 Ind. 122; *White v. Stellwagon*, 54 Ind. 186.

Kansas. — *Wilcox, etc., Organ Co. v. Lasley*, 40 Kan. 521.

New York. — *Rutty v. Consolidated Fruit Jar Co.*, 52 Hun (N. Y.) 492; *Reed v. McConnell*, 133 N. Y. 425.

3. *Metz v. Campbell Printing Press, etc., Co.*, 11 Misc. Rep. (N. Y. C. Pl.) 284; *Robinson v. Ficken*, 10 Misc. Rep. (N. Y. C. Pl.) 758.

The rule requiring the recovery to be *secundum allegata et probata* obtains in all cases where it does not appear that substituted issues were litigated. *Riker v. Curtis*, 10 Misc. Rep. (N. Y. C. Pl.) 125. See also articles BILLS IN EQUITY, vol. 3, p. 357; DECREES, vol. 5, p. 956.

Reason for Rule. — In *Taylor v. Keeler*, 50 Conn. 346, the court said: "It is an elementary rule of pleading that the plaintiff must, in his declaration, give the defendant fair notice of what he claims. * * * Another reason why such certainty as this rule prescribes is required as to the declaration and the judgment is that the defendant may plead the judgment in bar to any subsequent suit for the same injury." See also *Stevens v. Church*, 41 Conn. 370; *Plumb v. Ives*, 39 Conn. 127; *Treat v. Barber*, 7 Conn. 279; *Sanford v. Peck*, 63 Conn. 487.

"While the Code Is Liberal in disregarding technical defects and omissions in pleadings, and in allowing amendments, it does not permit a cause of action to be changed, either because the plaintiff fails to prove the facts necessary to sustain it or because he has mistaken his remedy and the force and effect of the allegations of his complaint." *Barnes v. Quigley*, 59 N. Y. 265 [citing Code, § 173; *Degraw v. Elmore*, 50 N. Y. 1; *Ross v. Mather*, 51 N. Y. 108; *Elwood v. Gardner*, 45 N. Y. 349]. See also *Neudecker v. Kohlberg*, 81 N. Y. 301; *Wright v. Delafield*, 25 N. Y. 266; *Tooker v. Arnoux*, 76 N. Y. 397.

(2) *Limiting Relief to That Sought by Pleadings* — (a) *Rule in Absence of Statute.* — In the absence of statute it is a general rule that the relief to be awarded by a judgment is limited to that sought by the pleadings.¹

Recovery May Be Less than Demand. — This rule, however, does not deprive a party of his right to any relief merely because he has sought more than he is entitled to, and judgment for less relief than demanded may be given when sustained by the pleadings and proof.²

1. *California.* — *Morrison v. Bowman*, 29 Cal. 337.

District of Columbia. — *Denison v. Lewis*, (D. C.) 23 Wash. L. Rep. 138.

Iowa. — *Eureka Dist. Tp. v. Farmers' Bank*, 88 Iowa 194; *Byam v. Cook*, 21 Iowa 392; *Lafever v. Stone*, 55 Iowa 49; *Marder v. Wright*, 70 Iowa 42; *Blotcky v. Caplan*, 91 Iowa 352.

Kansas. — *Holmden v. Janes*, (Kan. 1889) 21 Pac. Rep. 591.

Kentucky. — *Schnorbus v. Swinkle*, 12 Ky. L. Rep. 902.

Louisiana. — *Menefee v. Johnson*, 2 Rob. (La.) 274; *Brown v. Schmidt*, 7 La. Ann. 349; *Cole v. Reddick*, 28 La. Ann. 843.

Maryland. — *Zimmerman v. Fraley*, 70 Md. 561.

Missouri. — *Gamble v. Daugherty*, 71 Mo. 599.

Nebraska. — *Rockford Watch Co. v. Manifold*, 36 Neb. 801.

New York. — *Currie v. Cowles*, 6 Bosw. (N. Y.) 452; *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201; *Husted v. Ingraham*, 75 N. Y. 251; *Hale v. Omaha Nat. Bank*, 64 N. Y. 555; *Smith v. Rathbun*, 15 N. Y. Wkly. Dig. 403.

North Carolina. — *Hardy v. Carr*, 104 N. Car. 33.

Texas. — *Spence v. Morris*, (Tex. Civ. App. 1894) 28 S. W. Rep. 405; *Allen v. Waddill*, (Tex. Civ. App. 1894) 26 S. W. Rep. 273; *Houston v. Emery*, 76 Tex. 282; *Lewis v. Dennis*, 54 Tex. 487; *Cowart v. Edwards*, 4 Tex. Civ. App. 276; *Nowlin v. Hughes*, 2 Tex. App. Civ. Cas., § 314.

Virginia. — *Miller v. Smoot*, 86 Va. 1050.

United States. — *Rainey v. Herbert*, 55 Fed. Rep. 443.

See also article PRAYERS FOR RELIEF; and *infra*, III. 9. b. (4) *Basing on Grounds of Liability or Defense Alleged.*

Illustrations. — A personal judgment cannot be rendered in an action to fore-

close a vendor's lien where the pleadings seek merely a foreclosure of the lien, and do not allege facts showing a personal liability. *Spence v. Morris*, (Tex. Civ. App. 1894) 28 S. W. Rep. 405.

Equitable relief will not be granted where the petition is not properly framed to obtain such relief. *Vasquez v. Ewing*, 24 Mo. 31.

Revocation of the probate of a prior will may be had under a petition praying for the admission of a subsequent will, as such relief is necessarily implied. *Re Vogel's Estate*, 27 Pittsb. L. J. N. S. 80.

Under a complaint framed only to set aside an assignment on the ground of fraud, a plaintiff cannot, on failing to obtain the principal relief, insist on a judgment settling the construction of the instrument. *Hotop v. Neidig*, 17 Abb. Pr. (N. Y. Supreme Ct.) 332.

Where the cause of action set forth is a breach of a covenant for renewal in a lease, and the only relief demanded is judgment for a specified sum as damages, judgment for specific performance cannot be given on evidence that the plaintiff is entitled to it. *Ryder v. Jenny*, 2 Robt. (N. Y.) 56.

The plaintiffs in an action for the construction of a will are not estopped from receiving the full benefit of the judgment by having claimed less than they were entitled to. *Lamb v. Lamb*, (Supreme Ct.) 37 N. Y. St. Rep. 699.

A Decree Declaring a Deed to Be a Mortgage is not sustained by a complaint which asks that such deed be canceled and held for naught, on the ground that the grantor therein named was, at the time of its execution, incapacitated from making the deed, and that the execution of the same was procured by fraud and conspiracy. *Cole v. Bean*, 1 Arizona 364.

2. *Brown v. Hill*, 5 Ark. 78; *Knox v. Yow*, 91 Ga. 367; *Brame v. Swain*, 111 N. Car. 540; *In re Oshkosh Mut. F. Ins. Co.*, 77 Wis. 366.

(b) **Statutory Changes.** — In many states it is provided by statute that where the defendant appears and answers the plaintiff shall not be confined to the relief demanded, but that where there is no answer the relief granted to the plaintiff cannot exceed that demanded in the complaint.

Where Answer Is Filed. — The effect of such a statute is merely to relieve the plaintiff from any technical objection that he has not prayed for the precise relief to which, on the trial, he may seem entitled, and the relief to be granted must still conform to and be consistent with the case made by the complaint.¹

On Default. — Where, however, the defendant does not answer, but makes default, the relief granted to the plaintiff cannot exceed that which he has demanded and that necessarily incident thereto.²

In Ejectment. — The plaintiff may recover a part of the premises claimed where the defendant claims only a part. *Roche v. Campbell*, 4 Colo. 254.

1. *California.* — *Dennison v. Chapman*, 105 Cal. 447.

Indiana. — *Humphrey v. Thorn*, 63 Ind. 296.

Iowa. — *Wilson v. Miller*, 16 Iowa 111.

Kansas. — *Kimball v. Connor*, 3 Kan. 415.

New York. — *Cornell v. Cornell*, 96 N. Y. 108; *Saltus v. Genin*, 3 Bosw. (N. Y.) 250, 639; *Cowenhoven v. Brooklyn*, 38 Barb. (N. Y.) 9; *Towle v. Jones*, 1 Robt. (N. Y.) 87; *Bradley v. Aldrich*, 40 N. Y. 504; *Evans v. Burton*, (Supreme Ct.) 5 N. Y. St. Rep. 216; *Baker v. McLaughlin*, 19 N. Y. Wkly. Dig. 239; *Barnes v. Quigley*, 59 N. Y. 265; *Bell v. Merrifield*, 109 N. Y. 207 [citing *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Murtha v. Curley*, 12 Abb. N. Cas. (N. Y. Ct. App.) 12, 90 N. Y. 372].

South Carolina. — *Christopher v. Christopher*, 18 S. Car. 600.

United States. — *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (N. Y.) 112 and note.

Illustrations. — In *Cornell v. Cornell*, 96 N. Y. 108, it was held, in an action for a specified sum of money, claimed to be payable by contract, that where a jury trial is waived the plaintiff may, on prevailing at the trial of issues raised by the answer, have an interlocutory judgment for an accounting.

In *Murtha v. Curley*, 12 Abb. N. Cas. (N. Y. Ct. App.) 12, it was held that one suing in equity may, after answer, have a money judgment for the amount due if an accounting is found necessary.

Right to Amend. — In *Jenks v. Van Brunt*, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 158, it is said that where the verdict is slightly in excess of the amount claimed, the trial court may, after verdict, allow the complaint to be amended so as to support the verdict. But such amendment will not be allowed on appeal where the point was not raised in the lower court. The plaintiff will, however, be allowed on appeal in such case to remit the excess and thus save the verdict as for the amount claimed in his pleading.

In *Carr v. Sterling*, 114 N. Y. 558, it is said that even as against a defendant who has failed to answer, an amendment by leave, adding a new cause of action or increasing the amount claimed, does not necessarily avoid the judgment. To the same effect is *Peck v. New York, etc., R. Co.*, 85 N. Y. 246. This dictum is criticised in a note to *Reynolds v. Stockton*, 27 Abb. N. Cas. (U. S. Supreme Ct.) 112, as follows: "But it is hard to reconcile this with the provision of the first clause of section 1207, the object of which is to protect defendant in making default where he is willing to allow without contest a judgment not more favorable than that demanded in the complaint. If the dictum above referred to is sound, a defendant makes default at his peril of the court subsequently increasing the burden of relief without notice to him; and a defendant is therefore not safe in any case, unless he appears formally so as to have notice of any unfavorable amendment."

2. *California.* — *Holman v. Vallejo*, 19 Cal. 498. See also *Brooks v. Carpentier*, 53 Cal. 287.

Demurrer. — It has been held in *New York* and *Kentucky* that a demurrer is not an answer within the meaning of the statute

Colorado. — *Wilbur v. Maynard*, 6 Colo. 483; *Smith v. Havens*, 6 Colo. 297.

Idaho. — *Lowe v. Turner*, 1 Idaho 107.

Illinois. — *Belford v. Woodward*, 158 Ill. 122.

Iowa. — *McGlaughlin v. O'Rourke*, 12 Iowa 459.

Kentucky. — *Sinking Fund Com'rs v. Mason*, (Ky. 1897) 41 S. W. Rep. 548.

Missouri. — *Janney v. Spedden*, 38 Mo. 395.

New Mexico. — *Senescal v. Bolton*, 7 N. Mex. 351.

New York. — *Kelly v. Downing*, 42 N. Y. 71; *Simonson v. Blake*, 12 Abb. Pr. (N. Y. Supreme Ct.) 331, 20 How. Pr. (N. Y.) 484; *Hurd v. Leavenworth*, 1 Code Rep. N. S. (N. Y. C. Pl.) 278; *Porter v. Lent*, 4 Duer (N. Y.) 671, 2 Abb. Pr. (N. Y.) 115; *Hall v. Hall*, 38 How. Pr. (N. Y. Supreme Ct.) 97; *Shields v. Clement*, 12 N. Y. Misc. Rep. (Buffalo Super. Ct.) 506; *Olcott v. Kohlsaat*, (Supreme Ct.) 8 N. Y. Supp. 117, 55 Hun (N. Y.) 607.

North Carolina. — *White v. Snow*, 71 N. Car. 232.

Ohio. — *Rhodenbaugh v. Carey*, 1 West. L. M. (Ohio) 599.

Tennessee. — *Lancaster Mills v. Merchants' Cotton-press Co.*, 89 Tenn. 1, 45 Am. & Eng. R. Cas. 423.

Wisconsin. — *Viles v. Green*, 91 Wis. 217; *Jones v. Jones*, 78 Wis. 446; *Whitewell v. Jacobs*, 75 Wis. 474; *Leonard v. Rogan*, 20 Wis. 540; *McKenzie v. Peck*, 74 Wis. 208.

United States. — *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. C. (N. Y.) 112.

Reason and Object of Rule. — "This is not a mere statutory restriction, but is a general principle, fundamental to the administration of justice, that the complaint must advise the defendant clearly of what is claimed. If he chooses, he may waive answering and appear on the application for judgment, and there may object that the judgment proposed is more burdensome to him than that claimed in the complaint. It is not alone the case made, but also the judgment asked for, that controls. *Porter v. Lent*, 4 Duer (N. Y.) 671, 2 Abb. Pr. (N. Y.) 115; *Simonson v. Blake*, 12 Abb. Pr. (N. Y. Supreme Ct.) 331, 20 How. Pr. (N. Y.) 484. If the

defendant fails to answer, his rights are protected by the statute. *Hall v. Hall*, 38 How. Pr. (N. Y. Supreme Ct.) 97." Professional opinion given by *Austin Abbott*, in 20 Abb. N. Cas. (N. Y.) 434, note.

In *Peck v. New York, etc., R. Co.*, 85 N. Y. 246, it was held that this statute was intended for the protection of defendants who suffered default; that a bondholder for whose benefit a trustee prosecuted a foreclosure suit could not invoke the section in an attack upon the judgment, and that he could not demand as a matter of right to have the judgment vacated as illegal.

Illustrations. — In *Olcott v. Kohlsaat*, (Supreme Ct.) 27 N. Y. St. Rep. 914, it was held that on default in an action by a pledgee to foreclose the right of redemption, and have the security sold, and a judgment for a deficiency, if the right to foreclosure and sale is not established, the plaintiff cannot take a personal judgment for the debt.

In *Hurd v. Leavenworth*, 1 Code Rep. N. S. (N. Y. C. Pl.) 278, the complaint asked to have notes to the amount of \$5,000 delivered up and canceled, and to have a judgment for \$2,000. It was held that a judgment by default for \$7,000 exceeded the relief sought.

A judgment for a deficiency in a foreclosure suit where the complaint merely asked for a sale is in excess of the relief sought and should be vacated on motion. *Simonson v. Blake*, 12 Abb. Pr. (N. Y. Supreme Ct.) 331, 20 How. Pr. (N. Y.) 484. In this case it was further held that such a judgment is not merely irregular, but is void or voidable as unauthorized, and the right to move to have it vacated is not limited to one year. Compare *Jones v. Jones*, 78 Wis. 446; *Peck v. New York, etc., R. Co.*, 85 N. Y. 246, wherein the court said: "It may have been improper to allow the plaintiff, against the allegations in his complaint, to prove the large amount of bonds. But that was at most a mere irregularity. The action was properly commenced. The court had jurisdiction, and it could have allowed the complaint in respect to such allegations to have been amended *ex parte* before or after judgment without violating any provision of the code."

under consideration.¹ But a contrary conclusion has been reached in *Wisconsin*.²

(c) **Under Code and in Equity.** — Independently of the statute just considered, it is a general rule in equity and under the codes that any relief fairly within the issues formed by the pleadings and justified by the evidence may be given, regardless of the specific relief asked or the form of the action.³

Correction on Motion in Trial Court. —

A judgment granting relief not demanded where the defendant has not answered, or granting relief not authorized by the findings, may be corrected by a motion made to the trial court. *Olcott v. Kohlsaat*, (Supreme Ct.) 27 N. Y. St. Rep. 914, 8 N. Y. Supp. 117 [citing *De Lavallette v. Wendt*, 75 N. Y. 579; *Ladd v. Stevenson*, 112 N. Y. 326; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *People v. Goff*, 52 N. Y. 434; *Cagger v. Lansing*, 64 N. Y. 417; *Cole v. Tyler*, 65 N. Y. 77; *Hatch v. Central Nat. Bank*, 78 N. Y. 487; *Dinsmore v. Adams*, 48 How. Pr. (N. Y. Supreme Ct.) 274].

Full Faith and Credit. — A judgment rendered in the absence of the defendant, and not responsive to the issues presented by the pleadings, is not entitled to full faith and credit in a sister state. *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (N. Y.) 112.

Void or Voidable. — A judgment in excess of the relief demanded, where there is no answer, is erroneous, but is not void and cannot be collaterally attacked. *Chase v. Christianson*, 41 Cal. 253.

1. *Kelly v. Downing*, 42 N. Y. 71; *Sinking Fund Com'rs v. Mason*, (Ky. 1897) 41 S. W. Rep. 548.

2. *Viles v. Green*, 91 Wis. 217.

3. *Alabama*. — *Lyons v. McCurdy*, 90 Ala. 497.

Arkansas. — *Rogers v. Brooks*, 30 Ark. 612.

California. — *Nevada County, etc., Canal Co. v. Kidd*, 37 Cal. 282; *Johnson v. Polhemus*, 99 Cal. 240; *Poledori v. Newman*, 116 Cal. 375.

Colorado. — *Ross v. Purse*, 17 Colo. 24; *Becker v. Pugh*, 9 Colo. 589; *Nevin v. Lulu, etc., Silver Min. Co.*, 10 Colo. 357; *Schiffer v. Adams*, 13 Colo. 572; *Ohio Creek Anthracite Coal Co. v. Hinds*, 15 Colo. 173; *Rustin v. Merchants' etc., Tunnel Co.*, 23 Colo. 351.

Florida. — *St. John, etc., R. Co. v. Bartola*, 28 Fla. 82.

Iowa. — *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 286.

Kentucky. — *Hargis v. Louisville Gas Co.*, (Ky. 1893) 22 S. W. Rep. 85; *Parks v. Ingram*, 17 Ky. L. Rep. 1380.

Minnesota. — *Farmer v. Crosby*, 43 Minn. 459; *Wilson v. Fairchild*, 45 Minn. 203.

Missouri. — *Henderson v. Dickey*, 50 Mo. 161; *Ames v. Gilmore*, 59 Mo. 537; *Wittenauer v. Watson*, 11 Mo. App. 588; *Peyton v. Rose*, 41 Mo. 257; *Merchants' Bank v. Evans*, 51 Mo. 335; *Wright v. Barr*, 53 Mo. 340; *White v. Rush*, 58 Mo. 105; *Armstrong v. St. Louis*, 3 Mo. App. 100, 69 Mo. 309; *Beal v. McVicker*, 3 Mo. App. 592; *State v. Adler*, 97 Mo. 413; *Sharkey v. McDermott*, 91 Mo. 647; *Baker v. Missouri Pac. R. Co.*, 34 Mo. App. 98.

Nebraska. — *St. Clair v. Sedgwick*, 39 Neb. 562.

New York. — *Corn Exch. Ins. Co. v. Babcock*, 9 Abb. Pr. N. S. (N. Y. Comm. App.) 156; *Gaunt v. Taylor*, (Supreme Ct.) 39 N. Y. St. Rep. 757; *Johnson v. Hathorn*, 2 Abb. App. Dec. (N. Y.) 465, 2 Keyes (N. Y.) 476; *Beach v. Cooke*, 28 N. Y. 508, 39 Barb. (N. Y.) 360; *Bradley v. Aldrich*, 40 N. Y. 504; *Stevens v. New York*, 84 N. Y. 296; *Gale v. Gale*, (Supreme Ct.) 15 N. Y. St. Rep. 644; *Green v. Fry*, 93 N. Y. 353; *Knickerbacker v. Boutwell*, 2 Sandf. Ch. (N. Y.) 319; *Tiffany v. Bowerman*, 2 Hun (N. Y.) 643; *Hare v. Van Deusen*, 32 Barb. (N. Y.) 92; *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525; *Miller v. McCan*, 7 Paige (N. Y.) 451; *Taylor v. Taylor*, 43 N. Y. 578; *Thayer v. Marsh*, 75 N. Y. 340; *Sutherland v. Rose*, 47 Barb. (N. Y.) 144; *Vail v. Long Island R. Co.*, 106 N. Y. 283; *Wright v. Hooker*, 10 N. Y. 51; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Armitage v. Pulver*, 37 N. Y. 494; *Thomas v. Schumacher*, 17 N. Y. App. Div. 441; *Wood v. Wood*, 26 Barb. (N. Y.) 356; *Smith v. Fisher*, 87 Hun (N. Y.) 129; *Cassagne v. Marvin*, 143 N. Y. 292; *Sullivan v. Industrial Ben. Assoc.*,

(a) **Affirmative Relief to Defendant.** — It is a general rule that where the answer prays for no affirmative relief the defendant can have none,¹ and a judgment granting such relief is erroneous because not in conformity to the issues raised by the pleadings.² An affirmative judgment for the defendant is proper, however, where justified by the pleadings and proof.³

73 Hun (N. Y.) 319; *Buswell v. Lincks*, 8 Daly (N. Y.) 518; *McVity v. Stanton*, 10 Misc. Rep. (N. Y. C. Pl.) 105; *Chester v. Jumel*, (Supreme Ct.) 24 N. Y. St. Rep. 229; *Emery v. Pease*, 20 N. Y. 62; *Cythe v. La Fontain*, 51 Barb. (N. Y.) 194.

North Carolina. — *Dempsey v. Rhodes*, 93 N. Car. 120; *Parker v. Norfolk*, etc., R. Co., 119 N. Car. 677; *Presson v. Boone*, 108 N. Car. 78.

Oregon. — *Gilmore v. Burch*, 7 Oregon 374, 33 Am. Rep. 710.

Washington. — *Jackson v. Tatebo*, 3 Wash. 456.

Wisconsin. — *Leonard v. Rogan*, 20 Wis. 540; *Iowa County v. Mineral Point R. Co.*, 24 Wis. 93; *Amory v. Amory*, 26 Wis. 152.

United States. — *Hagar v. Townsend*, 67 Fed. Rep. 433; *Bound v. South Carolina R. Co.*, 58 Fed. Rep. 473; *Wittkowski v. Harris*, 64 Fed. Rep. 712; *Eddy*, etc., *Live Stock Co. v. Blackburn*, 70 Fed. Rep. 949.

See also article PRAYERS FOR RELIEF.

1. *Low v. Blackburn*, 2 Nev. 70; *McKey v. Welch*, 22 Tex. 390; *Jolliffe v. Collins*, 21 Mo. 338. See also article SET-OFF AND COUNTERCLAIM; and generally article CROSS-COMPLAINTS, vol. 5, p. 673. And as to affirmative relief to the defendant in equity upon answer and without cross-bill, see articles ANSWERS IN EQUITY PLEADING, vol. 1, p. 863; CROSS-BILLS, vol. 5, p. 624.

If the defendants' answer sets up what is merely a defense, and they succeed, and are entitled to have the complaint dismissed with costs, the court has no power to render any other judgment; and a judgment giving them affirmative relief on the evidence is wrong. *Wright v. Delafield*, 25 N. Y. 266.

Where New Parties Are Necessary. — The provision of section 274 of the code, that the judgment "may grant to the defendant any affirmative relief to which he may be entitled," does not apply where a complete determination of the controversy presented by the answer, and upon which the relief is de-

manded, cannot be had without the presence of other parties, who can only be properly brought in by the defendant by a cross-action. *Smith v. Howard*, 20 How. Pr. (Buffalo Super. Ct.) 151.

2. See *infra*, III. 9. u. (3) *Limitation and Conformity to Issues Raised*. See also the following cases:

California. — *McDougald v. Argonaut Land*, etc., Co., 117 Cal. 87.

Indiana. — *Cicero v. Clifford*, 53 Ind. 191; *Boardman v. Griffin*, 52 Ind. 101.

Iowa. — *Walker v. Walker*, 93 Iowa 643; *American Emigrant Co. v. Fuller*, 83 Iowa 599.

Louisiana. — *Coupry v. Dufau*, 1 Martin N. S. (La.) 90.

Missouri. — *Muller v. Gillick*, 66 Mo. App. 500; *Young v. Glascock*, 79 Mo. 574; *Jolliffe v. Collins*, 21 Mo. 338.

Pennsylvania. — *Neely v. Sensenig*, 150 Pa. St. 520.

South Carolina. — *Humbert v. Brisbane*, 25 S. Car. 506.

Tennessee. — *Gilreath v. Gilliland*, 95 Tenn. 383.

Texas. — *Holland v. Preston*, (Tex. Civ. App. 1897) 41 S. W. Rep. 374; *Reeves v. Roberts*, 62 Tex. 550.

Wisconsin. — *Casgrain v. Milwaukee County*, 81 Wis. 113.

Wyoming. — *Metcalfe v. Hart*, 3 Wyoming 513.

On Default of the Plaintiff, a judgment granting affirmative relief to the defendant upon an answer not claiming it is erroneous. *Trueheart v. Simpson*, (Tex. Civ. App. 1894) 24 S. W. Rep. 842.

3. *Mackinstry v. Smith*, 16 Misc. Rep. (N. Y. Supreme Ct.) 351. To the effect that affirmative relief may be granted to the defendant upon facts set forth in the pleadings, even in the absence of a prayer for such relief, see *Benedict v. Horner*, 13 Wis. 256 (under Rev. Stat. Wis., c. 132, § 26); *Cythe v. La Fontain*, 51 Barb. (N. Y.) 186, holding that if the answer, even in a legal action to enforce a forfeiture, sets up a sufficient ground for equitable relief from the forfeiture, it may be granted although

(3) *Limitation and Conformity to Issues Raised*—(a) *Statement of Rule*.—Judgments must be responsive to the issues presented in the pleadings,¹ and, as has been seen, must respond to and determine all the issues.²

Issues Not Raised by the pleadings will not be determined.³

(b) *Effect of Judgment Beyond Issues*—*Reversible Error*.—A judgment upon issues not made by the pleadings is at least erroneous, and may be set aside or reversed in a proper proceeding for that purpose.⁴

the answer does not claim affirmative relief if no objection be taken to this defect.

On an Accounting, the defendant may have an affirmative judgment if the balance found due is in his favor. *Hill v. Southerland*, 1 Wash. (Va.) 128; *Fitzgerald v. Jones*, 1 Munf. (Va.) 150.

1. *Ross v. Ross*, 81 Mo. 84; *Dougherty v. Adkins*, 81 Mo. 411; *Lee v. British, etc., Mortg. Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1041.

Illustrations of Judgments Not Responsive.—A judgment that a plea in abatement be "overruled" does not answer the issue. *Gates v. Nobles*, 1 Root (Conn.) 344.

"Without amendment of the pleadings, a judgment for the recovery of the possession of real estate, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted." *Reynolds v. Stockton*, 27 Abb. N. Cas. (U. S. Supreme Ct.) 123.

In Detinue or Replevin a general judgment for damages only is not responsive to the issues made by the pleadings and may be arrested on motion. *Hamilton v. Clark*, 25 Mo. App. 428; *Beale v. Dale*, 25 Mo. 301; *Bennett v. Butterworth*, 11 How. (U. S.) 675.

2. See *supra*, III. 7. *Determination of All Issues*.

3. *Carson v. Forsyth*, 94 Ga. 617. See also *Gregory v. Nelson*, 41 Cal. 278; *Buffalow v. Buffalow*, 2 Ired. Eq. (N. Car.) 113; *Yosemite Valley v. Barnard*, 98 Cal. 199.

4. *Judgments Beyond Issues Are Erroneous*.—*California*.—*Pottkamp v. Buss*, (Cal. 1892) 31 Pac. Rep. 1121.

Colorado.—*Newman v. Bullock*, 23 Colo. 217.

Connecticut.—*Powers v. Mulvey*, 51 Conn. 433.

Indiana.—*Hancock v. Heaton*, 53 Ind. 111; *Koons v. Jeffersonville First Nat. Bank*, 89 Ind. 178; *Furry v. O'Connor*, 1 Ind. App. 573; *Wayne Pike Co. v. Hammons*, 129 Ind. 368.

Iowa.—*Hines v. Horner*, 86 Iowa 594.

Kansas.—*Hill v. Alexander*, 2 Kan. App. 251.

Kentucky.—*Shelby v. Shelby*, 1 B. Mon. (Ky.) 266.

Louisiana.—*Hennen v. Wood*, 16 La. Ann. 266; *Kuhnholz v. New Orleans*, 45 La. Ann. 1398, 1400.

Missouri.—*Hamilton v. Armstrong*, (Mo. 1893) 21 S. W. Rep. 1124; *Paddock v. Lance*, 94 Mo. 283; *White v. Rush*, 58 Mo. 105.

Nebraska.—*Carter v. Gibson*, 47 Neb. 655.

New York.—*Maders v. Whallon*, (Supreme Ct.) 47 N. Y. St. Rep. 740, 20 N. Y. Supp. 145; *Bailey v. Ryder*, 10 N. Y. 363.

North Carolina.—*Willis v. Branch*, 94 N. Car. 148; *Miller v. Miller*, 89 N. Car. 209; *Waddell v. Swann*, 91 N. Car. 108; *Oakley v. Van Noppen*, 95 N. Car. 60.

Texas.—*Maddox v. Roberson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 563; *Cooper v. Conerty*, 83 Tex. 133; *Wheeler v. Wheeler*, 65 Tex. 573; *McKey v. Welch*, 22 Tex. 390; *Hall v. Jackson*, 3 Tex. 305; *Denison v. League*, 16 Tex. 399; *Chrisman v. Miller*, 15 Tex. 160; *Galveston, etc., R. Co. v. Pfueffer*, 56 Tex. 66.

Virginia.—*Montieth v. Com.*, 15 Gratt. (Va.) 172.

United States.—*New Orleans v. Citizens' Bank*, 167 U. S. 371.

Illustrations of Judgments Beyond Issues.—Where fraud and undue influ-

Judgment Void. — But many cases go even further, and hold that judgments based upon issues not made by the pleadings are *coram non judice* and void,¹ and subject to be set aside or dis-

ence in procuring a deed, and want of capacity, are the only issues presented by the pleadings, no question as to the delivery of a deed is involved, and such question cannot be litigated and determined. *Hamilton v. Armstrong*, (Mo. 1893) 21 S. W. Rep. 1124.

In an action by a ward against his guardian, where the only relief prayed was the discharge and removal of the defendant from his trust as guardian, and there was no averment nor finding that the guardian had any money for which he should account, an order removing the guardian and requiring him to report immediately and pay over assets belonging to the ward is beyond the issues made and is erroneous. *Hancock v. Heaton*, 53 Ind. 111.

New Trial. — Where issues not made by the pleadings are submitted to the jury, and they are calculated to mislead or obscure the real issues, there is good cause for a new trial. *Willis v. Branch*, 94 N. Car. 148 [citing *Miller v. Miller*, 89 N. Car. 209; *Waddell v. Swann*, 91 N. Car. 108].

A Judgment Entered on a Verdict on issues not made by the pleadings is erroneous. *Koons v. Jeffersonville First Nat. Bank*, 89 Ind. 178; *Fowler v. Cowper*, *Sneed (Ky.)* 58; *Brown v. Lillie*, 6 Nev. 177; *Yannes v. Brandtmaier*, 7 Kulp (Pa.) 517.

1. Judgments Beyond Issues Are Void — California. — *Burnett v. Stearns*, 33 Cal. 473; *Gregory v. Nelson*, 41 Cal. 284.

Indiana. — *McFadden v. Ross*, 108 Ind. 517; *Hutts v. Martin*, 134 Ind. 592; *Ringgenberg v. Hartman*, 124 Ind. 190; *Tracy v. Reed*, 4 Blackf. (Ind.) 56. *Kentucky.* — *McKinsey v. Anderson*, 4 Dana (Ky.) 62.

Massachusetts. — *Standish v. Parker*, 2 Pick. (Mass.) 20; *Spooner v. Davis*, 7 Pick. (Mass.) 149.

Missouri. — *Boogher v. Frazier*, 99 Mo. 325.

New Hampshire. — *Moulton v. Libbey*, 15 N. H. 480; *King v. Chase*, 15 N. H. 9.

New Jersey. — *Munday v. Vail*, 34 N. J. L. 418; *Reynolds v. Stockton*, 43 N. J. Eq. 211; *Jones v. Davenport*, 45 N. J. Eq. 77.

New York. — *Pray v. Hegeman*, 98 N. Y. 353; *Embury v. Conner*, 3 N. Y.

522; *Dunham v. Bower*, 77 N. Y. 76; *Manny v. Harris*, 2 Johns. (N. Y.) 24; *People v. Johnson*, 38 N. Y. 63; *Reid v. Gardner*, 65 N. Y. 579; *Smith v. Weeks*, 26 Barb. (N. Y.) 463.

Pennsylvania. — *Kille v. Ege*, 82 Pa. St. 111; *Lentz v. Wallace*, 17 Pa. St. 412; *Martin v. Gerandt*, 19 Pa. St. 124; *Hibshman v. Dulleban*, 4 Watts (Pa.) 183; *Lewis's Appeal*, 67 Pa. St. 165.

South Dakota. — *Wyman v. Hallock*, 4 S. Dak. 469.

Tennessee. — *Central Sav. Bank v. Carpenter*, 97 Tenn. 437; *Mayo v. Harding*, 3 Tenn. Ch. 237; *Dillard v. Harris*, 2 Tenn. Ch. 193.

Texas. — *O'Leary v. Durant*, 70 Tex. 409.

Vermont. — *Lamoille Valley R. Co. v. Bixby*, 57 Vt. 563.

Virginia. — *Seamster v. Blackstock*, 83 Va. 232; *Wade v. Hancock*, 76 Va. 620.

United States. — *Comstock v. Tracey*, 46 Fed. Rep. 162; *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (N. Y.) 112.

England. — *Outram v. Morewood*, 3 East 351.

Illustrations. — Where the pleadings in a replevin suit show that no question of title was involved, a judgment assuming to settle the question of ownership is not only irregular but *coram non judice* and void. *McFadden v. Ross*, 108 Ind. 517, citing *Munday v. Vail*, 34 N. J. L. 418.

A judgment determining the relation between parties to be that of principal and surety, where no such issue had been formed, is void. *Knopf v. Morell*, 111 Ind. 570.

If the judgment decrees the existence of facts not within any issues made or tendered by the pleadings, and then pronounces the judgment of the court upon such facts, such part of the judgment is superfluous and void. *Gregory v. Nelson*, 41 Cal. 278.

Partial Invalidity. — A judgment of another state adjudicating a matter not presented by the pleading or within the issue may be held invalid as to such adjudication, but valid as to other matters which the judgment record shows upon its face to be easily and naturally

regarded even in a collateral proceeding.¹

Reason for Rule. — These cases proceed upon the theory that a court has no jurisdiction to pass upon questions not submitted to it by the parties for decision.²

separable and within the issue. *Belford v. Woodward*, 158 Ill. 122.

Proceedings on the Foot of a Decree. — In an action by policy holders in which the complaint was framed to reach a fund deposited in the hands of the superintendent of insurance by an insurance company which had since become insolvent, and to have it distributed, a judgment was entered, after answer, making a final disposition of the fund in partial payment of the claims presented, and reserving leave to any party to apply for further directions on the foot of the decree, and directing also that the question of the indebtedness of the receiver of another company, which had reinsured the risks of the former, be reserved. It was held that a further decree, made on application for further directions, that such receiver pay a specified sum, was invalid, because not responsive to the issues on the pleadings. *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (N. Y.) 112. This is a leading case, wherein a judgment for one million dollars was held void because of this defect.

1. Collateral Attack — *Colorado*. — *Newman v. Bullock*, 23 Colo. 217.

Indiana. — *McFadden v. Ross*, 108 Ind. 512.

New Jersey. — *Munday v. Vail*, 34 N. J. L. 418; *Reynolds v. Stockton*, 43 N. J. Eq. 211.

New York. — *Campbell v. Consalus*, 25 N. Y. 613.

Texas. — *Sandoval v. Rosser*, (Tex. Civ. App. 1894) 26 S. W. Rep. 930.

United States. — *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (U. S. Supreme Ct.) 112.

The judgment of a court upon a subject of litigation within its jurisdiction, but not brought before it by any statement or claim of the parties, is null and void, and may be collaterally impeached. Thus an action to sell lands conveyed by a debtor to his wife through a third person, alleging that the conveyance was on consideration that the debtor's debts should be paid, which had not been done, will not sustain a judgment that the land should be sold as having been conveyed in

fraud of creditors. *Spoors v. Coen*, 44 Ohio St. 497.

2. Jurisdiction Limited to Matters Submitted. — "In other words, 'in order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject-matter, and of the particular question which it assumes to decide.' 'Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination.' " *Newman v. Bullock*, 23 Colo. 222.

"Neither reason nor authority lends any support to the view that because suitors have submitted certain designated matters to the consideration of a court, the tribunal is thereby authorized to determine any other matter in which the parties may be interested, whether it be involved in the pending litigation or not. 'Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises.' " *McFadden v. Ross*, 108 Ind. 516.

A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity. *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735.

Argument in Support of Rule — Leading Case. — "If the fact of a judgment rendered in a court of one state does not preclude inquiry in the courts of another, as to the jurisdiction of the court rendering the judgment over the person or the subject-matter, it certainly also does not preclude inquiry as to whether the judgment so rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it. Take an extreme case. Given a court of general jurisdiction, over actions in ejectment as well as those in replevin; a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer

Res Judicata. — A judgment upon issues not made by the pleadings is not *res judicata*.¹

denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same state. If not there, the constitutional provision quoted gives no greater force to the same record in another state." *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (N. Y.) 112, in which case the court continued, quoting *Munday v. Vail*, 34 N. J. L. 418: "'The inquiry is, had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises. * * * For the same doctrine that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon the property according to the rights that appear upon the record, I refer to the authority of Lord Redesdale (*Gifford v. Hort*, 1 Sch. & Lef. 386, 408; see also *Gore v. Stacpoole*, 1 Dow 18; *Colclough v.*

Sterum, 3 Bligh 186).' Reference is made in the opinion to the case of *Corwithe v. Griffing*, 21 Barb. (N. Y.) 9, in respect to which the court said: 'Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, as the jurisdiction was confined to the subject-matter set forth and described in the petition. In this case the court had jurisdiction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.' * * * In the case of *Smith v. Ontario*, 18 Blatchf. (U. S.) 457, Circuit Judge Wallace observed that 'the matter in issue' has been defined in a case of leading authority, as 'that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading. *King v. Chase*, 15 N. H. 9.' But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action and in that suit service on or appearance of the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same state; and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another state."

1. *Fulton v. Hanlow*, 20 Cal. 450; *Rice v. Rice*, 50 Mich. 448.

"Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is con-

(c) **Issues Broadened by Consent.** — While parties to an action have a right to limit the issues to be tried to those made by the pleadings, they are not bound to do so, and may by mutual consent try any other issues. This consent may be either express or implied, and in either case the judgment will be upheld.¹ But

clusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a state as to all subsequent inquiries in the courts of the same state, enters into and limits the constitutional provision quoted as to the full faith and credit which must be given in one state to judgments rendered in the courts of another state." *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (N. Y.) 112.

"The proposition that the judgment of a court having jurisdiction of the parties and the subject-matter is conclusive has become a settled maxim of the law. This, however, means nothing more than that such judgment is conclusive upon all questions which were or might have been litigated and determined within the issues before the court." *McFadden v. Ross*, 108 Ind. 512.

Issues in Replevin. — "Primarily, the action of replevin is possessory in its character, and unless the title to property is distinctly put in issue, a judgment in such action determines nothing beyond the right of possession." *McFadden v. Ross*, 108 Ind. 517 [citing *Entsminger v. Jackson*, 73 Ind. 144; *Kramer v. Matthews*, 68 Ind. 172; *Highnote v. White*, 67 Ind. 596; *Hoke v. Applegate*, 92 Ind. 570; *Van Gorder v. Smith*, 99 Ind. 404; *Wells on Replevin*, § 39].

A Judgment Responsive to the Issues is *res judicata*. — *Jonathan Mills Mfg. Co. v. Whitehurst*, 72 Fed. Rep. 496, 37 U. S. App. 664; *Trimmier v. Thomson*, 19 S. Car. 253. See also the title *Res Judicata*, Am. and Eng. Encyc. of Law.

1. "The General Rule is that the issuable facts or matters upon which the plaintiff's case proceeded determine what was in issue, unless it appears from an examination of all the pleadings in a given case that other matters were brought forward and thus became necessarily involved and determined in the suit." *McFadden v. Ross*, 108 Ind. 517 [citing *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Griffin v. Wallace*, 66 Ind. 410; *Davis v. Brown*,

94 U. S. 423; *Russell v. Place*, 94 U. S. 606; *Cromwell v. Sac County*, 94 U. S. 351].

Where the matter determined by the judgment was not in fact put in issue by the pleadings, but it is nevertheless apparent from the record that the defeated party was present at the trial and actually litigated that matter, the appellate court will consider as done that which ought to have been done, and the amendment which ought to have been made to conform the pleadings to the evidence will be treated as having been made. *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (N. Y.) 112.

"In the absence of amended pleading or of stipulation, the court of review must infer the consent to try issues from the evidence offered upon the one side and the absence of objections or the character of the objections, if any are made, upon the other side." *Frear v. Sweet*, 118 N. Y. 458 [citing *Marston v. Gould*, 69 N. Y. 220; *Platner v. Platner*, 78 N. Y. 95; *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 443].

In *Newman v. Bullock*, 23 Colo. 225, it was held, following *Reynolds v. Stockton*, 140 U. S. 254, 27 Abb. N. Cas. (N. Y.) 112, that where it appears that the parties had an opportunity to be heard, and in fact were heard, upon the question determined, and treated such question as an issue in the case and as though it were in the pleadings, the judgment is valid.

A Judgment by Agreement will bind those by whose agreement it is entered, although the pleadings would not in a contested case support the judgment. *Indiana, etc., R. Co. v. Bird*, 116 Ind. 217; *Hutts v. Martin*, 134 Ind. 592; *Lyon v. Roy*, 54 Ind. 300; *Fletcher v. Holmes*, 25 Ind. 458; *Hudson v. Allison*, 54 Ind. 215; *Wilson v. Panne*, 1 Kan. App. 721. Compare *Campbell v. Consalus*, 25 N. Y. 616, wherein it is said: "Even an agreement between the parties that matters foreign to the pleadings shall be given in evidence and decided by the verdict of a jury will not, it seems, enlarge the operation of a judgment entered on such verdict by way of estoppel." See also *Wolfe*

mere stipulations as to the facts of a case, or the evidence of facts, cannot make a case broader than it appears by the allegations of the pleadings, and they do not entitle a party to any relief beyond that to which the averments entitle him.¹ So an agreement that a pleading shall be amended in a certain particular does not alter the issues until the amendment is in fact made.²

b. APPLICATIONS OF RULES—(1) General Illustrations.—The rule that judgments must conform to the pleadings and proof finds numerous applications.³ Thus a judgment is void for inconsistency where it grants relief both to the plaintiff and to the defendant on inconsistent grounds.⁴

All or Nothing.—So where the plaintiff is entitled to the entire amount sued for, or else to nothing at all, a judgment for a part only is erroneous.⁵

v. Washburn, 6 Cow. (N. Y.) 262; *Guest v. Warren*, 9 Exch. 379, cited in 2 Smith L. Cas. 936; *Boggs v. Merced Min. Co.*, 14 Cal. 279; *Lamoille Valley R. Co. v. Bixby*, 57 Vt. 563. And see *infra*, IX. *Judgments by Confession*; X. *Judgments by Agreement or Consent*.

1. *Hicks v. Murray*, 43 Cal. 515.

2. Courts can hear and determine causes only on the pleadings actually filed, and not on what parties may agree they shall be. *Jones v. Davenport*, 45 N. J. Eq. 77.

3. **Illustrations of Judgments Supported by Pleadings.**—See *Pollock v. Agner*, 54 Kan. 618; *Akers v. Kirke*, 91 Ga. 590; *Gumpel v. Castagnetto*, 97 Cal. 15; *Harris v. Harrison*, 93 Cal. 676; *Van Voorhis v. Bond*, (Mich. 1896) 67 N. W. Rep. 974; *Henry v. Meighen*, 46 Minn. 548.

Immaterial Variance Between Pleadings and Proof.—Where the allegation in the complaint in an action for slander of title is that the plaintiff was "in the act of selling," and the proofs and finding show that the plaintiff was "in the act of trading," the variance is immaterial. *May v. Anderson*, 14 Ind. App. 251.

A finding that a personal injury was caused by the negligent backing of a car after a collision, and not by a second collision, is not such a variance from a charge of negligence in the petition ascribing the injury to the second collision as to prevent judgment thereon, where the evidence upon which such finding was based was adduced by the defendant, and the plaintiff asked to amend his petition to conform to the proof, and the motion was de-

nied as unnecessary. *Cincinnati St. R. Co. v. Whitcomb*, 66 Fed. Rep. 915.

Immaterial Variance Between Pleadings and Judgment.—An immaterial variance between the complaint and judgment as to the name of the defendant does not avoid the judgment. *St. Louis, etc., R. Co. v. State*, 55 Ark. 200. See also *Bole v. Sands, etc.*, *Lumber Co.*, 77 Mich. 239; *Ex p. Ah Men*, 77 Cal. 198.

A recital in a judgment giving a different date for a note and mortgage sued on from that alleged in the petition is not ground for reversal, in the absence of a statement of facts or bill of exceptions supporting the alleged error. *Hague v. Jackson*, 71 Tex. 761.

Where the damages laid in the declaration were expressed in pounds and the judgment was for dollars, the variance was held immaterial. *Blanton v. Luckett, Sneed* (Ky.) 307.

It is no cause for arresting judgment that the jury found the damages in pounds when the damages in the declaration were alleged in dollars. *Butts v. Shreve*, 1 Cranch (C. C.) 40.

See generally article VARIANCES.

4. **A Judgment Is Void for Inconsistency** which allows the plaintiff compensation for performing a contract with the defendant, and allows the defendant a counterclaim based on the plaintiff's failure to perform the contract. *King v. Brockschmidt*, 3 Mo. App. 571.

5. *Pionier v. Alexander*, 7 Misc. Rep. (N. Y. C. Pl.) 709; *Owens v. Flynn*, 7 Misc. Rep. (N. Y. C. Pl.) 171; *Shapiro v. McLaughlin*, 6 Misc. Rep. (N. Y. C. Pl.) 146; *Hammers v. Merrick*, 42 Kan. 32.

Where a Counterclaim Is the Only Defense set up, a judgment for the defendant must necessarily allow the counterclaim.¹

A Judgment for a Defendant Who Fails to Answer a complaint stating a cause of action is erroneous, because the default admits the case alleged.²

Where There Are Several Good Pleas in bar to the whole cause of action, the plaintiff cannot recover unless he succeeds on all the issues.³

A Judgment Affecting the Title to Property Not Described in the pleadings is at least erroneous,⁴ and such judgments have been held to be absolutely void and open to collateral attack.⁵

Reason for Rule. — In *Metz v. Campbell Printing Press, etc., Co.*, 11 Misc. Rep. (N. Y. C. Pl.) 284, the action was for money had and received on foreclosure of a chattel mortgage held by the defendant on the plaintiff's chattels. The plaintiff claimed to recover \$202.77, being the difference between the amount deducted for expenses of the sale and five per cent. of the proceeds, which the plaintiff alleged had been agreed upon as the limit of such expense. The making of such agreement was the only question litigated and submitted to the jury, who returned a verdict for the plaintiff for ninety-one dollars. It was held that such verdict and the judgment entered thereon were not *secundum allegata et probata*. The court said: "Obviously, the verdict and judgment transcend the rule that the recovery must be *secundum allegata et probata*. *Fuld v. Kahn*, 4 Misc. Rep. (N. Y. C. Pl.) 600, 54 N. Y. St. Rep. 134; *Pionier v. Alexander*, 7 Misc. Rep. (N. Y. C. Pl.) 709. Upon the pleadings and the evidence the verdict should have been either for the plaintiff, in the amount claimed, or for the defendant. The jury might well, upon the conflict of evidence which ensued upon the trial, have found either way; but they could not with consistency find both ways. A verdict which repudiated the alleged agreement, and yet awarded any recovery to the plaintiff, was manifestly unjust to the defendant."

1. *Wise v. Rosenblatt*, 16 Daly (N. Y.) 496, holding it to be error to give judgment for the defendant without allowing the counterclaim or costs.

2. *Bouscaren v. Brown*, 40 Neb. 722; *Moore v. Johnson*, 12 Tex. Civ. App. 694.

A judgment will be erroneous which wholly ignores the allegations of an

amended petition which are not contradicted, and therefore must be taken as admitted, especially where they are supported by evidence in the case. *Emison v. Walker*, 17 Ky. L. Rep. 238, (Ky. 1895) 31 S. W. Rep. 461.

Reply Undisputed. — A final judgment cannot be rendered against a plaintiff while there is one good paragraph of reply, undisputed by demurrer or trial. A failure to demur to a paragraph concedes that it is a good defense to the answer. *Silvers v. Junction R. Co.*, 43 Ind. 435; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *New Albany, etc., Plank Road Co. v. Stallcup*, 62 Ind. 345; *McCloskey v. Indianapolis Manufacturers', etc., Union*, 67 Ind. 86; *Dorman v. State*, 56 Ind. 454.

3. *Way v. Simmons*, 8 Blackf. (Ind.) 559; *Rubottom v. M'Clure*, 4 Blackf. (Ind.) 505; *Fischli v. Cowan*, 1 Blackf. (Ind.) 350; *MacLachlan v. Pease*, 66 Ill. App. 634; *Dana v. Bryant*, 6 Ill. 104; *Moffet v. Brown*, 16 Ill. 91.

Where the plaintiff replies a former suit, etc., to the plea of limitation, the defendant rejoins *nul tiel record*, and issue thereon is found for the defendant, he is entitled to final judgment, and the finding of the jury on other issues is extra-judicial. *State Bank v. Sherrill*, 12 Ark. 183.

4. *California*. — *Heinlen v. Heilbron*, 71 Cal. 557; *Redd v. Murry*, 95 Cal. 48. *Illinois*. — *Gage v. Curtis*, 122 Ill. 520. *New York*. — *Corn Exch. Bank v. Blye*, 119 N. Y. 414; *Clapp v. McCabe*, 84 Hun (N. Y.) 379.

Texas. — *Sen v. Rehling*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1114; *Medlin v. Wilkens*, 1 Tex. Civ. App. 465; *Lazarus v. Barrett*, 5 Tex. Civ. App. 5; *Throckmorton v. Davenport*, 55 Tex. 236.

5. **Void as to Property Not Described.** — *Central Sav. Bank v. Carpenter*, 97

(2) *Parties*. — A judgment rendered for or against persons not named as parties in the pleadings is erroneous.¹ So where the declaration shows that a person not a party has an interest in the recovery, a judgment in favor of the plaintiff is improper.²

Actions in Representative Capacity. — Where an individual cause of action is alleged, but the plaintiff describes himself as suing in a representative capacity, for example as executor or administrator, he may nevertheless recover in his individual right upon proof of the individual cause of action alleged,³ and the allegations as to

Tenn. 437, wherein it was held that a decree is *coram non judice* and void which, under a bill seeking to attach a specific debt or property, subjects to the complainant's claim other assets of his debtor not described or sought to be subjected by the bill. See also Randolph v. Merchants' Nat. Bank, 9 Lea (Tenn.) 63; Rogers v. Breen, 9 Heisk. (Tenn.) 679; Easley v. Tarkington, 5 Baxt. (Tenn.) 592.

In tax suits the court acquires jurisdiction of the property of the defendants by the filing of the petition and publication of the notice ordered to be made, and no judgment which would not be void and open to collateral attack can be rendered against property different from that described in the petition and order of publication. Milner v. Shipley, 94 Mo. 106.

A Contrary View. — A judgment erroneous for want of issues by the pleadings will be corrected on appeal, but it is not void. The extent of a decree, within the jurisdiction of the court rendering it, will be determined by its terms alone, and it cannot be restricted in a collateral attack by the pleadings, nor can the preliminary proceedings be examined to extend its effect or enlarge its meaning. Where the plaintiff sued to foreclose a mortgage on several tracts of land, including half of a third league survey, and during the progress of the case the parties submitted the matters to arbitrators, who awarded the whole of the third league survey to the plaintiff, and judgment was rendered accordingly, the decree passed the title to the land. Williamson v. Wright, 1 Tex. Unrep. Cas. 711 [citing Freeman on Judgments 135; Weathered v. Mays, 4 Tex. 388; Tadlock v. Eccles, 20 Tex. 791; Withers v. Patterson, 27 Tex. 491; Vogelsang v. Dougherty, 46 Tex. 472; Taylor v. Snow, 47 Tex. 465; Guilford v. Love, 49 Tex. 740; Kendall v. Mather, 48 Tex. 598.]

1. Ammonette v. Crandell, 10 La.

Ann. 174; Thorp v. Minor, 109 N. Car. 152; Cantrell v. Fowler, 24 S. Car. 424; Bell v. Vanzandt, 54 Tex. 150. See *supra*, III. 4. *Parties*; and also article PARTIES.

2. Laredo Electric Light, etc., Co. v. U. S. Electric Lighting Co., (Tex. Civ. App. 1894) 26 S. W. Rep. 310.

3. National Ben. Assoc. v. Jackson, 114 Ill. 533; Bingham v. Marine Nat. Bank, (Ct. App.) 20 N. Y. St. Rep. 292; Litchfield v. Flint, 104 N. Y. 543; Wick v. Jewett, (Supreme Ct.) 9 N. Y. St. Rep. 477; Murray v. Church, 1 Hun (N. Y.) 49; Hunter v. Postlethwaite, 10, Martin (La.) 456; M'Grew v. Browder 2 Martin N. S. (La.) 17; Childress v. Davis, 15 La. 492.

But where the plaintiff sues in his individual capacity and the proof shows a right to recover only in a representative capacity, there is a fatal variance. McColl v. Fraser, 40 Hun (N. Y.) 111.

Where the Plaintiff Is Entitled to Recover in Either an Individual or a Representative Capacity, and sues in his individual capacity, he is entitled to recover, although the proof shows that he will be liable to account for such recovery in his representative capacity. Merritt v. Seaman, 6 N. Y. 168; Thomas v. Bennett, 56 Barb. (N. Y.) 197; Davis v. Carpenter, 12 How. Pr. (N. Y. Supreme Ct.) 287.

A plaintiff suing in a representative capacity is entitled to judgment in his favor notwithstanding a defense is established which would have been good had he sued in an individual capacity, as he might have done. Scrantom v. Farmers', etc., Bank, 33 Barb. (N. Y.) 527, *affirmed* in 24 N. Y. 424.

Action on Individual Liability. — In an action against an administrator for failure to pay a claim as ordered by the Probate Court, the suit being based entirely on a personal liability, a judgment against the estate is void. Peckham v. O'Hara, 74 Mich. 287.

his representative character may be rejected as mere *descriptio personæ*.¹ But where the plaintiff alleges a cause of action accruing to him only in a representative capacity, and sues in such a capacity, proof of a cause of action belonging to him as an individual is a total variance, amounting to a failure of proof, and he cannot recover.²

Where the Pleadings Are Ambiguous as to the capacity in which the plaintiff sues, the theory upon which the case was tried controls the judgment.³

(3) *Form of Action*. — A judgment must be warranted by the facts and form of the action.⁴ Accordingly, where the declaration is in assumpsit⁵ or in case,⁶ a judgment in debt is erroneous. So where the declaration is in debt, a judgment in assumpsit⁷ or in damages⁸ is erroneous. But by the practice of

1. *Spooner v. Delaware, etc.*, R. Co., 115 N. Y. 22; *Newberry v. Robinson*, 36 Fed. Rep. 841. See also article EXECUTORS AND ADMINISTRATORS, vol. 8, p. 670.

In *Ducker v. Rapp*, 67 N. Y. 464, it was held that where the plaintiffs sued to recover rents as executors, whereas they should have sued as trustees, the same persons being entitled to recover, although in a different capacity, the validity of the judgment was not affected.

Amendment. — In *Risley v. Wightman*, 13 Hun (N. Y.) 163, it was held that where the plaintiff erroneously describes himself as executor instead of as administrator, the defect is amendable either before or after judgment or on appeal to the general term. See also *McElwain v. Corning*, 12 Abb. Pr. (N. Y. Supreme Ct.) 16; *Dean v. Gilbert*, 92 Hun (N. Y.) 427.

2. *Mowry v. Hawkins*, 57 Conn. 453; *Stokes v. Riley*, 121 Ill. 166.

Construction of Pleading. — The word "as." See article EXECUTORS AND ADMINISTRATORS, vol. 8, p. 667.

A judgment in favor of one person as trustee for another is warranted by a petition which begins, "Your petitioner, H., as trustee for L." etc., although there is no distinct allegation of trusteeship. *Connellee v. Hopkins*, (Tex. Civ. App. 1895) 31 S. W. Rep. 315.

3. *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439; *Bennett v. Whitney*, 94 N. Y. 302; *Fritz v. McGill*, 31 Minn. 536.

4. **Even Upon a Default**, a judgment not warranted by the facts and the form of the action should be reversed, as it may be presumed that the defendant did not defend because he knew that

he was not liable in the form of action adopted. *Gervais v. Powers*, 1 Minn. 45.

"Under the statutes of this state and the code practice as modified, an appeal lies from a final judgment by default, which is similar in its character to a decree *pro confesso* under the practice anterior to the code. Such judgment must conform to the matter of the pleadings of which defendant has notice, the plaintiff not being allowed to take such decree as he can abide by. A judgment by default inconsistent with the case made in the original complaint and conforming to a new case made by an amended and supplemental complaint, filed three months after service of summons upon the defendant, without notice to him, is not authorized by the code practice as modified by statute in this state." *State v. Jacksonville, etc.*, R. Co., 16 Fla. 708 [citing *Betton v. Williams*, 4 Fla. 11; *Freeman v. Timanus*, 12 Fla. 393].

5. *Jones v. Robinson*, 8 Ark. 484. Compare *Malone v. Hathaway*, 3 Stew. (Ala.) 29, holding that a judgment in debt in assumpsit on a note is not error.

6. *Lynch v. Freeland, Sneed* (Ky.) 269, holding that where the writ and declaration were in case and the verdict and judgment are in debt the judgment will be reversed.

7. *Anderson v. Sloan*, 1 Colo. 484. Compare *Carroll v. Meeks*, 3 Port. (Ala.) 226, holding that in debt on a promissory note it is not error to render judgment in assumpsit.

8. *Jones v. Lloyd*, 1 Ill. 225; *Brown v. Keller*, 38 Ill. 63, holding, however, upon a construction of the judgment, that it was in debt and sufficient.

perhaps the majority of states a judgment in damages upon a declaration in debt will be good, the objection being merely technical.¹ So upon a declaration in trespass, a recovery in case has been permitted.²

General and Special Assumpsit. — Plaintiffs who sue on a special contract cannot recover on a *quantum meruit*, and *vice versa*.³

1. Judgment for Damages in Action of Debt — *Alabama*. — Sanford v. Richardson, 1 Ala. 182; Carroll v. Meeks, 3 Port. (Ala.) 226; Boardman v. Poland, 2 Port. (Ala.) 431; Perdue v. Burnett, Minor (Ala.) 138; Spence v. Thompson, 11 Ala. 746; Botts v. Bridges, 4 Port. (Ala.) 274; Garrard v. Zachariah, 2 Stew. (Ala.) 410.

Illinois. — Independent Order, etc., v. Stahl, 64 Ill. App. 314.

Kentucky. — Gregg v. Com., 9 Dana (Ky.) 346; Jenkins v. Yeates, 2 J. J. Marsh. (Ky.) 48.

Mississippi. — Smith v. Nolen, 2 How. (Miss.) 735; Bradford v. Curlee, 41 Miss. 558.

Vermont. — Sinclair v. Gadcomb, 1 Vt. 32.

A Judgment Entered as in Debt, instead of for damages, is good. Perdue v. Burnett, Minor (Ala.) 138; Jenkins v. Yeates, 2 J. J. Marsh. (Ky.) 48.

2. Declaration in Trespass, Recovery in Case. — Recovery may be had by an abutting owner against a county alone for changing the grade of a public road, under a statement in trespass *vi et armis quare clausum fregit*, averring also an injury without a taking of the land by all the defendants, although the county is liable for the injury without taking in case only. Miller v. Lehigh County, 5 Northam. L. Rep. (Pa.) 158, 5 Pa. Dist. Rep. 588.

3. Iowa. — Wernli v. Collins, 87 Iowa 548.

Louisiana. — Mazureau v. Morgan, 25 La. Ann. 281; Allen v. Martin, 7 Martin N. S. (La.) 300; Gourjon v. Cucullu, 4 La. 117; Morton v. Pollard, 9 La. 176; Mitchell v. Curell, 11 La. 255; Bean v. Evans, 9 La. Ann. 163; Collings v. Hamilton, 14 La. 339; Jackson's Succession, 47 La. Ann. 1089.

Missouri. — Smith v. Haley, 41 Mo. App. 611; Mohny v. Reed, 40 Mo. App. 99; Deatherage Lumber Co. v. Snyder, 65 Mo. App. 568; Lewis v. Slack, 27 Mo. App. 119.

Nebraska. — Mayer v. VerBryck, 46 Neb. 221; Powder River Live Stock Co. v. Lamb, 38 Neb. 339.

New York. — Fuld v. Kahn, 4 Misc.

Rep. (N. Y. C. Pl.) 600, 54 N. Y. St. Rep. 134; Simms v. Wallace, 46 Hun (N. Y.) 172, 11 N. Y. St. Rep. 57; Lydecker v. Nyack, 6 N. Y. App. Div. 90.

United States. — Perkins v. Hart, 11 Wheat. (U. S.) 237.

An attorney who makes a contract for a stipulated fee cannot recover on a *quantum meruit*. Walker v. Bietry, 24 La. Ann. 349.

Under a declaration alleging the breach of an express contract for services at a stipulated price, without a count upon a *quantum meruit*, the plaintiff cannot recover what his services are reasonably worth. Martinez v. Runkle, 57 N. J. L. 111.

Recovery on Quantum Meruit Permitted. — Vermillion v. Mustard, 15 Ind. App. 293; Peterson v. Short, 15 La. 159.

It was a common-law rule that relief could not be given on an implied contract where the declaration was upon an express contract and no relief was asked on an implied contract. This rule has been abolished by the *North Carolina Code*. Wittkowski v. Harris, 64 Fed. Rep. 712.

Recovery on a *quantum meruit* may be had under a complaint setting up a contract where it also alleges facts entitling the plaintiff to recovery on a *quantum meruit* apart from the contract and general relief as prayed for. Landa v. Shook, (Tex. Civ. App. 1895) 31 S. W. Rep. 57. See also same case on previous issuance, (Tex. Civ. App. 1894) 28 S. W. Rep. 135, 87 Tex. 608.

Under a complaint containing allegations sufficient to make a good complaint, either upon an express contract for an agreed price for work or upon a *quantum meruit*, the plaintiff is entitled to recover upon either cause of action, in the absence of any motion by the defendant to make the complaint more definite and certain, although the causes of action are not separately stated. Beers v. Kuehn, 84 Wis. 33.

In Terwilliger v. Ontario, etc., R. Co., 73 Hun (N. Y.) 335, it was held that a judgment for the value of goods is authorized under a complaint alleg-

Under the common counts no recovery can be had for breach of a special contract.¹

(4) *Basing on Grounds of Liability or Defense Alleged—*

(a) **Statement of Rule.**—A judgment must be supported by and in accord with the pleadings of the party for whom it is rendered.² A valid judgment cannot be rendered for a party inconsistent with his own allegations.³

ing that they were sold and delivered at an agreed price, where there is no dispute as to the full value, and the defendant admits receiving, accepting, and using them.

1. *Barrere v. Soms*, 113 Cal. 97; *Bean v. Elton*, 44 Ill. App. 442; *Hamilton v. Frothingham*, 59 Mich. 253; *Callum v. Rice*, 35 S. Car. 551; *Clark v. Sherman*, 5 Wash. 681. See also article ASSUMPSIT, vol. 2, p. 1002 *et seq.*

Recovery for personal services rendered under a special or implied contract may be had in *Kansas*, under the *indebitatus* count, where the contract has been fully performed on the part of the plaintiff, and nothing remains to be done except payment by the defendant. *Schwartzel v. Karnes*, 2 Kan. App. 782.

2. *California*.—*Bachman v. Sepulveda*, 39 Cal. 688; *Delafield v. San Francisco, etc., R. Co.*, (Cal. 1895) 40 Pac. Rep. 958; *Riverside Water Co. v. Gage*, 89 Cal. 410; *Sigourney v. Zellerbach*, 55 Cal. 431; *White v. Allatt*, 87 Cal. 245.

Connecticut.—*Skinner v. Bailey*, 7 Conn. 500; *Frisbie v. Butler, Kirby* (Conn.) 215.

District of Columbia.—*Deane v. Echols*, 2 App. Cas. (D. C.) 522.

Kansas.—*Stone v. Young*, 4 Kan. 17.

Louisiana.—*Sharp v. Kleinpeter*, 7 La. Ann. 263; *Compton v. Compton*, 5 La. Ann. 620; *Milne v. Girodeau*, 12 La. 324.

Nevada.—*Frevort v. Henry*, 14 Nev. 191; *Marshall v. Golden Fleece Gold, etc.*, Min. Co., 16 Nev. 156.

New York.—*McVity v. Stanton*, 10 Misc. Rep. (N. Y. C. Pl.) 105; *Walsh v. Dolan*, (City Ct.) 39 N. Y. St. Rep. 216, 15 N. Y. Supp. 96.

Texas.—*Page v. Carson*, (Tex. 1891) 16 S. W. Rep. 1036; *San Antonio, etc., R. Co. v. Mayfield*, (Tex. App. 1890) 15 S. W. Rep. 503; *McDougal v. Bradford*, 80 Tex. 558.

Illustrations.—“If judgment is rendered in favor of the plaintiff, it must accord with and be warranted by the

pleading which he has filed; and if it is unwarranted by his pleading, or if none has been filed, it must be treated as a nullity.” *Jansen v. Hyde*, 8 Colo. App. 38 [citing *Young v. Rosenbaum*, 39 Cal. 646; *Bachman v. Sepulveda*, 39 Cal. 688; *Reynolds v. Stockton*, 43 N. J. Eq. 211; *Munday v. Vail*, 34 N. J. L. 418; *Dunlap v. Southerlin*, 63 Tex. 38].

A party cannot obtain relief on a state of facts different from that stated in his pleading. *Odell v. Bell*,* 67 Ill. App. 106.

If an absolute judgment be rendered when the petition prays only for a conditional one, it is a good ground for reversal. *Sprigg v. Beaman*, 6 La. 66.

Recovery by a laborer who converts materials of his own into a chattel cannot be had under a pleading in assumpsit for work and labor, but only upon one for goods sold and delivered. *Ferguson v. Reed*, 33 New Bruns. 580.

A plaintiff will not be entitled to judgment for want of a sufficient affidavit of defense where it appears on record that he has no title on which a recovery can rest. *Jones v. Gordon*, 124 Pa. St. 263, 23 W. N. C. (Pa.) 302.

In a Criminal Case the judgment must be supported by or follow the complaint. *Frisbie v. Butler, Kirby* (Conn.) 215.

A Substantial Accordance with the pleadings and proof is sufficient, and the judgment need not strictly accord with an immaterial allegation of the complaint. *White v. Allatt*, 87 Cal. 245.

3. *California*.—*Joshua Hendy Mach. Works v. Pacific Cable Constr. Co.*, 99 Cal. 421; *Von Drachenfels v. Doolittle*, 77 Cal. 295; *Gregory v. Haworth*, 25 Cal. 653; *Black v. Merrill*, 65 Cal. 90.

Georgia.—*Hickson v. Mobley*, 80 Ga. 314.

Kentucky.—*Marion Nat. Bank v. Fidelity T., etc., Co.*, (Ky. 1896) 14 S. W. Rep. 371.

Michigan.—*Mead v. Harris*, 101 Mich. 585.

Missouri.—*Kentucky Bank v. Poyntz*, 60 Mo. 531.

Allegations of Complaint. — A recovery by the plaintiff must be based upon facts alleged in the complaint,¹ and the relief which may be

Montana. — Kleinschmidt v. Steele, 15 Mont. 181.

South Carolina. — Kinsey v. Bennett, 37 S. Car. 319.

Parties are bound by their pleadings, and courts cannot give relief inconsistent with the statement of facts and admissions contained therein. Ramsey v. Henderson, 91 Mo. 560; Weber v. Weber, 16 Oregon 163.

A finding inconsistent with an un-denied admission in the complaint must be disregarded; and where such admission is sufficient to prevent a recovery, judgment cannot be given against the defendant. Joshua Hendy Mach. Works v. Pacific Cable Constr. Co., 99 Cal. 421.

1. *California.* — Sterling v. Hanson, 1 Cal. 478.

Colorado. — Greer v. Heiser, 16 Colo. 306.

Missouri. — Crawford v. Spencer, 36 Mo. App. 78.

Nebraska. — Whitney v. Levon, 34 Neb. 443.

New York. — Perls v. Metropolitan L. Ins. Co., 15 Daly (N. Y.) 517.

North Carolina. — Melvin v. Robinson, 7 Ired. Eq. (N. Car.) 80; Willis v. Branch, 94 N. Car. 147.

Texas. — Fort Worth, etc., R. Co. v. Measles, 81 Tex. 474.

Wisconsin. — Anderson v. Fetzer, 75 Wis. 562.

United States. — U. S. v. McClane, 74 Fed. Rep. 153.

England. — Marsh v. Bulteel, 5 B. & Ald. 507, 7 E. C. L. 175; Head v. Baldrey, 6 Ad. & El. 459, 33 E. C. L. 109.

In *Anderson v. Fetzer*, 75 Wis. 562, Cassoday, J., said: "It is claimed that the trial court found a balance due the plaintiff on the counterclaim of the defendants, and not upon the plaintiff's cause of action. The complaint was for the proceeds of cedar posts, as stated. The counterclaims were for advances and payments made on account of the ties and fence posts indiscriminately. The trial court found, in effect, that the \$900 was advanced upon the ties, and the \$700 on ties and posts, and that the proceeds of the ties and posts received by the defendants from the plaintiff amounted, in the aggregate, to \$1,773.28, or \$173.28 in excess of the moneys so advanced. We cannot hold that the mere form of the

issues precluded the plaintiff from recovering the true balance in his favor on account of both ties and posts, since it was considerably less than the amount claimed in the complaint."

Where Special Damages Are Sought to be recovered by the plaintiff they must be alleged. *Whitney v. Levon*, 34 Neb. 443; *Fort Worth, etc., R. Co. v. Measles*, 81 Tex. 474. See also article DAMAGES, vol. 5, p. 719.

"It is the Office of the Complaint to state in a clear, succinct, and intelligible manner the plaintiff's cause of action, and to demand judgment upon the same. The plaintiff cannot go to trial and recover upon a cause of action developed by facts stated in the answer, without alleging it himself. He must allege the cause of action in his complaint, and when the facts of the same are put in issue, prove them by competent evidence. He cannot rely upon a cause of action suggested in the pleadings by his adversary." *Willis v. Branch*, 94 N. Car. 147 [*citing* *Shelton v. Davis*, 69 N. Car. 324; *Rand v. State Nat. Bank*, 77 N. Car. 152; *McLaurin v. Cronly*, 90 N. Car. 50.]

Complaint Aided by Answer. — In some cases a defective or imperfect statement of a cause of action may be aided by admissions in the answer. *Garrett v. Trotter*, 65 N. Car. 430; *Johnson v. Fitch*, 93 N. Car. 205; *Willis v. Branch*, 94 N. Car. 147.

Original and Amended Complaints. — When a complaint is too uncertain, and an amended complaint is filed, it cannot purport to make the first more specific, nor to be an additional paragraph. It is error to render a judgment granting relief in a matter not averred in the latter complaint, though averred in the former. The former is out of the record. *Westerman v. Foster*, 57 Ind. 408.

Under the Missouri Code a party must recover upon a cause of action stated in his petition, and cannot recover upon a cause of action stated in his reply. *Crawford v. Spencer*, 36 Mo. App. 78.

In Equity the rule is the same, and a complainant must have relief, if at all, upon the case made by his bill. *Lyon v. Sanders*, 23 Miss. 530; *Evans v. Gibson*, 29 Mo. 223; *Kelsey v. Western*, 2 N. Y. 500; *Jameson v. Shelby*, 2 Humph. (Tenn.) 198; *Storey v. Nichols*,

awarded to the plaintiff must be within and justified by the case made by the declaration or complaint.¹

Recovery on Cause of Action Alleged. — In other words, a plaintiff cannot set up one cause of action in his complaint and recover upon proof of another and a different cause of action, but he must recover, if at all, upon the cause of action which he has alleged.²

22 Tex. 87; *Eib v. Martin*, 5 Leigh (Va.) 132, holding that matter stated in an answer which is not alleged in the bill will not justify a decree for the plaintiff, though, had it been alleged, he would have been entitled to a decree thereon; *Brayton v. Jones*, 5 Wis. 117; *Flint v. Jones*, 5 Wis. 424. Compare *Rose v. Mynatt*, 7 Verg. (Tenn.) 30. See also article **BILLS IN EQUITY**, vol. 3, p. 358.

Facts Plead and Proved by the Defendant are available to the plaintiff to rebut a defense, but not as a basis of recovery. Thus a breach of diligence shown by the allegations and evidence of the defendant, although not referred to in the plaintiff's pleadings, may be urged by the plaintiff to defeat the defendant's justification, but not as a basis of recovery. *East Tennessee, etc., R. Co. v. Kane*, 92 Ga. 187.

Under a Complaint on an Account the plaintiff cannot recover a sum due on a special contract in relation to a matter not included in the mutual account. *Hopkins v. Orcutt*, 51 Cal. 537.

1. Relief Must Be Within Case Made by Declaration — *Alabama*. — *Pattison v. Bragg*, 95 Ala. 55.

Connecticut. — *Skinner v. Bailey*, 7 Conn. 499.

Illinois. — *Russell v. Conners*, 140 Ill. 660; *McDole v. Kingsley*, 163 Ill. 433; *Barrett v. Short*, 41 Ill. App. 25; *Chicago Exhaust, etc., Pipe Co. v. Johnson*, 44 Ill. App. 224; *Purdy v. Hall*, 134 Ill. 298.

Indiana. — *Wilkerson v. Rust*, 57 Ind. 172; *Wilstach v. Heyd*, 122 Ind. 574; *Levy v. Chittenden*, 120 Ind. 37.

Iowa. — *Tice v. Derby*, 59 Iowa 312.

Michigan. — *Morgan v. Meuth*, 60 Mich. 238.

Missouri. — *O'Reilly v. Nicholson*, 45 Mo. 160; *Funkhouser v. Lay*, 78 Mo. 458.

New York. — *Truesdell v. Sarles*, 104 N. Y. 164; *Rome Exch. Bank v. Eames*, 4 Abb. App. Dec. (N. Y.) 83; *Wright v. Delafield*, 25 N. Y. 266; *Southwick v. Memphis First Nat. Bank*, 84 N. Y. 420; *Finlayson v. Wiman*, 84 Hun (N. Y.) 357; *Van Allen v. Rogers*, 5 Misc. Rep. (N. Y. Super. Ct.) 420.

Ohio. — *Beetz v. Strobel*, 6 Ohio Dec. 143, 4 Ohio N. P. 166.

South Carolina. — *Bank of Charleston Nat. Banking Assoc. v. Dowling*, 45 S. Car. 677.

Tennessee. — *Feder v. Ervin*, (Tenn. 1896) 38 S. W. Rep. 446.

Texas. — *Cook v. Arnold*, (Tex. Civ. App. 1896) 36 S. W. Rep. 343; *Childress v. Smith*, (Tex. Civ. App. 1896) 37 S. W. Rep. 1076.

Utah. — *Kelley v. Kershaw*, 5 Utah 417.

Virginia. — *Bates v. Gordon*, 3 Call (Va.) 555; *Potomac Mfg. Co. v. Evans*, 84 Va. 717.

United States. — *Spies v. Chicago, etc., R. Co.*, 40 Fed. Rep. 34.

Illustration. — In *Truesdell v. Sarles*, 104 N. Y. 164, the rule that no judgment can be given in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings or evidence, was applied in a creditor's suit to set aside a conveyance as fraudulent and without consideration, and a judgment establishing the defendants' deed as a mortgage for the amount of the consideration paid was reversed. The court cited *Rome Exch. Bank v. Eames*, 4 Abb. App. Dec. (N. Y.) 83; *Wright v. Delafield*, 25 N. Y. 266; *Southwick v. Memphis First Nat. Bank*, 84 N. Y. 420.

Collateral Attack. — In *O'Reilly v. Nicholson*, 45 Mo. 160, it was held that a judgment, though informal in granting relief not contemplated by the petition, was not void if the parties were before the court and the relief granted within its jurisdiction, and therefore it could not be impeached collaterally.

Exceptions and Objections. — If a complaint is sufficient to entitle the plaintiff to some kind of relief, and the court renders a judgment different from or beyond that authorized by the facts, the defendant may avail himself of error by objecting and excepting to the judgment as rendered. *Wilkerson v. Rust*, 57 Ind. 172.

2. California. — *Schultz v. McLean*,

Proof of a different cause of action from that alleged in the declaration or complaint amounts to a failure of proof, and is not a mere variance.¹

(Cal. 1890) 25 Pac. Rep. 427; *Benedict v. Bray*, 2 Cal. 251; *Mondran v. Goux*, 51 Cal. 151.

Colorado. — *Gibbs v. Wall*, 10 Colo. 153.

Connecticut. — *Sanford v. Peck*, 63 Conn. 486.

Florida. — *Southern Bell Telephone etc., Co. v. D'Alemberte*, (Fla. 1897) 21 So. Rep. 570.

Iowa. — *Hunter v. Burlington, etc.*, R. Co., 84 Iowa 605.

Kentucky. — *Ford v. Com.*, Litt. Sel. Cas. (Ky.) 3.

Maryland. — *Jeffrey v. Flood*, 19 Md. L. J. 949, 70 Md. 42.

Missouri. — *Gerrans v. George Wenger Machinery, etc., Mfg. Co.*, 51 Mo. App. 615; *Price v. Chicago, etc., R. Co.*, 40 Mo. App. 189; *Duke v. Compton*, 49 Mo. App. 304; *Trimble v. Stewart*, 35 Mo. App. 537; *McCray v. Lowry*, 25 Mo. App. 247.

Nebraska. — *Luce v. Foster*, 42 Neb. 818; *Omaha Consol. Vinegar Co. v. Burns*, 44 Neb. 21; *Traver v. Shaeffe*, 33 Neb. 531; *Imhoff v. House*, 36 Neb. 28.

New York. — *American Broom, etc., Co. v. Addickes*, 19 Misc. Rep. (N. Y. Supreme Ct.) 36; *McClung v. Foshour*, 47 Hun (N. Y.) 421; *Romeyn v. Sickles*, 108 N. Y. 650, 13 N. Y. St. Rep. 864.

North Carolina. — *Simpson v. Simpson*, 107 N. Car. 552; *Willis v. Branch*, 94 N. Car. 142.

South Carolina. — *De Walt v. Kinard*, 33 S. Car. 522.

Washington. — *Wilson v. Waldron*, 12 Wash. 149.

In *Ives v. Goshen*, 63 Conn. 82, the court said: "The appellant had alleged one cause of action which the court finds to be groundless. He proves a new and distinct cause of action which he had not alleged. If the court, under these circumstances, had granted him the relief which he now seeks, it would have been error, because there is nothing in the pleadings to support such a judgment. It is not enough that a party proves facts constituting a cause of action; he must also have alleged them before he can recover. He can recover only *secundum allegata et probata*." This was quoted with approval in *Sanford v. Peck*, 63 Conn. 486.

There can be no recovery upon a cause of action, however meritorious or however fully proved, when it is materially variant from that pleaded. *Parrish v. Pensacola, etc., R. Co.*, 28 Fla. 251.

Even before a justice of the peace, a plaintiff cannot sue on one cause and relover upon another. *Gerrans v. George Wenger Machinery, etc., Mfg. Co.*, 51 Mo. App. 615.

Even though a party fails to object to proof by the plaintiff of a cause of action which he has not alleged, no judgment should be given upon a case so made, at least without an amendment of the pleadings. *Gibbs v. Wall*, 10 Colo. 153.

Illustrations. — A plaintiff suing for goods sold and delivered cannot recover for work and labor. *Shrimpton v. Dworsky*, 2 Misc. Rep. (N. Y. C. Pl.) 123.

A complaint upon renewal notes whose validity is denied will not justify recovery upon the original notes. *Covington First Nat. Bank v. Gaines*, 87 Ky. 597, 10 Ky. L. Rep. 451.

Judgment cannot be rendered for a balance of account in a petition claiming the amount of a lost draft. Pleadings should have a reasonable certainty, and some connection should exist between the allegations and evidence. *Fisk v. Mead*, 18 La. 332.

"The plaintiff does not sue for the proceeds of the note, nor for any claimed negligent or wrongful conduct of the defendants in respect to the collection of the note or its proceeds; but for the loss and conversion of the instrument itself, the paper upon which Stenvers's promise was written. To that specific wrong, and to that alone, he has himself limited his proof, and for that and for that alone he has limited his right of recovery. *Ives v. Goshen*, 63 Conn. 79; *Sanford v. Peck*, 63 Conn. 486. Unless then the facts found show a conversion of the note, the plaintiff cannot recover in this suit." *Gilbert v. Walker*, 64 Conn. 394.

1. Variance and Failure of Proof. — A variance arises where the proofs do not sustain the cause of action alleged in the complaint. If it is immaterial, it will be disregarded; if material and

Ground of Liability.—The judgment must be based upon the ground of liability upon which the plaintiff in his pleadings has placed his right to recover.¹

misleading, the court may, in its discretion, allow an amendment upon just terms; but where the evidence relates to a cause of action entirely different from that stated in the complaint, it is not a case of variance at all, and it was never intended by the code to allow a plaintiff to prove a cause of action which he has not alleged. *Willis v. Branch*, 94 N. Car. 143.

A complaint seeking to set aside conveyances on the ground of fraud is not sustained by proof that they constitute a mortgage from which the plaintiff has a right to redeem. This is not a mere variance, but a failure to prove the cause of action in its entire scope and meaning, and an amendment of the proceedings to correspond with such findings, even though it could be made, would change substantially the claim, an action to set aside entirely for fraud being entirely different from one to redeem a mortgage. *Patterson v. Patterson*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 262.

The cause of action alleged must be proved, or the judgment cannot be supported. *Sutherland v. Heathcote*, (1891) 3 Ch. 504; *Lloyd v. Pine Lake Iron Co.*, 74 Mich. 83.

A Material Variance between facts pleaded and proved by the plaintiff is fatal to a judgment in his favor. *Wilson v. Fridenberg*, 22 Fla. 114; *Cooper v. McNeil, etc., Co.*, 43 Ill. App. 350; *Fowler v. Cowper, Sneed* (Ky.) 59; *Worth v. Buck*, 34 Neb. 703; *Omaha Consol. Vinegar Co. v. Burns*, 49 Neb. 229; *Frost v. State*, 33 Tex. Crim. Rep. 347.

1. *Iowa*.—*Aultman v. Goldsmith*, 84 Iowa 547.

Louisiana.—*Ammonette v. Crandell*, 10 La. Ann. 174.

Michigan.—*Smith v. Michigan Cent. R. Co.*, 100 Mich. 148; *Gooding v. Underwood*, 89 Mich. 187.

Missouri.—*O'Brien v. Loomis*, 43 Mo. App. 29; *Scammon v. Kansas City, etc., R. Co.*, 41 Mo. App. 194.

Nebraska.—*Claus v. Hardy*, 1 Neb. L. J. 509, 31 Neb. 35; *Luce v. Foster*, 42 Neb. 818.

New York.—*Smith v. Underhill*, (Supreme Ct.) 47 N. Y. St. Rep. 23, 19 N. Y. Supp. 249; *Sperling v. Boll*, 10

N. Y. App. Div. 290; *Munn v. Cook*, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 314; *Commercial Bank v. Ten Eyck*, 50 Barb. (N. Y.) 9; *Springer v. Westcott*, 87 Hun (N. Y.) 190.

North Dakota.—*Greenberg v. Union Nat. Bank*, 5 N. Dak. 483.

Pennsylvania.—*Lexow v. Pennsylvania Diamond Drill Co.*, 5 Pa. Dist. Rep. 491.

Rhode Island.—*McCulla v. Beadleston*, 17 R. I. 20.

Texas.—*Texas, etc., R. Co. v. Langsdale*, (Tex. Civ. App. 1895) 30 S. W. Rep. 681.

West Virginia.—*Currey v. Lawler*, 29 W. Va. 111.

United States.—*Eddy, etc., Live Stock Co. v. Blackburn*, 30 U. S. App. 571, 70 Fed. Rep. 949.

Reason for Rule.—In all actions demanding damages the complaint should be such as fairly and reasonably to apprise the defendant of the grounds upon which the damages are claimed; and the plaintiff should be confined in his evidence to the grounds so stated. Accordingly, where the complaint simply alleged a conversion by the defendant of the plaintiff's goods, which had been delivered to the defendant as warehouseman for storage, it was held that the plaintiff could not recover damages for injury to the goods prior to the conversion, although attributable to the defendant's negligence. *Sanford v. Peck*, 63 Conn. 486.

Illustrations of Rule.—Recovery cannot be had as for a common-law trespass in an action commenced for a penalty under a statute, and barred as such by the statute of limitations. *McCormick v. Kaye*, 41 Mo. App. 263.

In an action to recover part of the costs of repairing a sewer, where the complaint bases the right to recover upon a contract, no recovery can be had upon a supposed obligation growing out of the enjoyment of an easement of such sewer. *Sperling v. Boll*, 10 N. Y. App. Div. 290.

Under a complaint seeking to recover damages caused by negligence, damages wilfully inflicted cannot be recovered. *O'Brien v. Loomis*, 43 Mo. App. 29.

The personal liability of officers and

Theory of Liability.—And he must recover, if at all, upon the theory of liability which he has alleged, and not upon some other or different theory not suggested in his declaration or complaint.¹ Where the substantial facts creating the liability are alleged and proved a recovery may be had although they are alleged inaccurately.

trustees of a corporation for failure to make annual reports cannot be enforced under a bill seeking to enforce the liability of stockholders for unpaid subscriptions. *Lexow v. Pennsylvania Diamond Drill Co.*, 5 Pa. Dist. Rep. 491. See also *Smith v. Underhill*, (Supreme Ct.) 47 N. Y. St. Rep. 23, holding that the statutory liability for failure to make annual reports cannot be taken advantage of unless pleaded.

Negligence Not Counted On.—A judgment cannot be based upon an act of negligence not counted on. *Sanford v. Peck*, 63 Conn. 486; *Telle v. Leavenworth Rapid Transit R. Co.*, 50 Kan. 455; *Schlacker v. Ashland Iron Min. Co.*, 89 Mich. 253; *Fisher v. Rankin*, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 191; *Greenwich Ins. Co. v. Waterman*, 54 Fed. Rep. 839.

1. *California.*—*Elmore v. Elmore*, 114 Cal. 516; *Dorris v. Sullivan*, 90 Cal. 279.

Illinois.—*Brockhausen v. Bochland*, 137 Ill. 547; *Baker v. Updike*, 155 Ill. 54; *Chicago, etc., R. Co. v. Mehlsack*, 44 Ill. App. 124; *Coal Run Coal Co. v. Giles*, 49 Ill. App. 585; *Angelo v. Angelo*, 146 Ill. 629.

Indiana.—*Beattay v. O'Connor*, 2 Ind. App. 337; *Graham v. Henderson*, 35 Ind. 195; *Arcade File Works v. Juteau*, 15 Ind. App. 460; *Lindley v. Sullivan*, 133 Ind. 588; *Louisville, etc., R. Co. v. Renicker*, 8 Ind. App. 404.

Iowa.—*Agne v. Seitsinger*, (Iowa 1894) 60 N. W. Rep. 483.

Kansas.—*Syracuse v. Reed*, 5 Kan. App. 806.

Louisiana.—*Jackson v. Beling*, 22 La. Ann. 378; *West v. Negrotto*, 48 La. Ann. 922.

Michigan.—*Webster v. Peet*, 97 Mich. 326; *Dailey v. Preferred Masonic Mut. Acc. Assoc.*, 102 Mich. 289.

Minnesota.—*Benson v. St. Paul, etc., R. Co.*, 62 Minn. 198.

Missouri.—*O'Brien v. Western Steel Co.*, 100 Mo. 182; *Chouteau v. Allen*, 70 Mo. 290; *Priest v. Way*, 87 Mo. 16; *Brown v. Hershey Land, etc., Co.*, 65 Mo. App. 162; *Johns v. Riley*, 65 Mo. App. 356.

Nebraska.—*Randall v. Persons*, 42

Neb. 607; *Culbertson Irrigating, etc., Co. v. Wildman*, 45 Neb. 663.

New Hampshire.—*Morse v. Boston, etc., R. Co.*, 66 N. H. 148.

New York.—*Truesdell v. Bourke*, 145 N. Y. 612; *Matthews v. Cady*, 61 N. Y. 651; *Camp v. Smith*, 117 N. Y. 354; *Weinstock v. Levison*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 244; *Beecher v. Schuback*, 1 N. Y. App. Div. 359; *Felter v. Maddock*, 11 Misc. Rep. (N. Y. C. Pl.) 297, 1 N. Y. Ann. Cas. 92; *Phoenix Bridge Co. v. Keystone Bridge Co.*, 142 N. Y. 425; *McCrea v. Bedell*, 9 Misc. Rep. (N. Y. Super. Ct.) 372; *Hecla Powder Co. v. Hudson River Ore, etc., Co.*, 7 Misc. Rep. (N. Y. C. Pl.) 630.

Pennsylvania.—*Henry v. Fisher*, 2 Pa. Dist. Rep. 71; *Shaw v. Fleming*, 174 Pa. St. 52.

Rhode Island.—*Tillinghast v. Champlin*, 4 R. I. 173.

South Carolina.—*Brown v. Moore*, 26 S. Car. 160; *Booker v. Smith*, 38 S. Car. 228.

South Dakota.—*Novotny v. Danforth*, (S. Dak. 1896) 68 N. W. Rep. 749.

Tennessee.—*Shields v. Clifton Hill Land Co.*, 94 Tenn. 123.

Texas.—*Cowart v. Edwards*, 4 Tex. Civ. App. 276; *Mayer v. Swift*, 73 Tex. 367; *Hanner v. Summerhill*, 6 Tex. Civ. App. 764.

Washington.—*Jacobs v. Puyallup First Nat. Bank*, 15 Wash. 358.

Wisconsin.—*Hinckley v. Pfister*, 83 Wis. 64.

United States.—*Dashiell v. Grosvenor*, 66 Fed. Rep. 334; *Clyde v. Richmond, etc., R. Co.*, 59 Fed. Rep. 394.

Compare Adams v. Kehlor Milling Co., 36 Fed. Rep. 212, holding that where both the complaint and the proofs show that the complainant is entitled to relief on general equitable grounds, the complaint will not be dismissed, no matter on what ground the complainant has predicated his right.

Recovery on Inconsistent Theory.—A plaintiff cannot urge a ground of recovery which is directly contrary to the theory upon which his complaint is framed. *Stearns v. Richmond*, 16 Va. L. J. 243, 88 Va. 992. See generally article THEORY OF ACTION.

ately in detail, because this does not amount to a change of theory or a recovery upon grounds not alleged.¹

Judgment for Defendant. — It has been said that the defendant must prevail according to the case made by his answer, or not at all.² But this is not unqualifiedly true.³

A Judgment on Demurrer must be upon the ground stated in the demurrer.⁴

(b) **Tort or Contract.** — A declaration in tort will not support a judgment upon a contract;⁵ and conversely, under

1. *Alabama.* — Mutual Bldg., etc., Assoc. v. Wyeth, 105 Ala. 639; Louisville, etc., R. Co. v. Hurt, 101 Ala. 34.

Colorado. — Denver Tramway Co. v. Cloud, 6 Colo. App. 445.

Kentucky. — Faulkner v. Kean, 17 Ky. L. Rep. 654, (Ky. 1895) 32 S. W. Rep. 265.

Missouri. — St. Louis Carbonating, etc., Co. v. Eclipse Carbonating Co., 58 Mo. App. 411.

New York. — Sardinia v. Butler, 78 Hun (N. Y.) 527.

Pennsylvania. — Kennedy v. McCloskey, 170 Pa. St. 354.

South Carolina. — Pollock v. Carolina Interstate Bldg., etc., Assoc., 48 S. Car. 65.

United States. — Texas, etc., R. Co. v. Spradling, 72 Fed. Rep. 152.

Illustrations. — In an action to recover damages alleged to have been caused by simple negligence, a plaintiff may recover upon proof of reckless, wanton, or wilful negligence. Louisville, etc., R. Co. v. Hurt, 101 Ala. 34. And, *vice versa*, on an allegation of wilful negligence, a recovery may be had for damages caused by ordinary negligence. Faulkner v. Kean, (Ky. 1895) 32 S. W. Rep. 265.

Recovery may be had in an action for assault and battery, for injuries caused by the plaintiff's being pushed against a car near which he was standing when assaulted with a cane, although only the assault with the cane is alleged. Brzezinski v. Tierney, 60 Conn. 55.

A recovery for abandonment of treatment by a physician may be had under a declaration charging that he "carelessly, negligently, improperly, and unskilfully conducted himself" in the treatment, and that the injury resulted from his "careless, negligent, improper, and unskilful attention." Lawson v. Conoway, 37 W. Va. 159.

2. Gallup v. Bernd, 132 N. Y. 377,

[citing Wright v. Delafield, 25 N. Y. 266; Day v. New Lots, 107 N. Y. 148].

In Divorce Cases, however, the court is not confined to defenses set up by the answer. Moore v. Moore, 41 Mo. App. 176. See also article DIVORCE, vol. 7, p. 88.

3. **Illustrations.** — Where the plaintiff himself shows a state of facts upon which he cannot recover, he has failed to prove his case, and the defendant is entitled to the benefit of such facts although he has not pleaded them as a defense. Easter v. Hall, 12 Wash. 160.

A defendant is entitled to credit for payments alleged in the petition and proved at the trial, even though denied by his answer. Mullen v. Morris, 43 Neb. 596.

In an action upon an insurance policy providing that any sum due by the insured shall be deducted from the insurance, where the plaintiff's own evidence shows that a sum is due for an unpaid premium, such amount should be deducted, although the defendant has not pleaded it as a counterclaim. Stepp v. National L., etc., Assoc., 37 S. Car. 417.

4. Wilson v. New York, 6 Abb. Pr. (N. Y. C. Pl.) 6.

5. *Connecticut.* — Metropolis Mfg. Co. v. Lynch, 68 Conn. 459; Craft Refrigerating Mach. Co. v. Quinpiac Brewing Co., 63 Conn. 551; Thresher v. Stonington Sav. Bank, 68 Conn. 201.

Nebraska. — Matthews v. O'Shea, 45 Neb. 299.

New York. — Mea v. Pierce, 63 Hun (N. Y.) 400; Graves v. Waite, 59 N. Y. 162; Dudley v. Scranton, 57 N. Y. 428; Barnes v. Quigley, 59 N. Y. 269; Neudecker v. Kohlberg, 81 N. Y. 302; Degraw v. Elmore, 50 N. Y. 1; Gordon v. Hostetter, 37 N. Y. 99, 4 Abb. Pr. N. S. (N. Y.) 263; Matthews v. Cady, 61 N. Y. 651; Walter v. Bennett, 16 N. Y. 250; Townsend v. Hendricks, 40 How. Pr. (N. Y. Ct. App.) 143; Ross v.

a declaration upon a cause for action sounding in contract a

Mather, 51 N. Y. 108; Smith v. Smith, 4 N. Y. App. Div. 227. See also Conaughy v. Nichols, 42 N. Y. 83.

Oklahoma. — Noble v. Atchison, etc., R. Co., 4 Okla. 534.

South Carolina. — South Carolina Steamboat Co. v. Wilmington, etc., R. Co., 46 S. Car. 327.

United States. — Wilson v. Haley Live Stock Co., 153 U. S. 39.

Canada. — Lake Erie, etc., R. Co. v. Sales, 26 Can. Sup. Ct. Rep. 663.

Illustrations. — In an action *ex delicto* against a railroad company for the loss of goods no recovery can be had under a special contract for their delivery. Lake Erie, etc., R. Co. v. Sales, 26 Can. Sup. Ct. Rep. 663.

In trespass for taking property, money paid to obtain its return is damages and cannot be recovered back as money had and received, where the plaintiff fails to prove the trespass. Wilson v. Haley Live Stock Co., 153 U. S. 39.

In an action *ex delicto* for ejecting the plaintiff from a train, the plaintiff cannot recover as for a breach of contract to permit him to alight at his proper station. Noble v. Atchison, etc., R. Co., 4 Okla. 534. Compare Gordon v. Hostetter, 37 N. Y. 99, where it is said that it seems that on a complaint for damages for a conversion of money the plaintiff may recover on proving a cause of action for money had and received.

The Code Does Not Authorize a Recovery where the complaint alleges facts showing a cause of action in tort upon proof at the trial of a cause of action in contract. Degraw v. Elmore, 50 N. Y. 1, distinguished in Graves v. Waite, 59 N. Y. 162. See also Dudley v. Scranton, 57 N. Y. 428; Barnes v. Quigley, 59 N. Y. 269; Newdecker v. Kohlberg, 81 N. Y. 302.

As to Amendment of declaration or complaint from tort to contract, or *vice versa*, see article AMENDMENTS, vol. 1, p. 568.

Where Fraud Is the Gravamen of the action no recovery can be had as upon contract.

Michigan. — Carter v. Glass, 44 Mich. 157.

New York. — Barnes v. Quigley, 59 N. Y. 265; Burnham v. Walkup, 54 N. Y. 656; Dudley v. Scranton, 57 N. Y. 428; Matthews v. Cady, 61 N. Y. 652;

Newdecker v. Kohlberg, 81 N. Y. 302; Greentree v. Rosenstock, 61 N. Y. 590; McMichael v. Kilmer, 76 N. Y. 40; Bogardus v. New York L. Ins. Co., 101 N. Y. 343; Ross v. Mather, 51 N. Y. 108; Smith v. Smith, 4 N. Y. App. Div. 227; Truesdell v. Bourke, 145 N. Y. 612.

"The code never intended that a party who had failed in the performance of a contract merely should be sued for fraud, or that a party who had committed a fraud should be sued for a breach of contract, unless the fraud was intended to be waived. The two causes of action are entirely distinct, and there can be no recovery as for a breach of contract where a fraud is the basis of the complaint. * * * Conaughy v. Nichols, 42 N. Y. 83, is the only authority cited to the contrary, and it does not sustain that position." Ross v. Mather, 51 N. Y. 108.

"This action is based upon fraud, and the plaintiff, before he can recover, must prove the complaint or substitute another in its place. Salisbury v. Howe, 87 N. Y. 128. Where fraud is alleged as the basis of the action it must be proved. The law will not permit a recovery by proof of a right of action upon contract or of some other character, and this though facts may be stated or may appear which in proper form might sustain such an action. Degraw v. Elmore, 50 N. Y. 1; Ross v. Mather, 51 N. Y. 108; Barnes v. Quigley, 59 N. Y. 265. It was the theory of the action, disclosed by the complaint, that the learned trial judge submitted to the jury." Truesdell v. Bourke, 145 N. Y. 612.

Fraud and Mistake. — "When a complaint alleges fraud, and only that, a judgment for the plaintiff on the ground of mistake cannot be sustained." Gallup v. Bernd, 132 N. Y. 377, [citing McMichael v. Kilmer, 76 N. Y. 36; Dudley v. Scranton, 57 N. Y. 428]; Boehm v. Miller, (C. Pl.) 45 N. Y. St. Rep. 281.

"The complaint is for fraud, and the court below, when the cause first came before them, were probably right in holding that the action could not be maintained on the ground of mutual mistake. Barnes v. Quigley, 59 N. Y. 265; Ross v. Mather, 51 N. Y. 108; Elwood v. Gardner, 45 N. Y. 349. What was said in Kemp v. Knicker-

recovery as for a tort is erroneous.¹

(c) **Legal or Equitable Grounds.** — Under the Code it is the duty of the court to grant such relief as the complaint and the proof thereunder show the plaintiff entitled to receive, without any distinction between law and equity.² But the relief granted must nevertheless be consistent with the case made by the complaint.³

bocker Ice Co., 69 N. Y. 45, hardly affects the rule, as the court below there found the fraud, and this court merely refused to disturb that finding." *McMichael v. Kilmer*, 76 N. Y. 40.

1. *Bailey v. McCully*, 28 Mo. App. 572; *Robbins v. St. Louis, etc., R. Co.*, 34 Mo. App. 609; *Newmarket Mfg. Co. v. Coon*, 150 Mass. 566; *Guild Gold Min. Co. v. Mason*, 115 Cal. 95.

"The character of the action was determined by the complaint. *Welsh v. Darragh*, 52 N. Y. 590. Its allegations state a cause of action *ex delicto*, and it was not competent at the trial to convert it into one *ex contractu*." *Neudecker v. Kohlberg*, 81 N. Y. 302, citing *Degraw v. Elmore*, 50 N. Y. 1; *Ross v. Maier*, 51 N. Y. 108; *Walter v. Bennett*, 16 N. Y. 250.

Waiver of Tort. — If the plaintiff waive the tort and sues *ex contractu*, he cannot recover a judgment *ex delicto*, even though the evidence show a tort. *Furry v. O'Connor*, 1 Ind. App. 573.

Under the common counts for goods sold and delivered, without setting forth the facts constituting the cause of action, a plaintiff may recover for goods converted by the defendant, as he has the right to waive the tort. *Doherty v. Shields*, 86 Hun (N. Y.) 303.

Where the Gravamen of the Action Is Contract, allegations of fraud, etc., need not be proved. "Upon the trial defendant's counsel moved to dismiss the complaint, upon the ground that the complaint did not allege, and it was not proved, that the representations of defendant were made with fraudulent intent. The motion was denied. Held, no error; that the cause of action was not necessarily *ex delicto* because of the averments of false representations; that they were not the controlling facts, but the gravamen of the action was *ex contractu*." *Ross v. Terry*, 63 N. Y. 614 [citing *Conaughty v. Nichols*, 42 N. Y. 83; *Ledwich v. McKim*, 53 N. Y. 308; *Graves v. Waite*, 59 N. Y. 156; and *distinguishing Barnes v. Quigley*, 59 N. Y. 205].

2. *Leopold v. Silverman*, 7 Mont. 266.

The relief demanded in the complaint does not necessarily characterize the action or limit the plaintiff in respect to the remedy which he may have; and the fact that after the allegation of the facts relied upon the plaintiff has demanded judgment for a sum of money by way of damages does not preclude the recovery of the same amount by way of equitable relief, if the facts entitle the plaintiff to such relief. *Hale v. Omaha Nat. Bank*, 49 N. Y. 626.

In Iowa, under the code, § 2514, a judgment at law for the amount of a claim may be given although the proceeding was erroneously commenced in equity. *Swift v. Calnan*, (Iowa 1897) 71 N. W. Rep. 233.

3. *Bradley v. Aldrich*, 40 N. Y. 504; *Hale v. Omaha Nat. Bank*, 49 N. Y. 632; *Sternberger v. McGovern*, 56 N. Y. 20; *Brinckerhoff v. Bostwick*, 105 N. Y. 572. See *supra*, III. 9. b. (4) *Basing on Grounds of Liability or Defense Alleged*.

Effect of Code. — In *Stevens v. New York*, 84 N. Y. 304, the court said: "The names of actions no longer exist, but we retain in fact the action at law and the suit in equity. The pleader need not declare that his complaint is in either; it is only necessary that it should contain facts constituting a cause of action, and if these facts are such as at the common law his client would have been entitled to judgment, he will under the code obtain it. If, on the other hand, they establish a title to some equitable interposition or aid from the court, it will be given by judgment in the same manner as it would formerly have been granted by decree. So the complaint may be framed with a double aspect. *Wheelock v. Lee*, 74 N. Y. 500; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Bradley v. Aldrich*, 40 N. Y. 512; *Sternberger v. McGovern*, 56 N. Y. 12; *Margraf v. Muir*, 57 N. Y. 159. But in every case the judgment sought must be war-

If the Complaint Is Framed Solely for Equitable Relief, even under the code, where the same court administers both systems of law and equity, the party must maintain his equitable action on equitable grounds or fail, even though he may prove a good cause of action at law on the trial.¹

ranted by the facts stated. For, as was said in *Dobson v. Pearce*, 12 N. Y. 156, 'the question is, ought the plaintiff to recover?' or as in *Crary v. Goodman*, 12 N. Y. 266, 'whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish.' It is only when he fails in doing this that he can be treated as one making a false clamor. But, notwithstanding the liberality of the law which permits this construction, the plaintiff can have no relief that is not 'consistent with the case made by his complaint and embraced within the issue.' Code, § 275. He must, therefore, establish his allegations (*Salter v. Ham*, 31 N. Y. 321; *Bradley v. Aldrich*, 40 N. Y. 504; *Heywood v. Buffalo*, 14 N. Y. 540), and if they warrant legal relief only, he cannot have equitable relief upon the evidence. He must bring his case within the allegations as well as within the proof. *Bradley v. Aldrich*, 40 N. Y. 504; *Arnold v. Angell*, 62 N. Y. 508; *People's Bank v. Mitchell*, 73 N. Y. 415."

1. *Eady v. Napier*, 96 Ga. 736; *Bradley v. Aldrich*, 40 N. Y. 504; *Mann v. Fairchild*, 2 *Keyes* (N. Y.) 111; *Heywood v. Buffalo*, 14 N. Y. 534; *Gall v. Gall*, 17 N. Y. App. Div. 312; *Dalton v. Vanderveer*, 8 *Misc. Rep.* (N. Y. Supreme Ct.) 484, 31 *Abb. N. Cas.* (N. Y.) 434; *De Bussierre v. Holladay*, 4 *Abb. N. Cas.* (N. Y. Supreme Ct.) 111; *Bowen v. Webster*, 3 N. Y. App. Div. 86; *Corrigan v. Coney Island Jockey Club*, 2 *Misc. Rep.* (N. Y. Super. Ct.) 512; *Wylie v. Speyer*, 62 *How. Pr.* (N. Y. Supreme Ct.) 107; *Brinckerhoff v. Bostwick*, 105 N. Y. 572; *Dudley v. Congregation*, etc., 138 N. Y. 451; *Anderson v. Chilson*, 8 S. Dak. 64; *Wrigglesworth v. Wrigglesworth*, 45 *Wis.* 255; *Blalock v. Equitable L. Assur. Soc.*, 73 *Fed. Rep.* 655.

Failure of Proof.—Where a case for equitable relief is alleged, and that alone, and a case for legal relief is proved, the variance amounts to a total failure of proof. *Bradley v. Aldrich*, 40 N. Y. 504.

"The case of *Bradley v. Aldrich*, 40

N. Y. 504, merely holds that an allegation of grounds in plaintiff's complaint for equitable relief, and nothing else, where proof of such grounds fails, does not permit the court to try an action for fraud without a jury. The former practice of the Court of Chancery was to dismiss the bill when all ground for equitable interposition failed, even though a cause of action at law appeared to arise out of the transaction. When a party alleges a cause of action of an equitable nature he must prove one, so far as the question of a trial by jury is concerned, and he cannot escape such tribunal by alleging an equitable cause of action, and, while wholly failing to prove it, obtain a trial by the court of a common-law action arising out of the transaction." *Brinckerhoff v. Bostwick*, 105 N. Y. 572.

Dismissal.—A complaint which is framed solely for equitable relief will be dismissed where it is found upon trial that the plaintiff is not entitled to such relief, as the court in such case cannot give judgment for damages or amend the complaint so as to change the action into one at law. *Dalton v. Vanderveer*, 8 *Misc. Rep.* (N. Y. Supreme Ct.) 484, 31 *Abb. N. Cas.* (N. Y.) 430, 23 *Civ. Pro. Rep.* (N. Y.) 443.

The Reason and Limitations of This Doctrine are well illustrated and explained by the case of *Dudley v. Congregation*, etc., 138 N. Y. 451. In this case it was held that in an action to foreclose a mortgage, when the plaintiff fails to establish its validity, he is not entitled to recover upon the bond sought to be secured by the mortgage although execution of the bond is averred in the complaint. Having failed to establish the mortgage, he fails to establish his cause of action. The court said: "The complaint in this case does not contain but a single cause of action, and that in equity, for the foreclosure of the mortgage lien. It is true that the giving of the bond is stated, but that is incidental to the main facts alleged, and only necessary, if at all, for the purpose of showing the consideration of the mortgage and the amount of the deficiency, if any. When the plaintiff

Reason for Rule. — This rule is but an application of the principle already laid down that a plaintiff must recover, if at all, upon

failed to establish the mortgage he failed to establish his cause of action in its whole scope and meaning, and he could not stand upon the incidental allegations in regard to the bond. It is not necessary to inquire how far or under what circumstances it was within the power of the court to permit him to change the form of the action to one for the enforcement of some purely legal remedy. He applied to the court for that purpose at the trial, and the permission was refused, in the exercise of that discretion which the court undoubtedly possessed. The question that we are now concerned with is whether it was legal error in the court below to hold, after the plaintiff had failed to establish his equitable cause of action, that he was not entitled, upon the same complaint, to a personal judgment against the defendant. We think not. The case, as an action in equity, was terminated by the finding of the court that the plaintiff had no valid mortgage to foreclose, and without the permission of the court in some form, the plaintiff was not entitled in the same action to a different remedy. *Beck v. Allison*, 56 N. Y. 366. The established rule that, when equity has obtained jurisdiction of the parties and the subject-matter of the action, it may adapt the relief to the exigencies of the case, even to the extent of rendering a personal judgment, in order to prevent a failure of justice, does not apply here. That rule applies when the general basis of fact upon which equitable relief was sought has been made out, but for some reason it becomes impracticable to grant such relief, or where it would be insufficient; and not to a case like this, where it appears that there never was in fact any ground for equitable relief whatever, but the sole remedy was an action at law. When facts are made out which bring the case within the general jurisdiction of equity, the court will not allow the case to fail because the specific relief prayed for is no longer practicable, but in such a case, as a substitute for the relief demanded, will award an equivalent in damages, thus ending the controversy, instead of sending the parties to a court of law for that purpose. *Valentine v. Richardt*, 126 N. Y. 277; *Lynch v. Metropolitan El. R. Co.*, 129

N. Y. 274; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 213. In this case the plaintiff has failed because he never had any ground upon which to invoke equitable jurisdiction, and in such a case the court will not attempt to try another and purely legal cause of action. The question is not one of the right to a jury trial. That mode of trial is waived by the plaintiff when he elects to bring an action for relief, both legal and equitable in its nature, in respect to the same cause of action, and by a defendant when he omits to insist upon it in the answer by taking the proper objection, which is usually done by a distinct allegation that an adequate remedy exists at law, or by demanding it, or raising the question at the proper time in cases where he is entitled to that mode of trial according to the practice in equity cases. *Cogswell v. New York, etc., R. Co.*, 105 N. Y. 319; *Mentz v. Cook*, 108 N. Y. 504; *Ostrander v. Weber*, 114 N. Y. 95; *Truscott v. King*, 6 N. Y. 147. It is the case of an action in equity where none but equitable relief was demanded or claimed, commenced and tried before the court as such, and a finding made that the plaintiff was not entitled to the relief sought, with facts appearing upon the trial that might entitle the plaintiff to a money judgment in an action at law, which he did not claim in his complaint, and the right to which he in no way suggested to the court until the whole theory of his action, as presented by the pleadings, failed. Whatever power the court may have to permit a party, by amendment or otherwise, to thus change the whole scope and nature of his action, it cannot be demanded as a right, and a refusal by the court, under such circumstances, to go on and try other questions upon the same pleadings, and administer other remedies, purely legal in their nature, which are properly the subject of another and different form of action, is not error. *Bradley v. Aldrich*, 40 N. Y. 504; *Wheelock v. Lee*, 74 N. Y. 500; *Hawes v. Dobbs*, 137 N. Y. 465."

Contrary View. — "Let us now recur to the question whether damages can be recovered in an equity action where the plaintiff fails to establish his right to the equitable relief demanded. The

the cause of action which he has alleged in his petition.¹

(5) *Amount of Recovery* — (a) *Conformity to Process*. — It has been already seen that judgments must conform to the process served in the case.² The amount of recovery is limited by the writ.³

authorities are to the effect that such recovery may be had." *Matthews v. Delaware, etc., Canal Co.*, 20 Hun (N. Y.) 437 [*citing* *Marquat v. Marquat*, 12 N. Y. 336; *Phillips v. Gorham*, 17 N. Y. 270; *Davis v. Morris*, 36 N. Y. 569; *Barlow v. Scott*, 24 N. Y. 40; *Hudson v. Caryl*, 44 N. Y. 553; *Colman v. Dixon*, 50 N. Y. 572]. *Wheelock v. Lee*, 74 N. Y. 495, which was also cited, does not support the proposition to which the court cited it; it lays down, in fact, a doctrine precisely the contrary.

In *Fairchild v. Lynch*, 42 N. Y. Super. Ct. 265, it was held that a plaintiff suing for equitable relief and failing to establish his right thereto may, if he establishes the cause of action at law, have judgment therefor, the defendant not having objected nor demanded a trial by jury. In a note to this case the reporter says: "Of course if the facts constituting the legal cause of action are not averred in the complaint, and the defendant raises the point that although the facts proven constitute a legal cause of action, yet such cause of action is not complained upon, no recovery can be had thereon." This is undoubtedly the correct view. The case of *Barlow v. Scott*, 24 N. Y. 40, does not conflict with this proposition. There the complaint was framed for the specific performance of an agreement and in default thereof for compensation in damages. The opinion pronounced in that case held that on the face of the complaint there was no ground for specific performance, and the case in truth therefore presented a cause of action for damages and nothing more. The defendant therefore went to trial to meet that precise claim. *Greason v. Keteltas*, 17 N. Y. 491, was like *Barlow v. Scott*, 24 N. Y. 40, in this respect. See also *Bradley v. Aldrich*, 40 N. Y. 504.

1. "When a complaint is framed for equitable relief, and it appears upon the trial that the pleader is not entitled thereto, a judgment at law inconsistent with the allegations of the complaint for damages upon a breach of contract to pay a stipulated amount of money cannot be entered, and the complaint

must be dismissed. It was held in *Dalton v. Vanderveer*, 31 Abb. N. Cas. (N. Y. Supreme Ct.) 430, 23 Civ. Pro. Rep. (N. Y.) 443, 8 Misc. Rep. (N. Y.) 484; "Where a complaint states a cause of action which is within the jurisdiction of equity, and is not an action at law, and the evidence given on the trial fails to sustain such equitable cause of action, but shows a cause of action at law, the complaint will nevertheless be dismissed, as a distinction between equitable and legal actions still exists, though the forms have been abolished." From the head-note in *Parrish v. Pensacola, etc., R. Co.*, 28 Fla. 251, we quote the following: "There can be no recovery upon a cause of action, however meritorious it may be, or however satisfactorily proved, that is in substance variant from that which is pleaded by the plaintiff." To the same effect see *Lewark v. Carter*, 117 Ind. 206; *Bradley v. Aldrich*, 40 N. Y. 504; *Homer v. Homer*, 107 Mass. 82; *Park v. Lide*, 90 Ala. 246; 18 Am. and Eng. Encyc. of Law 515. The principle that plaintiff must recover, if at all, upon the cause of action alleged in his complaint, is elementary. The record discloses no error, and the judgment appealed from is affirmed." *Anderson v. Chilson*, 8 S. Dak. 64.

2. See *supra*, III. 8. *Conformity to Process*.

Where the *Ad Damnum* Is Left Blank in the Declaration, but is laid in the writ, a judgment entered that the plaintiff recover of the defendant "according to specialty, with six per cent. interest and costs," on a verdict "for the plaintiff according to specialty, with six per cent. interest," is valid. *Malone v. Donnally, Minor* (Ala.) 12.

3. Judgment by default in a garnishment suit is limited to the amount claimed in the affidavit and writ. *Carroll v. Milner*, 93 Ala. 301.

In *Hughes v. Union Ins. Co.*, 8 Wheat. (U. S.) 294, it was held that the judgment must be responsive to the writ, and must either be given for the whole sum demanded or exhibit cause why it is given for a less sum, but that in debt a less sum may be recovered

Default. — Accordingly, where the judgment is by default the amount of recovery is limited to the sum specified in the summons or indorsed on the copy served.¹

Where Defendant Answers. — Where, however, the defendant appears and answers, the judgment is not limited to the amount indorsed on the summons.²

(b) **Conformity to Pleadings.** — A judgment must conform to the pleadings with respect to its amount as well as in other respects.³ Accordingly, as a general rule, the amount of a judgment is limited by the *ad damnum* clause of the declaration,⁴ and a judgment in excess of the sum claimed is erroneous.⁵ But a judg-

than that demanded in the writ where the entire sum demanded is shown by the counts to consist of several distinct accounts, or where the precise sum demanded is diminished by extrinsic evidence. "The requisite conformity between the writ and judgment in the action of debt may be fully complied with either by the pleadings, the finding of the jury, or a remitter entered by the plaintiff either before or after verdict, or even after demurrer."

Accrued Interest May Be Added. — A judgment for an amount greater than the sum indorsed on the summons may properly be given where the excess is for interest accrued since the commencement of the suit. *Elliott v. Knight*, 64 Ill. App. 87.

1. *Bassett v. Mitchell*, (Kan. 1888) 19 Pac. Rep. 671; *Lamping v. Hyatt*, 27 Cal. 102; *Jackson v. Hovey*, 2 N. Y. Misc. Rep. (Buffalo Super Ct.) 208; *Hopper v. Steelman*, 3 N. J. L. 466; *Carroll v. Milner*, 93 Ala. 301.

In *Thompson v. Turner*, 22 Ill. 389, it was held that a judgment by default for an amount greater than is stated in the summons may be rendered against a defendant regularly served with process, if within the damages claimed by the declaration. Compare *Basset v. Mitchell*, (Kan. 1888) 19 Pac. Rep. 671, holding that a judgment by default for an amount larger than that indorsed upon the copy of the summons served upon the plaintiff is void and may be enjoined.

In *Mississippi*, the indorsement of the amount on the writ, required by statute, shows only the cause of action, and the damages recovered may exceed the amount claimed by the indorsement, if not greater than the damages laid in the declaration. *Lynch v. Sinking Fund Com'rs*, 4 How. (Miss.) 377.

2. *Erck v. Omaha Nat. Bank*, 43 Neb. 613.

After Striking Out an Answer for irregularity, a judgment rendered in an action on a contract in favor of the plaintiff on the complaint alone must be considered as a judgment by default, and it is therefore erroneous if rendered for a greater amount than that for which the summons stated the judgment would be taken. *Lattimer v. Ryan*, 20 Cal. 628.

In *Attachment*, where the error assigned was that the judgment exceeded the amount sworn to in the affidavit for attachment and named in the writ, but it did not exceed the *ad damnum*, the judgment was sustained on writ of error. *Plato v. Turrill*, 18 Ill. 273.

3. **For Example**, a judgment greater than the amount claimed in the petition less the amount of a counterclaim not denied by the plaintiff is erroneous, and the verdict for such sum should be set aside. *Ashland Land, etc., Co. v. Woodford*, 50 Neb. 118.

4. See article DAMAGES, vol. 5, p. 706 *et seq.* See also the following cases:

Illinois. — *Stephens v. Sweeney*, 7 Ill. 375; *Walcott v. Holcomb*, 24 Ill. 331; *Hichins v. Lyon*, 35 Ill. 150; *Altes v. Hinckler*, 36 Ill. 275; *Pierson v. Finney*, 37 Ill. 29; *Hobson v. Emporium Real Estate, etc., Co.*, 42 Ill. 306; *Kelley v. Chicago Third Nat. Bank*, 64 Ill. 541; *Foreman v. Sawyer*, 73 Ill. 484; *Oakes v. Ward*, 19 Ill. 46; *Brown v. Smith*, 24 Ill. 196.

Massachusetts. — *Safford v. Weare*, 142 Mass. 231.

Michigan. — *Kenyon v. Woodward*, 16 Mich. 326.

Vermont. — Anonymous, *Brayt*. (Vt.) 72.

5. *Alabama*. — *Boardman v. Poland*, 2 Port. (Ala.) 431; *Flournoy v. Chil-*

ment for the amount shown due by the declaration or petition may be given although it is greater than the damages laid in the

dress, *Minor* (Ala.) 93; *Dinsmore v. Austill*, *Minor* (Ala.) 89; *Derrick v. Jones*, 1 *Stew.* (Ala.) 18; *Evans v. Bridges*, 4 *Port.* (Ala.) 348; *M'Whorter v. Sayre*, 2 *Stew.* (Ala.) 225; *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247.

Arkansas. — *Hudspeth v. Gray*, 5 Ark. 157; *White v. Cannada*, 25 Ark. 41; *Pleasants v. State Bank*, 8 Ark. 456; *Jones v. Robinson*, 8 Ark. 484.

California. — *Palmer v. Reynolds*, 3 Cal. 396; *Burke v. Koch*, 75 Cal. 356; *Skym v. Weske Consol. Co.*, (Cal. 1896) 47 Pac. Rep. 116; *Reynolds v. Lewis*, 59 Cal. 20; *Pierce v. Payne*, 14 Cal. 419; *Farrell v. Jones*, 63 Cal. 194; *Gage v. Rogers*, 20 Cal. 91.

Colorado. — *Wilcox v. Field*, 1 Colo. 3; *Wilbur v. Maynard*, 6 Colo. 483.

Connecticut. — *Smith v. Allen*, 5 Day (Conn.) 337; *Davenport v. Bradley*, 4 Conn. 309.

District of Columbia. — *Denison v. Lewis*, 5 App. Cas. (D. C.) 328.

Florida. — *St. Johns, etc., R. Co. v. Bartola*, 28 Fla. 82.

Georgia. — *Terrell v. McKinny*, 26 Ga. 450.

Illinois. — *Russell v. Chicago*, 22 Ill. 283; *Fournier v. Faggott*, 4 Ill. 347; *Stephens v. Sweeney*, 7 Ill. 375; *Rives v. Kumler*, 27 Ill. 291; *Dowling v. Stewart*, 4 Ill. 193; *Badgeley v. Heald*, 9 Ill. 64; *Toledo, etc., R. Co. v. Pence*, 71 Ill. 174; *Brown v. Phillips*, 6 Ill. App. 250; *Ephley v. Eubanks*, 11 Ill. App. 272; *Miller v. Glass*, 11 Ill. App. 560; *Pierson v. Finney*, 37 Ill. 29; *Oakes v. Ward*, 19 Ill. 46; *Brown v. Smith*, 24 Ill. 196; *Linder v. Monroe*, 33 Ill. 388; *Kelley v. Chicago Third Nat. Bank*, 64 Ill. 541; *Hichins v. Lyon*, 35 Ill. 150; *Foreman v. Sawyer*, 73 Ill. 484; *Pickering v. Pulsifer*, 9 Ill. 79.

Indiana. — *Hay v. McCoy*, 6 Blackf. (Ind.) 69; *Johnson v. Hawkins*, 2 Blackf. (Ind.) 459; *Price v. Grand Rapids, etc., R. Co.*, 18 Ind. 137; *Short v. Scott*, 6 Ind. 430; *Wetherill v. Congressional Tp.*, 5 Blackf. (Ind.) 357; *Epperly v. Little*, 6 Ind. 345; *Swift v. Woods*, 5 Blackf. (Ind.) 97; *Horner v. Hunt*, 1 Blackf. (Ind.) 214; *Murphy v. Evans*, 11 Ind. 517.

Iowa. — *Blake v. Blake*, 13 Iowa 40; *Gower v. Carter*, 3 Iowa 244; *Stafford v. Oskaloosa*, 57 Iowa 748; *Stiles v.*

Brown, 3 *Greene* (Iowa) 589; *Haven v. Baldwin*, 5 Iowa 503; *Heffernan v. Burt*, 7 Iowa 320.

Kansas. — *Green v. Dunn*, 5 Kan. 254; *Loper v. State*, 48 Kan. 540; *Atchison, etc., R. Co. v. Combs*, 25 Kan. 729; *Pratt v. Brockett*, 20 Kan. 201.

Kentucky. — *Edwards v. Wiester*, 2 A. K. Marsh. (Ky.) 382; *Morton v. Smith*, 4 T. B. Mon. (Ky.) 313; *Young v. Lancaster*, 5 T. B. Mon. (Ky.) 381; *Bush v. Dyke*, 6 T. B. Mon. (Ky.) 142; *Rowan v. Lee*, 3 J. J. Marsh. (Ky.) 97; *Offut v. Stout*, 4 J. J. Marsh. (Ky.) 332; *Robinett v. Morris*, Hard. (Ky.) 99; *Bealle v. Schoal*, 1 A. K. Marsh. (Ky.) 475; *Harrison v. Park*, 1 J. J. Marsh. (Ky.) 174.

Louisiana. — *Jackson v. Beling*, 22 La. Ann. 378; *Claverie's Succession*, 34 La. Ann. 1122.

Massachusetts. — *Hemmenway v. Hickey*, 4 Pick. (Mass.) 497; *Grosvenor v. Danforth*, 16 Mass. 74.

Michigan. — *Abernethy v. Van Buren Tp.*, 52 Mich. 383.

Mississippi. — *Potter v. Prescott*, 2 How. (Miss.) 686.

Missouri. — *Carr v. Edwards*, 1 Mo. 137; *Hayton v. Hope*, 3 Mo. 53; *Maupin v. Triplett*, 5 Mo. 422; *Beckwith v. Boyce*, 12 Mo. 440; *Pope v. Salsman*, 35 Mo. 362; *Horton v. St. Louis, etc., R. Co.*, 83 Mo. 541; *Johnson v. Robertson*, 1 Mo. 615; *Poulson v. Collier*, 18 Mo. App. 583; *Pendergast v. Hodge*, 21 Mo. App. 138; *Lesinsky v. Great Western Dispatch*, 13 Mo. App. 576, 14 Mo. App. 598; *Moore v. Dixon*, 50 Mo. 424; *Armstrong v. St. Louis*, 3 Mo. App. 100, 69 Mo. 309; *Cox v. St. Louis*, 11 Mo. 431.

New Jersey. — *Hawk v. Anderson*, 9 N. J. L. 319; *Daniel v. Park*, 3 N. J. L. 557; *Lake v. Merrill*, 10 N. J. L. 288; *Cortleyou v. Cortleyou*, 2 N. J. L. 301; *Johnson v. Van Doren*, 2 N. J. L. 353; *Earl v. Still*, 3 N. J. L. 434.

New York. — *Weed v. Lee*, 50 Barb. (N. Y.) 354; *Fish v. Dodge*, 4 Den. (N. Y.) 311; *Curtiss v. Lawrence*, 17 Johns. (N. Y.) 111; *Dox v. Dey*, 3 Wend. (N. Y.) 356; *Pharis v. Gere*, 31 Hun (N. Y.) 444.

North Carolina. — *Conant v. Barnard*, 103 N. Car. 315; *Spencer v. Bell*, 109 N. Car. 39.

Pennsylvania. — *Dennison v. Leech*,

ad damnum clause proper.¹ But where the judgment is greater than the amount shown due by the pleading, it is erroneous although within the amount laid in the *ad damnum* clause.²

Where a Bill of Particulars Is Filed, a recovery is in general limited by the amount therein specified.³

9 Pa. St. 164; *Pinchin v. Fry*, 1 Dall. (Pa.) 405.

South Carolina. — *Croxtan v. Addison*, Harp. L. (S. Car.) 72; *Covington v. Lide*, 1 Bay (S. Car.) 158.

Tennessee. — *Crabb v. Nashville Bank*, 6 Yerg. (Tenn.) 333; *Williams v. State Bank*, 1 Coldw. (Tenn.) 43; *Paragon Refining Co. v. Lee*, 98 Tenn. 643; *Fowlkes v. Webber*, 8 Humph. (Tenn.) 530; *Campbell v. Hancock*, 7 Humph. (Tenn.) 75.

Texas. — *Warren v. Prewett*, (Tex. Civ. App. 1894) 25 S. W. Rep. 647; *Wilkins v. Burns*, (Tex. Civ. App. 1893) 25 S. W. Rep. 431; *Hillebrant v. Barton*, 39 Tex. 599; *Walker v. Lewis*, 49 Tex. 123; *International, etc., R. Co. v. McDonald*, 75 Tex. 41; *Frazier v. Woodward*, 61 Tex. 449; *Gulf, etc., R. Co. v. Simonton*, 2 Tex. Civ. App. 558; *Gregory v. Coleman*, 3 Tex. Civ. App. 166.

Virginia. — *Tennant v. Gray*, 5 Munf. (Va.) 494; *Cloud v. Campbell*, 4 Munf. (Va.) 214.

Wisconsin. — *Smith v. Phelps*, 7 Wis. 211.

United States. — *Cox v. U. S.*, 6 Pet. (U. S.) 172; *Simms v. Guthrie*, 9 Cranch. (U. S.) 19; *Hogan v. Taylor*, Hempst. (U. S.) 20.

England. — *Pickwood v. Wright*, 1 H. Bl. 642; *Hoblins v. Kimble*, 1 Bulst. 49.

Amendment of Ad Damnum Clause. — See generally articles DAMAGES, vol. 5, p. 716; AMENDMENTS, vol. 1, p. 589.

A sum in excess of that demanded in the complaint cannot be recovered without amendment. *Conant v. Barnard*, 103 N. Car. 315.

A judgment in excess of the damages claimed in the declaration is erroneous, and cannot be cured by an amendment *nunc pro tunc* of the *ad damnum* clause. *Kenyon v. Woodward*, 16 Mich. 326.

1. *Kennedy v. Young*, 25 Ala. 563; *Sanders v. City Nat. Bank*, (Tex. 1889) 12 S. W. Rep. 110.

In *Mississippi*, under the Act of 1850, changing the forms of pleadings at common law and providing that the complaint thereby authorized instead

of a declaration should conclude for a demand for the relief which the plaintiff claims, where the complaint conforms to this provision an averment of the amount of damages in the conclusion is to be regarded as surplusage, and hence, if the judgment exceeds the damages claimed in the complaint, it will be no ground for reversal. *French v. Davis*, 38 Miss. 218.

In *Kentucky*, where a verdict is rendered for a larger amount than the damages laid in the declaration, judgment must be entered for the latter sum. *Bush v. Dyke*, 6 T. B. Mon. (Ky.) 142; *Baltzell v. Hickman*, 4 Litt. (Ky.) 265.

Reference to Arbitrators. — Where an action together with other claims of the plaintiff against the defendant has been referred to arbitrators, under a rule of court, it is not error to render judgment for an amount of damages exceeding the *ad damnum* in the writ. *Day v. Berkshire Woollen Co.*, 1 Gray (Mass.) 420.

2. *Girvin v. St. Louis Refrigerator, etc., Co.*, 66 Mo. App. 315.

A General Allegation and demand of damages cannot contravene specific statements, in the same pleading, of the precise amount and character of damage, so as to allow recovery of damages not specifically claimed. *Denison v. Lewis* (D. C.) 23 Wash. L. Rep. 138.

Videlicet. — Where the damages in the body of the declaration under a *videlicet* are placed at \$200, but in the *ad damnum* at \$500, a verdict for \$275 is not improper, no objection to the declaration being made in the trial court. *Chicago, etc., R. Co. v. O'Brien*, 34 Ill. App. 155.

3. *George H. Hess Co. v. Dawson*, 51 Ill. App. 146, affirmed in 149 Ill. 138; *Morton v. McClure*, 22 Ill. 257; *Morrison v. L'Hommedieu*, (Supreme Ct.) 44 N. Y. Supp. 79, 15 N. Y. App. Div. 623.

Unnecessary Bill of Particulars. — A judgment may, however, be rendered for any sum within the *ad damnum* notwithstanding a bill of particulars for a less sum, where no bill of particulars is necessary and the bill filed is accord-

Where the Defendant Has Appeared and Answered, the amount of the judgment may be greater than the sum demanded, should the case justify it.¹

But a Judgment by Default cannot be greater than the amount shown due by the complaint.²

Single Damages are recoverable although the declaration or complaint improperly claims treble damages under a statute.³

A Statutory Allowance as Costs may be included in the judgment though not claimed in the declaration.⁴

(c) **Conformity to Proof.** — A judgment for more than the proof warrants is erroneous.⁵

(d) **Effect of Excessive Judgment.** — A judgment which is merely excessive under the pleadings and proofs, within the rules heretofore stated, is erroneous and liable to be reversed, but it is not void,⁶

ingly surplusage. *Clark v. Ford*, 41 Ill. App. 199.

1. *Bozarth v. McGillicuddy*, (Ind. App. 1897) 47 N. E. Rep. 397.

A Judgment Is Not Limited by the Prayer when it is within the issues consistent with the complaint and supported by the proof. *Johnson v. Rider*, 84 Iowa 50. See generally article PRAYERS FOR RELIEF.

2. *California*. — *Lamping v. Hyatt*, 27 Cal. 102; *Lattimer v. Ryan*, 20 Cal. 628.

Colorado. — *Creighton v. Kerr*, 1 Colo. 509.

Florida. — *Columbia County v. Branch*, 31 Fla. 62.

Illinois. — *Hobson v. Emporium Real Estate, etc., Co.*, 42 Ill. 306.

Indiana. — *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158.

Kansas. — *St. Louis, etc., R. Co. v. Armstrong*, 25 Kan. 561.

Missouri. — *State v. Davidson*, 87 Mo. 683.

Pennsylvania. — *Dennison v. Leech*, 9 Pa. St. 164.

3. *Cramer v. Oppenstein*, 16 Colo. 495; *Von Hoffman v. Kendall*, (Supreme Ct.) 44 N. Y. St. Rep. 484; *Starkweather v. Quigley*, 7 Hun (N. Y.) 26.

4. **Attorney's Fee.** — Under a statute allowing a reasonable attorney's fee to be recovered as costs in a suit for injury to live stock by failure to furnish cars with trapdoors in the top, such fee may be allowed although not claimed in the petition. *Paddock v. Missouri Pac. R. Co.*, 60 Mo. App. 328.

5. *Iowa*. — *Callender v. Drabelle*, 73 Iowa 317.

Kentucky. — *Elliston v. Common-*

wealth Bank, 3 Dana (Ky.) 100; *Petty v. Malier*, 14 B. Mon. (Ky.) 198.

Michigan. — *Mitchell v. Shuert*, 16 Mich. 444.

Nebraska. — *Deering v. Miller*, 33 Neb. 654.

Texas. — *Ostrom v. Smith*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1130.

Compare Baldwin v. Stebbins, Minor (Ala.) 180, where it was held that the fact that a verdict and judgment are for a greater sum than is due for principal and interest on a promissory note declared on is not ground for reversal on appeal, it being a matter for the determination of the jury upon the evidence.

A Judgment Without Proof for more than the amount admitted is erroneous. *Van Etten v. Kosters*, 48 Neb. 152; *Houston v. Smythe*, 66 Miss. 118; *Straub v. Screven*, 19 S. Car. 451.

6. *California*. — *Chase v. Christian-son*, 41 Cal. 253; *Reeve v. Kennedy*, 43 Cal. 643.

Georgia. — *Buice v. Lowman Gold, etc.*, Min. Co., 64 Ga. 771; *Lester v. Cloud*, 67 Ga. 770.

Indiana. — *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158.

Iowa. — *O'Connell v. Cotter*, 44 Iowa 48; *Ketchum v. White*, 72 Iowa 195.

Kansas. — *Bassett v. Mitchell*, 40 Kan. 549; *Loper v. State*, 48 Kan. 540.

Louisiana. — *Cincinnati Ins. Co. v. Harrison*, 21 La. Ann. 379.

New Hampshire. — *Jarvis v. Brooks*, 27 N. H. 37.

North Carolina. — *Savage v. Hussey*, 3 Jones L. (N. Car.) 149.

Utah. — *Darke v. Ireland*, 4 Utah 192.

Vermont. — *Chaffee v. Hooper*, 54 Vt. 513.

and therefore is not subject to collateral attack.¹

Where the Excess Is Very Small, the maxim *de minimis non curat lex* applies, and the judgment will not be reversed.²

(e) Remedies for Excessive Judgment. — An excessive judgment may generally be corrected by modification either in the trial court or on appeal.³

Remittitur. — Usually the party recovering an excessive judgment is permitted to remit the excess and take a judgment for the proper amount.⁴

c. MANNER OF RAISING OBJECTION. — Where the nonconformity of a judgment to the process, pleadings, or proof constitutes mere error, the proper method of raising the objection is by perfecting an appeal.⁵

d. WAIVER OF OBJECTION. — The objection that the judgment is not authorized by the pleadings is waived by a failure to object to the evidence upon which it is based or to the rendition of the judgment.⁶

10. Conformity to Verdict or Findings — a. STATEMENT OF RULE — (1) *In General*. — A judgment must be supported by the verdict or findings in the case,⁷ and a judgment which goes beyond

1. *Ketchum v. White*, 72 Iowa 195; *Chaffee v. Hooper*, 54 Vt. 513.

2. *Edwards v. Greene*, 5 Sneed (Tenn.) 669; *Williams v. State Bank*, 1 Coldw. (Tenn.) 43; *Bowen v. School Dist. No. 9*, 36 Mich. 149.

3. *Smith v. Robinson*, 11 Ala. 270; *Reynolds v. Lewis*, 59 Cal. 20.

If the jury find more damages than are laid in the writ, and the court during the same term correct the judgment, it is not error. *Holeman v. Coleman*, 1 A. K. Marsh. (Ky.) 296.

4. See article REMITTITUR.

5. See article APPEALS, vol. 2, p. 1.

If this objection be taken on a motion, at the trial, before a referee, to dismiss the complaint upon the plaintiff's evidence, it is available on appeal from a judgment for the plaintiff upon the referee's report in his favor, although no exceptions were taken to the report upon the ground that the cause of action as found was not that set forth in the complaint. *Patterson v. Patterson*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 262.

On trial of questions of fact by the court, the decision of the judge should pass upon and find all the material issues presented by the pleadings. If the decision and judgment are contrary to the legal effect of the case as admitted by the pleadings, the objection may be taken without a case, and per-

haps without exceptions, if the point be passed upon in the court below. *Gilchrist v. Stevenson*, 7 How. Pr. (N. Y. Supreme Ct.) 273.

New Trial. — Where the judgment is broader than the facts alleged and found will justify, the proper remedy is by an appeal from the judgment on the judgment roll, and not by a motion for a new trial. *Shepard v. McNeil*, 38 Cal. 72. See also article NEW TRIAL.

6. *Fox v. Hale*, etc., *Silver Min. Co.*, 108 Cal. 369; *Buchanan v. Berkshire L. Ins. Co.*, 96 Ind. 510; *Landers v. George*, 49 Ind. 309; *Kean v. Brandon*, 17 La. Ann. 37; *Eastman v. Harris*, 4 La. Ann. 193; *Ames v. People's Telegraph*, 5 La. Ann. 184; *Gayarre v. Tunnard*, 9 La. Ann. 255; *Mengis v. Fifth Ave. R. Co.*, 81 Hun (N. Y.) 480, 24 Civ. Pro. Rep. (N. Y.) 131. But see *supra*, III. 9. a. (3) (b) *Effect of Judgment Beyond Issues*.

7. *California*. — *Davidson v. Devine*, 70 Cal. 519.

New York. — *People v. Metropolitan Telephone, etc., Co.*, 31 Hun (N. Y.) 596.

North Carolina. — *Brunhild v. Potter*, 107 N. Car. 415.

Texas. — *Carter v. Bolin*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1084; *Texas, etc., R. Co. v. Padgett*, (Tex. Civ. App. 1896) 36 S. W. Rep. 300; *Longcope v. Bruce*, 44 Tex. 434.

the verdict is erroneous.¹ There is no principle of law more firmly established than that the judgment must follow and conform to the verdict or findings.²

Utah. — *Maynard v. Locomotive Engineers' Mut. L., etc., Ins. Assoc.*, 14 *Utah* 458.

In Ejectment, where the verdict was for the plaintiff, but contained no assessment of damages, and the court entered judgment for damages, it was held that such judgment was not sustained by the verdict. *Cannon v. Davies*, 33 *Ark.* 56.

In an Action for Damages upon a Contract, where the verdict is that both parties were guilty of fraud, and that each shall pay half the costs, the only judgment that can be rendered is a judgment for the defendant for costs. *Baker v. Wofford*, 9 *Tex.* 516.

Verdict Apportioning Damages. — In an action by the wife and child of a brakeman, killed by the concurrent negligence of two railroad companies, wherein each had cast the blame upon its codefendant, a verdict in favor of the plaintiffs against both defendants in the sum of \$10,000 — \$5,000 in favor of the wife and \$5,000 in favor of the child, \$5,000 to be paid by one defendant and \$5,000 by the other — is sufficient to sustain two separate judgments for \$5,000 against each of the defendants. But it will not support a joint judgment for \$10,000. *San Antonio, etc., R. Co. v. Bowles*, (Tex. Civ. App. 1895) 30 *S. W. Rep.* 727. Compare *Post v. Stockwell*, 34 *Hun (N. Y.)* 373.

Criminal Law — Grade of Offense. — On an indictment for an assault with intent to commit murder, when any less grade of offense is found by the jury, the verdict must show the character of the offense so found, and the judgment must not exceed that warranted by the verdict. *People v. Cozad*, 1 *Idaho* 167.

1. *Lyons v. Planters' Loan, etc., Bank*, 86 *Ga.* 485; *Boyd v. Ernst*, 36 *Ill. App.* 583; *King v. Kindred*, 38 *Minn.* 354; *Kuhlman v. Medlinka*, 29 *Tex.* 385.

Material omissions in the verdict cannot be supplied. See *Cobb v. Wise*, 71 *Ga.* 103; *Cram v. Stiles*, 47 *Mich.* 129; *Shoemaker v. St. Louis, etc., R. Co.*, 30 *Kan.* 359; *Wood v. McGuire*, 17 *Ga.* 361.

A judgment is erroneous where it is not based on the findings of fact. *Spencer v. Bell*, 109 *N. Car.* 39.

Where the cause is tried upon issues of fact by the court, without a jury, the judgment cannot contain any provisions not embraced in the decision. Conclusions of law found by the court must contain all that goes into the judgment. *Loeschigk v. Addison*, 19 *Abb. Pr. (N. Y. Super. Ct.)* 169; *People v. Stephens*, 51 *How. Pr. (N. Y. Supreme Ct.)* 227.

A verdict merely for the amount due upon a claim will not authorize a judgment foreclosing a lien securing such claim. *Bledsoe v. Wills*, 22 *Tex.* 650; *Heisch v. Adams*, 81 *Tex.* 94; *Bedford v. Rayner Cattle Co.*, (Tex. Civ. App. 1896) 35 *S. W. Rep.* 931; *Freiberg v. Brunswick-Balke-Collender Co.*, (Tex. App. 1890) 16 *S. W. Rep.* 784; *Longcope v. Bruce*, 44 *Tex.* 434.

2. *Alabama.* — *Reid v. Dunklin*, 5 *Ala.* 205.

Arkansas. — *Cole v. State*, 10 *Ark.* 318; *McElroy v. State*, 13 *Ark.* 711; *Cannon v. Davies*, 33 *Ark.* 56; *Hallum v. Dickinson*, 47 *Ark.* 120.

Illinois. — *Gall v. Beckstein*, 66 *Ill. App.* 478.

Indiana. — *Nordyke v. Dickson*, 76 *Ind.* 188; *Dawson v. Shirk*, 102 *Ind.* 184; *Mitchell v. Geisendorff*, 44 *Ind.* 358; *Reid v. State*, 58 *Ind.* 406.

Kentucky. — *Cooper v. Poston*, 1 *Duv. (Ky.)* 94; *Martin v. Com.*, 6 *J. J. Marsh. (Ky.)* 549; *Clay v. Moseley*, 1 *A. K. Marsh. (Ky.)* 361.

Louisiana. — *Walker v. Acklen*, 19 *La. Ann.* 186; *Cochrane v. Murphy*, 4 *La. Ann.* 6; *Dale v. Downs*, 7 *Martin N. S. (La.)* 225; *Bulloc v. Parthet*, 8 *Martin N. S. (La.)* 123; *Mayor v. Duplessis*, 5 *Martin (La.)* 309; *Pierce v. Flower*, 5 *Martin (La.)* 390.

Minnesota. — *Wilson v. McCormick*, 10 *Minn.* 216.

Mississippi. — *Abbey v. Merrick*, 27 *Miss.* 320.

Montana. — *Kimpton v. Jubilee Placer Min. Co.*, 16 *Mont.* 379; *Frohnert v. Rodgers*, 2 *Mont.* 179.

New York. — *Outwater v. Moore*, 124 *N. Y.* 66.

North Carolina. — *Merrimon v. Norton*, 67 *N. Car.* 115; *Murray v. King*, 8 *Ired. L. (N. Car.)* 528.

Pennsylvania. — *Moser v. Mayberry*, 7 *Watts (Pa.)* 12.

Where a Special Verdict is rendered, a judgment to be entered thereon must be the logical legal conclusion upon the facts found by the jury and upon those facts alone.¹

South Carolina. — *Eason v. Miller*, 15 S. Car. 194.

Texas. — *Tinnen v. Matthews*, Dall. (Tex.) 491; *Thomas Mfg. Co. v. Griffin*, (Tex. Civ. App. 1897) 40 S. W. Rep. 755; *Stafford v. King*, 30 Tex. 257; *European-American Colonization Soc. v. Reed*, 25 Tex. Supp. 353; *Bledsoe v. Wills*, 22 Tex. 650; *Emerson v. Skidmore*, 7 Tex. Civ. App. 641; *McMullen v. Kelso*, 4 Tex. 235; *Kinkler v. Junica*, 84 Tex. 116; *Crosson v. Dwyer*, 9 Tex. Civ. App. 482; *March v. Williams*, 3 Tex. App. Civ. Cas., § 377; *Texas, etc., R. Co. v. Logan*, 3 Tex. App. Civ. Cas., § 186; *Claiborne v. Tanner*, 18 Tex. 79; *Smith v. Tucker*, 25 Tex. 604; *Hall v. Jackson*, 3 Tex. 305; *Menard v. Sydnor*, 29 Tex. 257.

Virginia. — *Blackwell v. Landreth*, 90 Va. 748; *Lee v. Tapscott*, 2 Wash. (Va.) 276.

Wisconsin. — *Diedrich v. Northwestern Union R. Co.*, 47 Wis. 662.

United States. — *Bennett v. Butterworth*, 11 How. (U. S.) 675.

Meaning of "Conformity." — "The word 'conformity' means agreement — congruity with something else — and, as applied to cases of this kind, its use was intended to convey the idea that the judgment should carry out the intent of the verdict. In fact, no other judgment but one in conformity with the true intent of the verdict would be legal." *Eason v. Miller*, 15 S. Car. 200.

Effect of Nonconformity. — Judgments for relief different from that authorized by the verdict, or in which a clause is inserted without authority, are not void or inoperative, but are simply irregular, and the defect may be waived or acquiesced in by delay in moving to vacate, or by taking an appeal. *Corn Exch. Bank v. Blye*, 119 N. Y. 414. See also *Hogue v. Fanning*, 73 Cal. 54; and see generally cases cited *supra*, this section.

Illustrations of Judgments Conforming to Verdict. — The duty of the court is to pronounce the regular judgment of the law upon the verdict; and its conformity to the verdict is the test of its regularity; the verdict is the basis of the judgment. *Wilson v. Newland*, 5 Ark. 373.

The court is not obliged to make a decree in conformity with the verdict of the jury, under *Montana* Code Civ. Pro., § 250, in an action to adjudicate and determine a controversy regarding the priority of right by appropriation to use water for irrigating purposes, it being an equitable action. *Kleinschmidt v. Greiser*, 14 Mont. 484. See also *Arnold v. Sinclair*, 12 Mont. 248.

A verdict against one of several defendants authorizes the entry of a judgment in favor of the defendants not mentioned in it, where there have been no issues raised between the defendants, and no affirmative relief asked by them. *Missouri Pac. R. Co. v. Kingsbury*, (Tex. Civ. App. 1894) 25 S. W. Rep. 322. To the same effect see *Kinkler v. Junica*, 84 Tex. 116.

Judgment in Gold Coin or Its Value. — The jury assessed damages at \$743 in gold coin of the United States, or \$757.86 in legal tender treasury notes of the United States, the equivalent of the gold coin. The judgment was entered for the last-named sum. It was held that the judgment did not follow the verdict, and that the judgment should fix the amount to be paid if paid in gold coin, and the amount to be paid if paid in said legal tenders. *Knox v. Gerhauser*, 3 Mont. 267.

Illustrations of Judgments Not Conforming to Verdict. — In replevin, see *Holliday v. McKinne*, 22 Fla. 153. In detinue, see *Whitfield v. Whitfield*, 40 Miss. 352.

Where the validity of a will is the only issue, a judgment on a general verdict for the plaintiff cannot recognize him as heir. *Swift v. Swift*, 9 La. Ann. 117.

1. *California.* — *Hawkins v. Morehead*, (Cal. 1893) 34 Pac. Rep. 223.

Indiana. — *Wetzel v. Kellar*, 12 Ind. App. 75; *Toledo, etc., R. Co. v. Trimble*, 8 Ind. App. 333; *Lyon v. Logansport*, 9 Ind. App. 21; *Armacost v. Lindley*, 116 Ind. 295.

Kansas. — *Chicago, etc., R. Co. v. Totten*, 1 Kan. App. 558.

Kentucky. — *Louisville, etc., R. Co. v. Brantley*, 96 Ky. 297, 16 Ky. L. Rep. 691.

Michigan. — *Burdick v. Chamberlain*, 38 Mich. 610; *Peck v. Grand Rapids*

Where the Verdict Is Joint the judgment must be joint.¹

Where the Verdict Is Several the judgment must be several.²

The Proper Remedy in case a judgment does not conform to the verdict is by a motion to modify the judgment.³

(2) *Exceptions and Qualifications.* — One Real Exception to the rule that judgments must conform to the verdict or findings consists of cases where a judgment is rendered *non obstante veredicto*. This will be considered in detail in a succeeding section.⁴

As a Qualification of the rule it may be stated that the judgment should conform to the real and substantial finding rather than to the literal form of expression of the verdict.⁵ Where the finding

City Nat. Bank, 51 Mich. 353; Walter A. Wood Mowing, etc., Mach. Co. v. Seaver, 90 Mich. 546.

North Carolina. — Pearson v. Crawford, 116 N. Car. 756; Nash v. Sutton, 119 N. Car. 298.

Pennsylvania. — Com. v. Grimes, 116 Pa. St. 450.

Texas. — Clendenning v. Matthews, 1 Tex. App. Civ. Cas., § 905; May v. Taylor, 22 Tex. 349; Darden v. Matthews, 22 Tex. 324; Barnett v. Caruth, 22 Tex. 173; McConkey v. Henderson, 24 Tex. 212; Harrell v. Babb, 19 Tex. 148; La Rue v. Bower, 1 Tex. App. Civ. Cas., § 1285; Claiborne v. Tanner, 18 Tex. 78; Akin v. Jefferson, 65 Tex. 137.

Wisconsin. — Schweickhart v. Stuewe, 75 Wis. 157.

See generally article SPECIAL FINDINGS.

A judgment should correspond with and be only the legal result of the facts found in the verdict. Bledsoe v. Wills, 22 Tex. 650.

When a court is called to rule upon a motion for judgment upon a special verdict, it is to consider what the law is, and is not bound by its instruction previously given to the jury. Baird v. Chicago, etc., R. Co., 61 Iowa 359; Evans v. St. Paul Harvester Works, 63 Iowa 204.

A judgment must correspond with and be only the legal result of facts found in the verdict, and cannot be rendered in favor of a party as to whom the verdict is silent. Thompson v. Albright, (Tex. App. 1889) 14 S. W. Rep. 1020.

When a verdict is in response to special issues alone, the court will not look beyond the finding to any fact apparent in the record in aid of the judgment; the judgment must be sustained

by the finding. Smith v. Warren, 60 Tex. 462.

Where there is a special verdict and there are no exceptions thereto, and no motion for further findings or for a new trial, and a judgment is rendered on the verdict, and the Supreme Court determines that the verdict is not sufficient to sustain the judgment, such court has no power to send the case back for a new trial, but must order a judgment on the verdict. McGonigle v. Gordon, 11 Kan. 167.

1. Allen v. State, 34 Tex. 230. See also *supra*, III. 4. d. (1) (c) *Judgment when Joint*.

2. Stewart v. Pruett, 6 La. Ann. 727.

3. When the judgment fails to follow the verdict, the remedy is not by a motion for a new trial, or for a *venire de novo*, but by a motion to modify the judgment. Branson v. Studabaker, 133 Ind. 147; Thrash v. Starbuck, 145 Ind. 673.

The error can be saved for correction in the Supreme Court by a specific motion for a proper modification only, but not by a motion embracing more. Scotton v. Mann, 89 Ind. 404.

The objection cannot be taken on appeal in the absence of a motion in the trial court to modify the judgment. Brigg v. Hilton, 99 N. Y. 517 [citing Williams v. Thorn, 81 N. Y. 382; DeLavallette v. Wendt, 75 N. Y. 579]. See also Meredith v. Lackey, 14 Ind. 529.

4. See *infra*, III. 10. b. *Non Obstante Verdicto*.

5. Etter v. Hughes, (Cal. 1895) 41 Pac. Rep. 790; Hogan v. Shuart, 11 Mont. 498; Hackworth v. Zeiting, 48 Mo. App. 32; Brannin v. Bremen, 2 N. Mex. 40; Wells v. Cox, 1 Daly (N. Y.) 515; Jones v. Ford, 60 Tex. 127; Houston v. Newsome, 82 Tex. 75; Lake v.

reported could not possibly be arrived at without also finding another fact not expressed but necessarily included in the verdict, judgment can be rendered as if that fact had been positively found.¹ So, also, superfluous matter in a verdict may be disregarded;² and, on the other hand, the mere addition of descriptive matter not found in the verdict is surplusage and immaterial.³

The Pleadings May Be Considered in connection with the verdict,⁴ and

Tyree, 90 Va. 719; Hardy v. Hohl, 11 Wash. 1; Downey v. Hicks, 14 How. (U. S.) 240.

Assessment of "Damages" Instead of "Value."—A party will not be deprived of a recovery merely because of a bare informality in a verdict. Thus, while a verdict by a jury in a replevin suit that they "do assess the damages of the property mentioned in the declaration at \$825, and the actual damages of the defendant at six per centum per annum to be \$24.75," is not well expressed, in that the word "damages" is used with reference to the property instead of the word "value," a correct judgment rendered upon it will not be set aside. Such a verdict is not objectionable for nonconformity to the law which requires the "value" of the property to be assessed. Brannin v. Bremen, 2 N. Mex. 40.

Correcting Error in Computation of Amount.—If the data which accompany the verdict indicate that the amount assessed by the jury is the result of an error in computation, the court may render a corrected judgment upon the data furnished. Dawson v. Shirk, 102 Ind. 189; Case v. Colter, 66 Ind. 336; Hall v. Harlow, 66 Ind. 448; Medler v. Hiatt, 14 Ind. 405; Sanders v. Scott, 68 Ind. 130; Houston v. Newsome, 82 Tex. 75.

In Dawson v. Shirk, 102 Ind. 189, the court said: "Before a judgment can be rendered for an amount different from that assessed by the jury, the conclusion must be irresistible, from the facts and data given, that an error in computation, or an omission, growing out of a misconception of the relation to each other of the several facts specifically found, has occurred."

Verdict Violating Instructions.—In Wells v. Cox, 1 Daly (N. Y.) 515, it was held that where there is only one issue, and the intent of the jury is manifest, the court will, in case of a mistake by them, correct their verdict by making it conform to their finding and give

judgment upon it accordingly, as by reducing a finding for the whole amount claimed to a specific sum which the court had instructed them they could not exceed.

Where the jury, not following the instructions of the court, found a less sum than was proper in the case, it was held not to be error for the court to increase such amount by applying the correct rule of damages. Schweitzer v. Connor, 57 Wis. 177.

But see Rafferty v. Missouri Pac. R. Co., 15 Mo. App. 559, where it was held that a verdict in disregard of the court's instruction would not support a judgment. In this case the statute fixed the damages at \$5,000, and the verdict was for \$2,500, and the judgment was arrested.

1. Jones v. Ford, 60 Tex. 127.

In an action on a note stipulating for an attorney's fee, where the verdict is in favor of the plaintiff for the principal and interest, but does not include the attorney's fee, the court may add such attorney's fee, because the verdict necessarily found the facts entitling the plaintiff to recover such fee. Hardy v. Hohl, 11 Wash. 1. See also Lake v. Tyree, 90 Va. 719.

2. Miner v. Booz, 6 Kulp (Pa.) 373.

3. American Furniture Co. v. Batesville, 139 Ind. 77.

Illustrations of Immaterial Surplusage.—A judgment that the plaintiff recover of the defendant a certain sum, "being the amount of her paraphernal property received by him and in his possession," is sufficiently responsive to a verdict for the same sum, "the value of paraphernal property." De Young v. De Young, 9 La. Ann. 545.

Where a person is found guilty of unlawful detainer, and judgment is entered for forcible and unlawful detainer, the word "forcible" is surplusage and not error. Payne v. Martin, 1 Stew. (Ala.) 407.

4. Blakeley v. El Paso Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W.

facts admitted therein may be considered in aid of the verdict in order to support the judgment.¹

The Evidence, however, cannot be considered in aid of the verdict,² and the court cannot render a judgment on an issue not determined by the verdict, no matter how clear and undisputed the evidence may be.³

(3) *In Whose Favor*. — The judgment must be rendered in favor of the party indicated by the verdict, provided his pleadings are sufficient to sustain it.⁴ Accordingly, a judgment must

Rep. 292; *Brient v. Bruce*, 5 Tex. Civ. App. 580.

A verdict must always be read in the light of the pleadings, and when it refers to documents annexed to it they must be regarded as incorporated in it; and if not annexed, the verdict may be aided by the judge's notes, where they will suffice for that purpose. *Keeler v. Robertson*, 27 Mich. 116.

1. Admissions in Pleadings May Be Considered. — *Carr v. Huffman*, 1 Kan. App. 713; *Hoefling v. Dobbin*, (Tex. Civ. App. 1897) 40 S. W. Rep. 58; *Blakeley v. El Paso Bldg., etc., Assoc.*, Tex. Civ. App. 1894) 26 S. W. Rep. 292.

The omission of the jury to find by their verdict the amount due, when the question is not in controversy, does not deprive the prevailing party of his right to a judgment for the sum admitted to be due by the pleadings. *Betts v. Butler*, 1 Idaho 185.

Where a cause is tried before the court, the plaintiff is entitled to judgment on motion where all the special findings of facts are in his favor, and when taken in connection with an admitted fact they entitle him to recover. *Carr v. Huffman*, 1 Kan. App. 713.

Oral Admissions at Trial. — In *Handel v. Elliott*, 60 Tex. 145, it was said that resort would be had only to the verdict and to admissions contained in the pleadings in order to support a judgment. It was therefore held that a judgment declaring a lien could not be supported where both the verdict and the pleadings of the party against whom it was adjudged were silent as to the lien, although a recital in the judgment stated that the party orally admitted the lien after the charge to the jury and before their retirement to the jury room.

The Amount of a Judgment may, it seems, be varied from the amount of the verdict, because of admissions in pleadings, on motion. *Meredith v. Lackey*, 14 Ind. 529.

2. *Brient v. Bruce*, 5 Tex. Civ. App. 580; *Tripis v. Rosborough*, (Tex. Civ. App. 1893) 23 S. W. Rep. 231; *Crosson v. Dwyer*, 9 Tex. Civ. App. 482; *Kuhlman v. Medlinka*, 29 Tex. 385; *Clairborne v. Tanner*, 18 Tex. 68; *Blakeley v. El Paso Bldg., etc., Assoc.*, (Tex. Civ. App. 1894) 26 S. W. Rep. 292; *Akin v. Jefferson*, 65 Tex. 137; *Texas Brewing Co. v. Meyer*, (Tex. Civ. App. 1896) 38 S. W. Rep. 263; *Mason First Nat. Bank v. Vander Stucken*, (Tex. Civ. App. 1896) 37 S. W. Rep. 170.

Oral admissions at the trial cannot be considered. *Handel v. Elliott*, 60 Tex. 145.

Contrary Intimations. — The court below, in giving judgment on a special verdict, may, to a certain extent, supply its defects from the evidence. *Desdunes v. Miller*, 2 Martin N. S. (La.) 53.

In determining, for the purpose of judgment, the consistency of the general verdict with the special finding, the trial court may be aided by its knowledge of the facts as developed in the trial. More than a mere comparison of the language of the verdict and findings is required. *Gilbert v. American Ins. Co.*, 30 Mich. 400.

Reference to Documents. — When the jury's special findings refer directly to documents they can be understood only by comparing them with the documents, and where such reference is made, and a court is called upon to apply the verdict, it must be treated as embodying such documents by reference. *Gilbert v. American Ins. Co.*, 30 Mich. 400; *Keeler v. Robertson*, 27 Mich. 116.

3. *Mason First Nat. Bank v. Vander Stucken*, (Tex. Civ. App. 1896) 37 S. W. Rep. 170; *Fairbank v. Cincinnati, etc., R. Co.*, 66 Fed. Rep. 471.

4. *Smith v. State*, 140 Ind. 343; *Elliott v. Public Grain, etc., Exchange*, (N. H. 1892) 27 Atl. Rep. 172; *Cummings v. Hoffman*, 113 N. Car. 267; *Probate*

be for the plaintiff upon a finding in his favor,¹ and for the defendant when the verdict determines any one good plea in bar in his favor.² Where the finding is against all the defendants the judgment must be entered against all.³

(4) *Amount* — (a) *In General*. — A judgment must be rendered for the amount indicated by the verdict.⁴ Therefore, where the judgment is entered for an amount greater than the verdict it is erroneous and will be reversed.⁵ So, also, a court has no

Ct. v. Sprague, 3 R. I. 205; Todd v. Munson, 53 Conn. 591.

Unless the pleadings confess facts entitling the other party to a judgment, the judgment must be entered for the party indicated by a general verdict. Manning v. Orleans, 42 Neb. 712.

A plaintiff is entitled to a judgment upon a verdict in his favor unless the declaration is radically defective in substance. Harley v. Lebanon Mut. Ins. Co., 120 Pa. St. 182, 21 W. N. C. (Pa.) 403.

1. Medler v. Hiatt, 14 Ind. 405; Person v. Barlow, 35 Miss. 174; Fields v. Hurst, 20 S. Car. 298; John A. Tolman Co. v. Savage, 5 S. Dak. 496; Hardy v. De Leon, 5 Tex. 211.

2. State v. Brantley, 27 Ala. 44; Pejepsco v. Nichols, 10 Me. 256; Gordon v. Downey, 1 Gill (Md.) 41; Coleman v. Grubb, 23 Pa. St. 393; Newlin v. North America Ins. Co., 20 Pa. St. 312.

3. Boys v. Shawhan, 88 Cal. 111; Kellogg v. Gilman, 3 N. Dak. 538. But see St. Louis Coffin Co. v. Rubelman, 15 Mo. App. 280, wherein it was held that the court may enter judgment against R. on a verdict against R. & Co., where R. and another are copartners as R. & Co., and R. alone is summoned and answers as garnishee, and where no effects are attached except those in his hands.

4. Hawker v. Baltimore, etc., R. Co., 15 W. Va. 628.

The court is not authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury. *Per* Justice Gray in Kennon v. Gilmer, 131 U. S. 29. But an admission in the pleadings may perhaps justify a judgment for an amount different from the verdict. Meredith v. Lackey, 14 Ind. 529.

Illustrations.—Where a jury returned a verdict for the plaintiff for \$51.60, subject to an offset of \$26.80 if said

offset had not already been paid, but if it had been paid then for \$51.60 without offset, it was proper to render the judgment for \$51.60 and to reject the balance as surplusage. Hawkins v. House, 65 N. Car. 615.

If the jury, in an action of debt on a single bill, find nominal damages, the clerk should enter the judgment for the principal debt, with interest from the time it became due, and the damages. Taul v. Moore, Hard. (Ky.) 96.

5. Reid v. Dunklin, 5 Ala. 205; National Horse Importing Co. v. Novak, 95 Iowa 596; Haldane v. Arcadia, 70 Iowa 462; Buck v. Little, 24 Miss. 463; Tinnen v. Matthews, Dall. (Tex.) 491.

Reversing and Rendering. — The judgment should follow the verdict, and where the judgment was for a larger amount than the verdict this has been held an error for which it would be reversed and such judgment rendered in the Supreme Court as should have been rendered in the court below. European-American Colonization Soc. v. Reed, 25 Tex. Supp. 353.

Special Verdict. — In Mitchell v. Geisendorff, 44 Ind. 358, it was held that the judgment on a special verdict should not exceed the amount of damages found by the jury. See also Reid v. Dunklin, 5 Ala. 205.

In McCartney v. Hubbell, 52 Wis. 360, it was held that a judgment for a larger amount than that indicated by a special verdict is erroneous, unless the right of the party to the increase is clear as a matter of law.

Costs. — A judgment may include costs although not given by the verdict, where it appears from the record that costs follow as a legal incident. Levan v. Sternfeld, 55 N. J. L. 41.

In Blackwell v. Landreth, 90 Va. 748, it was held that where the verdict is for five dollars and costs, the court has no power to render a judgment for five dollars only, without costs, on the ground that the verdict is too small to

authority to render judgment for an amount less than the verdict.¹

A Small Variance in Amount between the verdict and the judgment may, however, be disregarded as immaterial, under the maxim *de minimis non curat lex*.²

Excessive Verdict. — It is error to enter a judgment on an excessive verdict.³

(b) **Increasing Damages Super Visum Vulneris.** — At early common law the jury were practically the arbitrary judges of the amount of damages, cases of mayhem constituting the single exception. In such cases the court might, upon inspection of the wound — *super visum vulneris* — increase the amount of damages awarded.⁴ This practice is obsolete in the United States, if it ever existed.⁵

carry costs. If the verdict is considered irregular the only power of the court is to set it aside and grant a new trial.

1. Judgment Less than Verdict. — *Brown v. McLeish*, 71 Iowa 381.

A judgment for nominal damages does not conform to a verdict for substantial damages. *Maxwell v. Cisco First Nat. Bank*, (Tex. Civ. App. 1893) 23 S. W. Rep. 342.

2. Gould v. Bridgers, 3 Martin N. S. (La.) 692; *Lieberman v. Hill*, 1 Tex. App. Civ. Cas., § 27; *Rankin v. Filburn*, 1 Tex. App. Civ. Cas., § 798.

In *Brown v. Montgomery*, (Tex. Civ. App. 1895) 31 S. W. Rep. 1079, a judgment exceeding the verdict by only ten cents was sustained.

3. Dorsett v. Crew, 1 Colo. 18.

Remittitur. — Where the verdict is excessive, the court may very properly require the entry of a remittitur of the excess before entering judgment. *Libby v. Scherman*, 50 Ill. App. 123, affirmed in 146 Ill. 540. See also article REMITTITUR.

Where the Verdict Is Greater than the Amount Alleged, it has been held that judgment should be entered for the latter sum. *Bush v. Dyke*, 6 T. B. Mon. (Ky.) 142; *Baltzell v. Hickman*, 4 Litt. (Ky.) 265.

If the verdict exceeds the penalty of a bond, the court may enter judgment for the proper amount. *Cohea v. State*, 34 Miss. 179. See also *Simmons v. Garrett*, 1 Kan. 511.

4. Sedgwick on Damages, § 349, citing *Hawkins v. Sciety*, Palm. 314; *Staneley's Case*, Hetl. 93, Litt. 150; *Delves v. Wyer*, Brownl. 204.

5. In McCoy v. Lemon, 11 Rich. L. (S. Car.) 165, the action was trespass for an assault, battery, and mayhem. The jury awarded the plaintiff thirty dollars for the loss of one eye and an

injury to one thumb. The plaintiff moved the court to increase the damages, invoking the old common-law cases as authority for the motion. The motion was denied, and this decision was sustained on appeal. The court said: "The battery of which the plaintiff complained had occasioned the loss of an eye, and the jury returned a verdict for thirty dollars. This appeal rests on the refusal of the judge on circuit to increase the damages, after verdict, on motion of plaintiff's counsel, *super visum vulneris*. This court has been urged by a very learned and ingenious argument to administer a remedy never, so far as we are informed, adopted by the courts in this country. Not a single case has been found in any book of American reports in support of the present motion, notwithstanding the great research displayed by counsel. Neither has there been for a period of more than a century any recognition of the rule by any adjudged case in England to which we have been able to procure access. It is true, modern text-writers, in brief paragraphs, allude to this peculiarity as appertaining to the action of mayhem; and Mr. Christian, in a note, 3 Black. Com. 121, states the point fully, that 'a remarkable property peculiar to the action for a mayhem is deemed to exist, viz., that the court in which the action is brought have a discretionary power to increase the damages, if they think the jury at the trial have not been sufficiently liberal to the plaintiff; but this must be done *super visum vulneris*, and upon proof that it is the same wound concerning which evidence was given to the jury.' The same principle is stated in Bul. N. P. 21 and Steph. N. P. 225, each deriving authority from the same sources.

b. NON OBSTANTE VEREDICTO — (1) *In General* — (a) *Definition*. — In its broadest sense a judgment *non obstante veredicto* is a judgment given for one party notwithstanding the finding of a verdict in favor of the other party.¹

(b) *When and for Whom Rendered* — *aa. At Common Law* — *When Rendered*. — At common law a judgment *non obstante veredicto* could be entered only when the plea confessed the cause of action and set up matters in avoidance which were insufficient, although found true, to constitute either a defense or a bar to the action.²

* * * In the last case at Lent Assizes, in 1742, and referred to by Christian, *Brown v. Seymour*, 1 Wils. 5, the application was refused, though the judge said there was no doubt of the rule. In the case of *Cook v. Beal*, 1 Raym. 176, I think in 1696, the court resolved, '1st, that if a wound be apparent, though not a mayhem, an eye injured, not out, but wound visible;' 2d, 'for loss of nose, though not a mayhem;' or, 3d, 'if a grievous wound,' the court may increase the damages. In *Smallpiece v. Bockingham*, referred to in Buller N. P. 21a, it seems witnesses and jurymen were examined, who all said that no evidence was given that any blow had been inflicted upon the eye, or that the party had lost an eye by the battery; and for this reason the court would not increase the damages, 'for new evidence ought not to be given, for this is a censure on the first verdict and a correction of it.' * * * Damages, strictly speaking, are a compensation given by the jury for an injury or wrong sustained by the complaining party before action brought. Co. Litt. 257. The *quantum* of damages, being in most cases intimately blended with questions of fact, must have been generally left with the jury. Sedg. Dam. 21. But, says the same author, the limits of their power were not at first as clearly defined as they have become in later days. In this course of development we find, in Roll. Abr. 11, p. 703, it said, 'the jury are chancellors, and they can give such damages as the case requires in equity,' whilst again it is said, 'the old books are full of cases where, on judgment by default, and even on demurrer, the court themselves fix the amount of damages, and the remains of this is seen in the power exercised by the English courts in cases of mayhem.' * * * Yet, looking as we must to the long sleep into which this practice, at best not very clearly de-

fined, has fallen in the mother country, and still more to the fact that it has never been transplanted in our soil, and is now wholly incongruous with our usages and institutions, this court has not seen its way to the conclusion urged."

1. Gould's Plead., c. 10, § 46, p. 482.

A More Narrow Definition is usually given because, as will be seen in a succeeding section, a judgment *non obstante veredicto* could only be rendered in favor of the plaintiff and upon one particular state of the pleadings. See *infra*, III. 10. *b. (1) (b) aa. At Common Law*.

Thus, in *Williams v. Anderson*, 9 Minn. 50, a judgment *non obstante veredicto* was defined as a judgment entered by order of the court for the plaintiff in an action at law notwithstanding a verdict for the defendant. This is the usual definition. See 2 Tidd's Pr. 922; Rap. & L. Law Dict., tit. *Non Obstante Veredicto*.

Interlocutory Judgments. — Where the damages are unliquidated, a judgment *non obstante veredicto* is interlocutory, and a final judgment cannot be given until the damages to be recovered are assessed. *Davidson v. Myers*, 24 Md. 538.

2. *Alabama*. — *Chapman v. Holding*, 60 Ala. 522.

Connecticut. — *Church v. Tomlinson*, 2 Conn. 134, note; *Hill v. Blackstone*, 2 Conn. 250; *Fitch v. Scot*, 1 Root (Conn.) 351.

Illinois. — *Gauch v. Harrison*, 12 Ill. App. 457.

Indiana. — *Berry v. Borden*, 7 Blackf. (Ind.) 384; *Pomeroy v. Burnett*, 8 Blackf. (Ind.) 142; *Martindale v. Price*, 14 Ind. 115; *Snyder v. Robinson*, 35 Ind. 311.

Iowa. — *Jones v. Fennimore*, 1 Greene (Iowa) 134.

Massachusetts. — *Dewey v. Humphrey*, 5 Pick. (Mass.) 187.

Minnesota. — *Lough v. Bragg*, 18

In such a case the plaintiff was entitled to a judgment in his favor notwithstanding a verdict for the defendant.¹

For Whom Rendered. — As a judgment *non obstante veredicto* could only be granted at common law under the circumstances here stated, it follows that such a judgment could only be entered upon the application of the plaintiff,² and a motion by a defendant for a judgment *non obstante veredicto* was never allowed, no

Minn. 121; Lough v. Thornton, 17 Minn. 253.

Mississippi. — State v. Commercial Bank, 6 Smed. & M. (Miss.) 218.

Nebraska. — Oades v. Oades, 6 Neb. 304.

New Hampshire. — Roberts v. Dame, 11 N. H. 226.

New York. — Bellows v. Shannon, 2 Hill (N. Y.) 86; Burdick v. Green, 18 Johns. (N. Y.) 14.

North Carolina. — Virgin Cotton Mills v. Abernathy, 115 N. Car. 402; Walker v. Scott, 106 N. Car. 56; Riddle v. Germanton, 117 N. Car. 387; Ward v. Phillips, 89 N. Car. 215; Moye v. Petway, 76 N. Car. 327.

Ohio. — Sullenberger v. Gest 14 Ohio 204.

Pennsylvania. — Morris v. Ziegler, 71 Pa. St. 450; Glading v. Frick, 88 Pa. St. 460.

Wisconsin. — Sheehy v. Duffy, 89 Wis. 11.

England. — Pim v. Grazebrook, 2 C. B. 429, 52 E. C. L. 429, 3 D. & L. 454; Atkinson v. Davies, 11 M. & W. 236, 2 Dow. N. S. 778, 12 L. J. Exch. 169; Benson v. Duncan, 3 Exch. 644; Cook v. Pearce, 8 Q. B. 1044, 55 E. C. L. 1044; Mardall v. Thellusqn, 21 L. J. Q. B. 410, 17 Jur. 389.

Confession Essential. — If matter is pleaded or replied in due form which, if found true by the jury, constitutes neither a bar nor an answer, there should be judgment *non obstante veredicto* in favor of the party whose plea is confessed and not avoided by the fact found by the verdict. Sullenberger v. Gest, 14 Ohio 204.

The practice of granting judgment *non obstante veredicto* is very restricted and is confined to cases where a plea confesses a cause of action and the matter relied upon in avoidance is insufficient. Moye v. Petway, 76 N. Car. 327.

In Pim v. Grazebrook, 2 C. B. 429, 52 E. C. L. 429, citing Gwynne v. Burnell, 6 Bing. N. Cas. 453, 37 E. C. L. 451, and distinguishing Hitchcock v.

Humfrey, 6 Scott N. R. 540, it was held that the plaintiff is never entitled to a judgment *non obstante veredicto* upon the ground of the insufficiency of the defendant's pleading (where such plea or rejoinder is found for the defendant, and against the plaintiff) unless the plea or rejoinder implies an admission of the plaintiff's title, which a traverse by the defendant never does.

Under the Relaxed Rule which now exists in many jurisdictions, by statute or decision, this confession or admission of the adversary's title is no longer essential. See the succeeding section.

1. See cases cited in the preceding note.

Illustration. — A plea of a tender of rent after the day of its falling due is insufficient; and after a verdict on such plea in favor of the defendant, the plaintiff is entitled to judgment *non obstante veredicto*. Dewey v. Humphrey, 5 Pick. (Mass.) 187.

2. **Rendered Only for Plaintiff** — Iowa. — Bradshaw v. Hedge, 10 Iowa 402.

Minnesota. — Williams v. Anderson, 9 Minn. 50.

New York. — Bellows v. Shannon, 2 Hill (N. Y.) 86; Schermerhorn v. Schermerhorn, 5 Wend. (N. Y.) 513; Smith v. Smith, 4 Wend. (N. Y.) 468.

Ohio. — Buckingham v. McCracken, 2 Ohio St. 287.

Rhode Island. — Burnham v. New York, etc., R. Co., 17 R. I. 544; Tillinghast v. McLeod, 17 R. I. 208.

South Carolina. — Bowdre v. Hampton, 6 Rich. (S. Car.) 208.

Vermont. — Stoughton v. Mott, 15 Vt. 169.

United States. — German Ins. Co. v. Frederick, 58 Fed. Rep. 144, 19 U. S. App. 24, where the court said that the common-law rule here stated must be applied unless relaxed by statute or decisions. As will be seen in succeeding sections of this article, the rule has been very generally so relaxed.

Compare Brown v. Searle, 104 Ind. 218; Martindale v. Price, 14 Ind. 118;

matter how defective the plaintiff's pleadings might be.¹ Where the plaintiff's pleadings would not support a judgment upon a verdict in his favor, the defendant's sole remedy was by motion in arrest of judgment.²

bb. RELAXATION OF RULE. — It is apparent from the foregoing statement of the rule that a judgment *non obstante veredicto* at common law was merely one species of a judgment on the pleadings.³ Accordingly, it was an easy step to relax the rule and hold that a judgment might be rendered on the pleadings for either party entitled to it thereby, irrespective of the verdict,⁴ and this is now the rule in many jurisdictions.⁵ Such a judgment can be rendered only when the pleadings entitle the party against whom the verdict is rendered to a judgment.⁶

Farmers', etc., Bank *v.* Lefever, 74 Pa. St. 49, 14 Am. L. Rev. 499.

1. *Never Rendered for Defendant* — Iowa. — Bradshaw *v.* Hedge, 10 Iowa 402.

Nevada. — Brown *v.* Lillie, 6 Nev. 177.

New Hampshire. — Smith *v.* Powers, 15 N. H. 546.

New York. — Smith *v.* Smith, 4 Wend. (N. Y.) 468; Schermerhorn *v.* Schermerhorn, 5 Wend. (N. Y.) 513; Bellows *v.* Shannon, 2 Hill (N. Y.) 86; Phoenix *v.* Stagg, 1 Hall (N. Y.) 635.

Rhode Island. — Burnham *v.* New York, etc., R. Co., 17 R. I. 544.

Vermont. — Bradley Fertilizer Co. *v.* Caswell, 65 Vt. 231.

Wisconsin. — Sheehy *v.* Duffy, 89 Wis. 6.

United States. — German Ins. Co. *v.* Frederick, 58 Fed. Rep. 144, 19 U. S. App. 24.

There is an able and interesting article in 14 Am. L. Rev. 494, wherein the right of a defendant to a judgment *non obstante veredicto* is considered, and upon a review of all the common-law cases the conclusion is reached that there is nothing in reason or authority to prevent such a judgment.

2. Smith *v.* Powers, 15 N. H. 546; Schermerhorn *v.* Schermerhorn, 5 Wend. (N. Y.) 513; Bellows *v.* Shannon, 2 Hill (N. Y.) 86; Buckingham *v.* McCracken, 2 Ohio St. 287; Bowdre *v.* Hampton, 6 Rich. (S. Car.) 208.

3. Marion St. R. Co. *v.* Carr, 10 Ind. App. 200; Wright *v.* Williams, 83 Ind. 421.

"In fact, the judgment *non obstante veredicto* appears to be only one species of judgment by confession, where the plea confesses a right of action, but

sets up an avoidance bad in substance, which cannot hold good as to a material traverse, whether of the whole, or a part only, of the plea." Pim *v.* Grazebrook, 2 C. B. 429, 52 E. C. L. 429. See generally *infra*, XII. *Judgments on Pleadings*.

4. Fitch *v.* Scot, 1 Root (Conn.) 352; Lindsey *v.* Rutherford, 17 B. Mon. (Ky.) 249; Patapsco Guano Co. *v.* Bryan, 118 N. Car. 576; Tootle *v.* Clifton, 22 Ohio St. 247. Compare Lewis *v.* Foard, 112 N. Car. 402, holding that where an issue raised by the answer is submitted to a jury without objection the plaintiff's right to move for a judgment on the pleadings is waived, and he cannot therefore move for judgment *non obstante veredicto*. See also Collier *v.* Jencks, (R. I. 1896) 34 Atl. Rep. 998, holding that the plaintiff waived his right to move for judgment *non obstante veredicto* on the ground that there was no plea filed by failure to object to evidence of facts constituting a defense.

5. See generally cases cited in the notes to this section, and *infra*, XII. *Judgments on Pleadings*.

6. Grant *v.* Alabama Gold L. Ins. Co., 76 Ga. 575; Louisville, etc., R. Co. *v.* Coyne, (Ky. 1895) 30 S. W. Rep. 970; McFerran *v.* McFerran, 69 Ind. 29; Debord *v.* La Hue, 26 Ind. 212; Manning *v.* Orleans, 42 Neb. 712; Gibbon *v.* American Bldg., etc., Assoc., 43 Neb. 132; Willoughby *v.* Willoughby, 6 Q. B. 722, 51 E. C. L. 722; Gregory *v.* Brunswick, 3 C. B. 481, 54 E. C. L. 481. See also, *infra*, XII. *Judgments on Pleadings*.

Where a declaration is bad and the defendant pleads bad pleas thereto, a plaintiff cannot have judgment *non obstante veredicto*. Leigh *v.* Lillie, 30 L.

When Rendered for Plaintiff. — The plaintiff is entitled to a judgment *non obstante veredicto* where the issue determined for the defendant is immaterial,¹ provided the case is not one calling for a repleader,² and where the plea or answer sets up facts insufficient in law to constitute a defense.³ Where there is a good plea or answer filed, the plaintiff is not entitled to a judgment *non obstante veredicto*.⁴

When Rendered for Defendant. — The defendant is entitled to a judgment *non obstante veredicto* where the plaintiff's pleadings are insufficient to support a judgment in his favor, as where the declaration states no cause of action,⁵ or where the plaintiff fails

J. Exch. 25. So a failure to reply to a bad answer does not entitle the defendant to judgment. *Debord v. La Hue*, 26 Ind. 212.

1. *Hyer v. Vaughn*, 18 Fla. 647; *Stucker v. Miller*, 5 Litt. (Ky.) 235; *Gould v. Ray*, 13 Wend. (N. Y.) 633; *Tootle v. Clifton*, 22 Ohio St. 247.

Where there is a verdict for the plaintiff on the general issue, he is entitled to judgment *non obstante veredicto* though immaterial issues have been found in favor of the defendant. *Lewis v. Tams*, 4 Phila. (Pa.) 276.

2. See *infra*, III. 10. b. (1)(c) *Repleader Distinguished*. See also article REPLEADER.

3. *McCloskey v. Indianapolis Manufacturers', etc., Union*, 67 Ind. 86; *Rochester v. Whitehouse*, 15 N. H. 473; *Kittredge v. Emerson*, 15 N. H. 227; *Friendly v. Lee*, 20 Oregon 202; *Postmaster Gen. v. Reeder*, 4 Wash. (U. S.) 678; *Cook v. Pearce*, 8 Q. B. 1044, 55 E. C. L. 1044.

"We are of the opinion that the case is not one to which a motion for judgment *non obstante veredicto* is applicable. As generally held by the courts, such a motion will be entertained only by the plaintiff when the verdict of the jury is for the defendant upon facts that present no defense." *Templeman v. Gibbs*, (Tex. Civ. App. 1894) 25 S. W. Rep. 737 [citing *Brown v. Rentfro*, 57 Tex. 332; *Hays v. Stone*, 36 Tex. 186; *Tillinghast v. McLeod*, 17 R. I. 208; *Smith v. Smith*, 4 Wend. (N. Y.) 470].

4. *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 213; *Donaldson v. Dunn*, 87 Ind. 343; *Musselman v. Wise*, 84 Ind. 248; *Crist v. Jacoby*, 10 Ind. App. 688; *Huff v. Cole*, 45 Ind. 300; *Cox v. Vickers*, 35 Ind. 27; *Conrad v. Commercial Mut. Ins. Co.*, 54 Pa. St. 373.

Waiver of Right. — In *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep.

213, it was held that where a demurrer to a plea in bar is overruled and the plaintiff waives error by pleading over, a motion for judgment *non obstante veredicto* should be overruled.

Where a General Denial Is Pleaded, it is not error to refuse to render judgment on the pleadings *non obstante veredicto*. *Cox v. Vickers*, 35 Ind. 27.

Where There Is a Plea of Payment on the record, it is error to enter judgment *non obstante veredicto* on a general verdict for the defendant. *Conrad v. Commercial Mut. Ins. Co.*, 54 Pa. St. 373.

If One of Several Paragraphs of an Answer Be Good, a motion by the plaintiff for judgment *non obstante veredicto* must be overruled. *Musselman v. Wise*, 84 Ind. 248; *Huff v. Cole*, 45 Ind. 300.

5. *Hackett v. Hewitt*, 57 Vt. 442; *Boyles v. Overby*, 11 Gratt. (Va.) 202; *Canadian Pac. R. Co. v. Robinson*, 19 Can. Sup. Ct. Rep. 292.

Where it is clear, from the ruling of the court upon a motion for a new trial, that the claimant can in no event be entitled to damages for the cause for which he claims them, the court will order judgment, notwithstanding the verdict, to be entered up for the respondents. *Ballou v. Harris*, 5 R. I. 419.

There may be a judgment for the defendant notwithstanding the verdict upon an immaterial issue, if the case will otherwise warrant it. *Tyler v. Flanders*, 58 N. H. 371.

Where a Cause Has Been Tried upon Several Issues, but some of them are immaterial, and a verdict is rendered for the plaintiff upon the whole case upon the merits, a judgment *non obstante veredicto* cannot be given for the defendant upon the ground that some of the immaterial issues should have been found in favor of the defendant. If

to reply to a good plea of new matter.¹

Rule under Statutes. — In many states the right to render a judgment for either party appearing to be entitled thereto upon the pleadings, irrespective of the verdict, is expressly declared by statute.²

cc. IN EQUITY. — The verdict of a jury upon an issue of fact directed out of chancery has not the dignity of a like verdict in

the verdict had been in favor of the defendant upon such immaterial issues, still the plaintiff would have been entitled to judgment *non obstante*. *Hyer v. Vaughn*, 18 Fla. 647.

Verdict for Substantial Instead of Nominal Damages. — When a verdict is rendered for substantial instead of nominal damages, which only should be recovered, the court may not sustain a motion for judgment for the defendant notwithstanding the verdict. *Carl v. Granger Coal Co.*, 69 Iowa 519.

1. *Benicia Agricultural Works v. Creighton*, 21 Oregon 495. Compare *Debord v. La Hue*, 26 Ind. 212.

Where Contributory Negligence Is Pleaded in an action founded upon the defendant's negligence, a failure to reply thereto will entitle the defendant to a judgment *non obstante veredicto*. *Needham v. Webb*, 20 Ind. 213; *Board of Trustees v. Mayer*, 10 Ind. 400; *Louisville, etc., R. Co. v. Schweitzer*, 14 Ky. L. Rep. 855; *Louisville, etc., R. Co. v. Mayfield*, 18 Ky. L. Rep. 224, (Ky. 1896) 35 S. W. Rep. 924; *Gore v. Illinois Cent. R. Co.*, (Ky. 1895) 32 S. W. Rep. 754.

2. *Indiana.* — *Martindale v. Price*, 14 Ind. 115; *Brown v. Searle*, 104 Ind. 218; *Freitag v. Burke*, 45 Ind. 38; *Dorman v. State*, 56 Ind. 454; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *McCloskey v. Indianapolis Manufacturers, etc., Union*, 67 Ind. 86.

Iowa. — *Singer Mfg. Co. v. Billings*, 39 Iowa 347; *Sheriff v. Hull*, 37 Iowa 174; *Carl v. Granger Coal Co.*, 69 Iowa 522.

Kentucky. — *Gore v. Illinois Cent. R. Co.*, 17 Ky. L. Rep. 799, (Ky. 1895) 32 S. W. Rep. 754.

Minnesota. — *Hemstad v. Hall*, 64 Minn. 136; *Kernan v. St. Paul City R. Co.*, 64 Minn. 312.

Nebraska. — *Scofield v. Clark*, 48 Neb. 711; *Manning v. Orleans*, 42 Neb. 712; *Madden v. Lancaster County*, 27 U. S. App. 528.

Ohio. — *Humboldt Min. Co. v. Variety Iron Works Co.*, 22 U. S.

App. 334, 47 Am. & Eng. Corp. Cas. 242, 62 Fed. Rep. 356.

Oregon. — *Benicia Agricultural Works v. Creighton*, 21 Oregon 495.

Under Iowa Code, § 2859, which provides that judgment may be rendered in favor of a party appearing by the pleadings to be entitled thereto although a verdict has been found against him, where the defendant fails to answer judgment should be rendered for the plaintiff notwithstanding evidence on the part of the defendant, disproving the claim, had been erroneously received. *Singer Mfg. Co. v. Billings*, 39 Iowa 347.

So where the defendant pleads a tender, judgment must be rendered in the plaintiff's favor for the amount of the tender notwithstanding a verdict for the defendant. *Sheriff v. Hull*, 37 Iowa 174. See generally article TENDER.

"As the jury found a verdict in favor of the plaintiff for substantial damages, did the court err in rendering judgment for the defendant? We think this question must be answered in the affirmative, for the reason that, under the statute, it is only when the petition fails to show that the plaintiff is entitled to any relief that judgment on the finding of a jury in his favor can be arrested. Code, §§ 2650, 2842, 2843, 2859. When the verdict is excessive, a motion for a new trial is the only remedy." *Carl v. Granger Coal Co.*, 69 Iowa 522.

Under Nebraska Code Civ. Pro., § 440, a judgment *non obstante veredicto* can be rendered only when the pleadings of the party in favor of whom the verdict was rendered confess facts entitling the other party to judgment. *Manning v. Orleans*, 42 Neb. 712, followed by *Gibbon v. American Bldg., etc., Assoc.*, 43 Neb. 132. This is substantially the rule at common law. See *supra*, III. 10. b. (1) (b) aa. *At Common Law*.

Under this statute a judgment should be rendered for the defendant *non ob-*

an action at law. As a general rule, it is advisory only, and if the court comes to a contrary conclusion upon the facts, a decree may be entered in disregard of the verdict.¹

dd. ON RECORD. — A judgment *non obstante veredicto* must be based solely upon matters appearing upon the record.² It cannot be granted upon affidavit.³

ee. ON EVIDENCE. — Since a judgment *non obstante veredicto* must be granted, if at all, upon the record, it follows that the evidence cannot be looked to in determining a motion for such judgment.⁴ Such a judgment cannot be rendered merely because the verdict is against the weight of the evidence,⁵ although there are intimations that such a judgment may be moved for upon undisputed evidence or where the verdict is not sustained by any evidence whatever.⁶

stante veredicto where the pleadings of the plaintiff confess facts entitling the defendant to judgment. *Scofield v. Clark*, 48 Neb. 711.

In Ohio, Rev. Stat., § 5328, providing that when, upon the statements in the pleadings, one party is entitled to judgment in his favor, the judgment shall be rendered by the court notwithstanding a verdict has been found against him, does not make the rendition of a verdict essential to a judgment on the pleadings. *Humboldt Min. Co. v. Variety Iron Works Co.*, 22 U. S. App. 334, 47 Am. & Eng. Corp. Cas. 242, 62 Fed. Rep.'356.

Motion for Judgment: — As to motions for judgments *non obstante veredicto*, under these and similar statutes, see *infra*, III. 10. b. (1) (d) *Motion for Judgment*.

1. See article ISSUES TO THE JURY, *ante*, p. 599.

2. *Smith v. Smith*, 2 Wend. (N. Y.) 624; *Lewis v. Foard*, 112 N. Car. 402; *Walker v. Scott*, 106 N. Car. 56; *Snow v. Conant*, 8 Vt. 309; *Stoughton v. Mott*, 15 Vt. 162; *Stearn v. Clifford*, 62 Vt. 92; *Brown v. Pollard*, 89 Va. 696.

A rule for judgment *non obstante veredicto* ought to be drawn up "upon reading the record." *Beaty v. Warren*, 4 M. & G. 158, 43 E. C. L. 89, 4 Scott N. R. 725.

The court will give judgment for the plaintiff notwithstanding the verdict is for the defendant, if upon the whole record it appears that the right of the case is with the plaintiff. *Fitch v. Scot*, 1 Root (Conn.) 351.

3. "On a motion of this kind, the *nisi prius* record and *postea* must be produced, so that the court may be en-

abled to judge whether the party is entitled to his judgment notwithstanding the verdict. It is irregular to apply on affidavit." *Smith v. Smith*, 2 Wend. (N. Y.) 624.

4. *Templeman v. Gibbs*, (Tex. Civ. App. 1894) 25 S. W. Rep. 736.

"If admissions were made by the defendant in his testimony, as alleged, the plaintiff should have asked for instructions upon that aspect of the case. He did not do so, nor did he file any exceptions to the charge. We do not understand how he can get the benefit of an objection for an omission to charge by a motion *non obstante veredicto*. Indeed, that motion can only be made on the face of the pleadings." *Lewis v. Foard*, 112 N. Car. 402, *citing Walker v. Scott*, 106 N. Car. 56.

On Appeal. — In passing on a ruling on a motion for a judgment *non obstante*, the appellate court cannot look to the evidence to determine whether or not it sustains the general verdict. *Stevens v. Logansport*, 76 Ind. 498; *Pittsburgh, etc., R. Co. v. Martin*, 82 Ind. 476; *Shaffer v. Ryan*, 84 Ind. 140; *Cox v. Ratcliffe*, 105 Ind. 374; *Weller v. Bectell*, 2 Ind. App. 228; *British-American Assur. Co. v. Wilson*, 132 Ind. 278; *Evansville v. Thacher*, 2 Ind. App. 370; *Fort Wayne v. Patterson*, 3 Ind. App. 34; *Merchants', etc., Sav. Bank v. Frazee*, 9 Ind. App. 161.

5. *Manning v. Orleans*, 42 Neb. 712, construing Code Civ. Pro., § 440; *Conover v. Knight*, 91 Wis. 573; *Slivitski v. Wien*, 93 Wis. 460; *McFetridge v. American F. Ins. Co.*, 90 Wis. 142.

6. In *Murray v. Blackledge*, 71 N. Car. 492, it was held that where there was no evidence to support a finding,

(c) **Repleader Distinguished.** — A party is not entitled to a judgment *non obstante veredicto* in every case where the issue determined against him by the verdict is immaterial.¹ A plaintiff is entitled

the court might disregard or set it aside and render judgment *non obstante veredicto*. So in *Holland v. Kindregan*, 155 Pa. St. 156, it was held in an action of ejectment, where the verdict was for the plaintiff, that the evidence in support thereof was but a mere scintilla, and judgment was therefore entered for the defendants *non obstante veredicto*. In *Snow v. Conant*, 8 Vt. 309, the court said: "It may be further remarked that a motion of this kind is necessarily founded on the record alone; as when, according to English practice, the *postea* is sent from *nisi prius* to the court in banc. It can never depend on any state of evidence which is not disclosed by the record." In the later case of *Stearn v. Clifford*, 62 Vt. 92, the court said: "The motion for a judgment *non obstante*, 'on the undisputed evidence in the case,' was properly overruled. The 'undisputed evidence' did not appear of record, and that was a sufficient answer to the motion; for such a motion is based upon the record, and reaches nothing *dehors* it. *Snow v. Conant*, 8 Vt. 301. Whether the motion could be sustained if the evidence could and did appear of record, and showed a state of facts entitling the plaintiff to the remedy he seeks, as would seem to be inferable in *Snow v. Conant*, 8 Vt. 301, we do not intimate, as that question is not involved."

Limits of Doctrine. — In *Sheehy v. Duffy*, 83 Wis. 12, the limits of this doctrine in *Wisconsin* are well stated. The court said: "Without setting aside the verdict, the court gave judgment for the defendants on the ground that by the uncontradicted evidence they were entitled to it, having first made a finding amending the verdict as stated, to the effect that the contract was rescinded and abandoned by the parties and no new one was expressly made in its place, and therefore the defendants were entitled to compensation for services, both before and after the termination of the contract, as on a *quantum meruit*. It was error to thus amend the verdict. In *Schweickhart v. Stuewe*, 75 Wis. 160, it was announced that 'the utmost extent to which this court has gone in authorizing the trial courts to disregard the

special verdict rendered by a jury, when such verdict is wholly unsupported by the evidence, is to set aside such verdict, and then, in its discretion, and not as an absolute duty, to enter judgment in accordance with the undisputed evidence in the case, or to set aside the verdict entirely and grant a new trial.' And the previous cases on the subject were cited. There was, we think, evidence in support of the finding of the jury as made, and therefore the finding could not be amended by the court and a different one, in whole or in part, substituted in its stead. *Ohlweiler v. Lohmann*, 82 Wis. 203. The proper course was to grant a new trial; and where judgment of reversal is given on the ground of an erroneous amendment of a verdict in a material respect, it is the practice of this court to award a new trial, as the Circuit Court ought to have done, if the verdict was not in accordance with the merits, instead of amending the verdict. To sustain the course pursued in this case would be to place special verdicts in legal actions substantially on the footing of verdicts in equitable actions as on a feigned issue, and make them merely advisory." See also *Conover v. Knight*, 91 Wis. 573, holding that where there is any evidence in support of the verdict, a judgment *non obstante veredicto* cannot be rendered because of its insufficiency. See *infra*, III. 10. b. (2) *On Point Reserved*.

1. Repleader and Judgment Non Obstante Verdicto Compared and Distinguished. — "This brings us to the plaintiff's motion for judgment *non obstante veredicto*. That judgment is rendered where the defendant by his pleading confesses, without sufficiently avoiding the action. The distinction between a repleader and a judgment *non obstante veredicto* is accurately stated by Mr. Tidd. He says where the plea is good in form, though not in fact, or, in other words, if it contain a defective title or ground of defense, by which it appears to the court, upon the defendant's own showing, that in any way of putting it he can have no merits, and the issue joined thereupon be found for him, there, as the awarding of a repleader could not mend the

to judgment *non obstante veredicto* where the issue is immaterial or the plea bad only where a repleader is unnecessary to do justice between the parties.¹ A judgment *non obstante veredicto* is always upon the merits, and therefore is never rendered except where it is clear that the defense is without merits in whatever form pleaded.² Such a judgment will not be rendered where there is substantially a material issue or a good defense although

case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*; but where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there, for their own sake, they will award a repleader. A judgment therefore *non obstante veredicto* is always upon the merits, and never granted but in a very clear case; a repleader is upon the form and manner of pleading. 2 Tidd's Pr. 953. This distinction is adopted in 1 Chitty's Pl. 695 (ed. 1837). *Staple v. Haydon*, 1 Salk. 173, is a leading case on this subject. It is there said that where the defendant pleads an ill plea, but the matter, if well pleaded, might have amounted to a good bar or justification, judgment can never be given against the defendant as by confession; but where the matter, though never so well pleaded, could signify nothing, judgment may in such case be given as by confession. This case is also reported in 2 Ld. Raym. 922, where Holt, C. J., took this difference: that where the defendant confesses a trespass, and avoids it by such a matter as can never be made good by any sort of plea, there judgment shall be given upon the confession, without regard to such an immaterial issue. But where the matter of the justification is such as, if it were well pleaded, would be a good justification, there, though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff's action. *Staple v. Heydon*, 6 Mod. 1. Numerous cases in support and illustration of this doctrine have been collected and are cited by Mr. Tidd and Mr. Chitty at the pages already mentioned." *Bellows v. Shannon*, 2 Hill (N. Y.) 88. See also *Otis v. Hitchcock*, 6 Wend. (N. Y.) 433; *Hitchcock v. Haight*, 7 Ill. 610.

1. *Shreve v. Whittlesey*, 7 Mo. 473;

Goodburne v. Bowman, 9 Bing. 667, 23 E. C. L. 412.

Where there is a verdict for the defendant on a plea which is substantially bad in law, the court may on motion render judgment *non obstante veredicto*. *Hitchcock v. Haight*, 7 Ill. 604. But where the finding is decisive of the merits it cures the issue. *Rothschild v. Bruscke*, 131 Ill. 265.

2. *Illinois*.—*Aird v. Haynie*, 36 Ill. 174. *Minnesota*.—*Williams v. Anderson*, 9 Minn. 50; *Lough v. Thornton*, 17 Minn. 253.

New Hampshire.—*Kittredge v. Emerson*, 15 N. H. 227; *Rochester v. Whitehouse*, 15 N. H. 468.

New York.—*Macomb v. Wilber*, 16 Johns. (N. Y.) 227; *Otis v. Hitchcock*, 6 Wend. (N. Y.) 433; *Bellows v. Shannon*, 2 Hill (N. Y.) 86; *Schermerhorn v. Schermerhorn*, 5 Wend. (N. Y.) 513.

Oregon.—*Friendly v. Lee*, 20 Oregon 202.

Wisconsin.—*Sheehy v. Duffy*, 89 Wis. 11.

England.—*Pim v. Grazebrook*, 2 C. B. 429, 52 E. C. L. 429; *Gwynne v. Burnell*, 6 Bing. N. Cas. 453, 37 E. C. L. 451, 2 Scott N. R. 711; *Hitchcock v. Humfrey*, 6 Scott N. R. 540.

Where the issue is wholly immaterial the verdict or finding will be set aside and judgment rendered *non obstante*, the rule being that when the matter, though never so well pleaded, can signify nothing, judgment may be given as by confession. *Rothschild v. Bruscke*, 131 Ill. 265. Compare *Woods v. Hynes*, 2 Ill. 103.

Ordinarily, where one of the parties, passing by what is material in adverse pleading, tenders a good issue upon an immaterial point and obtains a verdict, the judgment must be arrested and a repleader awarded. *Probate Judge v. Briggs*, 5 N. H. 66.

Judgment should not be rendered upon a verdict upon an immaterial issue. *Hughes v. McCutchen*, 1 Morr. (Iowa) 154.

the pleading is technically defective.¹ Where the pleading contains matters which, if well pleaded, might form a good bar or justification, the court will not give judgment *non obstante veredicto*, but will award a repleader.²

(d) **Motion for Judgment.** — Where a party against whom a judgment is rendered wishes a judgment *non obstante veredicto*, he must move therefor.³

Time of Motion. — The motion may of course be made after verdict,⁴ and must be made before entry of judgment on the verdict.⁵ The right to a judgment *non obstante veredicto* cannot be raised for the first time on appeal.⁶

Discretion of Court. — The rendition of judgment *non obstante veredicto* is discretionary with the court.⁷

1. *Lough v. Thornton*, 17 Minn. 253; *Williams v. Anderson*, 9 Minn. 50.

After verdict for the defendant upon an issue of failure of consideration, the fact that the defense is defectively pleaded will not justify a judgment *non obstante veredicto*, unless it be totally defective in some essential particular. *Andros v. Childers*, 14 Oregon 447.

A Verdict on a Material Issue will support a judgment in favor of the party indicated by the verdict. *Orton v. Brown*, 117 Cal. 501; *West v. Carter*, 25 Ill. App. 245; *Allard v. Lamirande*, 29 Wis. 502.

2. *Bellows v. Shannon*, 2 Hill (N. Y.) 86; *Postmaster Gen. v. Reeder*, 4 Wash. (U. S.) 678; *Hitchcock v. Haight*, 7 Ill. 604; *Caldwell v. Estelle*, 20 N. J. L. 326. See also generally article REPLEADER.

3. **Under the Indiana Statute** a motion for judgment *non obstante veredicto* can only be made by the party against whom the verdict has been found. *Brown v. Searle*, 104 Ind. 218.

Under the Minnesota Statute a party is not entitled to a judgment *non obstante veredicto* upon a motion for a new trial unless he has asked for that relief in his moving papers. *Crane v. Knauf*, 65 Minn. 447; *Kernan v. St. Paul City R. Co.*, 64 Minn. 312; *Netzer v. Crookston*, 66 Minn. 355.

A motion at the close of the testimony to direct a verdict in his favor is a condition precedent to the right of a party to move for a judgment *non obstante veredicto*. *Hemstad v. Hall*, 64 Minn. 136; *Netzer v. Crookston*, 66 Minn. 355.

4. *Benicia Agricultural Works v. Creighton*, 21 Oregon 495.

Motion in Vacation. — A motion in

arrest, and for judgment notwithstanding the verdict, cannot be filed and considered in vacation without an express agreement of the parties to that effect. *Scribner v. Rutherford*, 65 Iowa 551.

5. *Scheible v. Hart*, (Ky. 1889) 12 S. W. Rep. 628; *State v. Commercial Bank*, 6 Smed. & M. (Miss.) 218; *Harrison v. Great Northern R. Co.*, 11 C. B. 542, 73 E. C. L. 542, 21 L. J. C. P. 16; *Beatty v. Warren*, 4 M. & G. 158, 43 E. C. L. 89, 4 Scott N. R. 725.

The court will not, unless by consent, enlarge the time for moving for judgment *non obstante veredicto* until after the determination of issues of law. *Harrison v. Great Northern R. Co.*, 11 C. B. 542, 73 E. C. L. 542, 21 L. J. C. P. 16.

The motion should be made and disposed of before a motion for a new trial. *Stein v. Chicago, etc., R. Co.*, 41 Ill. App. 38.

After the verdict has been set aside, a motion for judgment *non obstante veredicto* is too late. *Hemstad v. Hall*, 64 Minn. 136.

Motion Considered as One for a New Trial. — If a decision upon a motion for judgment *non obstante veredicto* will work injustice, the court will convert the same into a motion for a new trial and proceed to decide that. *Gring v. Burkholder*, 2 Woodw. (Pa.) 82. See also *Templeman v. Gibbs*, (Tex. Civ. App. 1894) 25 S. W. Rep. 736.

6. *Shordan v. Kyler*, 87 Ind. 38; *Martindale v. Price*, 14 Ind. 115; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281.

7. *Frick v. Joseph*, 2 N. Mex. 138; *Sheehy v. Duffy*, 89 Wis. 12; *Schweickhart v. Stuewe*, 75 Wis. 157.

Bill of Exceptions. — In *Indiana* a motion for judgment *non obstante veredicto* and exceptions to rulings thereon are parts of the record and need not be saved by a bill of exceptions.¹

(2) *On Point Reserved.* — The practice prevails in a few jurisdictions of taking a verdict subject to the decision of a reserved point of law by the court. The judgment is then entered for one party or the other according to the decision of the reserved point.²

Judgment on Verdict or Point Reserved. — Where the verdict of the jury and the decision by the court of the point reserved are both in favor of the plaintiff, the judgment should be entered for the plaintiff on the verdict, and not on the point reserved.³ But where the verdict is for the defendant a judgment cannot be rendered for the plaintiff although the point reserved is determined in his favor, as in such case there is nothing to support the judgment.⁴ Where it is uncertain whether the jury found their ver-

1. *Terre Haute, etc., R. Co. v. Clark*, 73 Ind. 168; *Pennsylvania Co. v. Smith*, 98 Ind. 42; *Redinbo v. Fretz*, 99 Ind. 458; *Frank v. Grimes*, 105 Ind. 346; *Cox v. Ratcliffe*, 105 Ind. 374; *Schaffner v. Kober*, 2 Ind. App. 409; *Evansville, etc., R. Co. v. Marohn*, 6 Ind. App. 646; *Monroe v. Adams Express Co.*, 65 Ind. 60.

2. *Jackson v. Fitzsimmons*, 6 Wend. (N. Y.) 546.

On a Verdict Subject to the Opinion of the Court no stay is necessary. *Jackson v. Case*, 12 Johns. (N. Y.) 431.

The plaintiff must prepare the case and have it settled, *Eagle v. Alner*, 1 Johns. Cas. (N. Y.) 332; *Percival v. Jones*, 1 Johns. Cas. (N. Y.) 393, Col. & C. Cas. (N. Y.) 107; or else the defendant is entitled to judgment. *Jackson v. Case*, 12 Johns. (N. Y.) 431.

The plaintiff opens the argument. *Jackson v. Murray*, 2 Johns. Cas. (N. Y.) 219.

If the bench is equally divided, judgment goes according to the verdict, unless the court orders further argument. *Van Dyck v. Van Beuren*, 2 Cai. (N. Y.) 103.

In Pennsylvania, a judgment *non obstante veredicto* cannot be entered where no question of law has been reserved at the trial. *Inquirer Printing, etc., Co. v. Rice*, 106 Pa. St. 623; *Buckley v. Duff*, 111 Pa. St. 223; *Farmers', etc., Bank v. Lefever*, 74 Pa. St. 49; *Philadelphia v. Donath*, 13 Phila. (Pa.) 4; *Savings Fund v. Murphy*, 1 Walk. (Pa.) 31; *Henry v. Heilman*, 114 Pa. St. 499.

New Trial Where Point Not Reserved.

— Where no point is reserved on the trial, the court has no power to enter judgment for the defendant *non obstante veredicto*. *Farmers', etc., Bank v. Lefever*, 74 Pa. St. 49, where, the court below having without a reserved point entered judgment for the defendant *non obstante veredicto* on the ground that in law the evidence did not warrant the verdict, on reversal the Supreme Court, under the circumstances, instead of entering judgment on the verdict, sent the case back that the defendant might move for a new trial *nunc pro tunc*. Where the Supreme Court was satisfied that the court below intended to reserve a question of law, but did not do so, it sent the case back for a new trial. *Saving Fund v. Murphy*, 1 Walk. (Pa.) 31.

3. *Ringle v. Pennsylvania R. Co.*, 164 Pa. St. 529, 35 W. N. C. (Pa.) 379. Accordingly, where there is a judgment on the verdict for the plaintiff, and not for the defendant *non obstante veredicto*, it is immaterial whether the points of law were properly reserved or not, the jury having been rightly instructed. *Erie City Iron Works v. Barber*, 106 Pa. St. 125.

4. *Ringle v. Pennsylvania R. Co.*, 164 Pa. St. 533; *Robinson v. Myers*, 67 Pa. St. 9; *State Bank v. McCoy*, 69 Pa. St. 204; *Morris v. Ziegler*, 71 Pa. St. 450; *Glading v. Frick*, 88 Pa. St. 460; *Hosler v. Hursh*, 151 Pa. St. 415.

"As a matter of practice it may be well to notice an irregularity in the form of the judgment. A point re-

dict upon the facts relating to which the question of law was reserved or upon other facts also submitted to them, a judgment *non obstante veredicto* cannot be rendered.¹

Nature of Questions Reserved. — The point reserved must be solely a question of law, and a question of fact or a mixed question of law and fact cannot be reserved.² The question whether there is any evidence in the case to support a recovery is a question of law and may be reserved, but the question whether there is sufficient evidence to support a recovery where the evidence is conflicting cannot be reserved.³

served is an authority to the court to enter judgment for the defendant *non obstante veredicto*. There can be no reservation in favor of the plaintiff; the verdict must be for him, with authority to enter judgment for the defendant against the verdict. *Robinson v. Myers*, 67 Pa. St. 9; *State Bank v. McCoy*, 69 Pa. St. 204; *Morris v. Ziegler*, 71 Pa. St. 450; *Gladings v. Frick*, 88 Pa. St. 460; *Hosler v. Hursh*, 151 Pa. St. 415. If that authority is not exercised the reservation drops out of the case altogether, and judgment is entered for plaintiff, not on the point reserved, but on the verdict, as if there had been no reservation at all." *Ringle v. Pennsylvania R. Co.*, 164 Pa. St. 533.

In *State Bank v. McCoy*, 69 Pa. St. 204, a verdict for the defendant was rendered subject to the question of law reserved "whether upon all the facts * * * the plaintiff is not entitled to recover." Judgment on the verdict for the defendant was afterwards entered on the reserved point, and on writ of error, taken by the plaintiff, that judgment was reversed. The court said: "Where the verdict is for the defendant, no question of law can be properly reserved, for no judgment can be entered in favor of the plaintiffs *non obstante veredicto* in case of a decision in his favor. * * * We must, therefore, reverse the judgment and remit the record to the court below for a new trial." This case was approved and followed in *Hosler v. Hursh*, 151 Pa. St. 420.

Directing Verdict. — The court may direct a verdict for the plaintiff subject to certain questions of law, and afterwards enter judgment for defendant *non obstante veredicto*. *Hays v. City*, 35 Pittsb. Leg. J. (Pa.) 117. But it may not direct a verdict for the defendant subject to a reserved point.

ing v. Frick, 88 Pa. St. 460, where the court below directed a verdict for the defendant subject to a reserved point. The court in banc afterwards entered judgment for the plaintiff on the point reserved *non obstante veredicto*. It was held that the more correct practice was to direct a verdict for the plaintiff, as a judgment could not be entered upon a reserved point for the plaintiff where the verdict was for the defendant.

1. *Keifer v. Eldred Tp.*, 110 Pa. St. 1.

2. *Buckley v. Duff*, 111 Pa. St. 223; *Johnston v. Board*, 44 Leg. Int. (Pa.) 27; *Keifer v. Eldred Tp.*, 110 Pa. St. 3; *Wilde v. Trainor*, 59 Pa. St. 439; *Chandler v. Commerce F. Ins. Co.*, 88 Pa. St. 223.

"A Valid Reservation of a question of law on the trial of an issue of fact must be a question of law solely. It cannot be of a question of law and fact mingled. The effect of such a reservation would be to transfer to the court that ascertainment of facts which belongs to the jury. The facts must be found by the jury or agreed upon by the parties." *Buckley v. Duff*, 111 Pa. St. 227 [citing *Winchester v. Bennett*, 54 Pa. St. 510; *Campbell v. O'Neill*, 64 Pa. St. 290; *Robinson v. Myers*, 67 Pa. St. 18; *Com. v. McDowell*, 86 Pa. St. 377].

The judge cannot himself draw conclusions of fact from the evidence and enter judgment thereon *non obstante veredicto*. *Keifer v. Eldred Tp.*, 110 Pa. St. 3.

3. *Butts v. Armor*, 164 Pa. St. 73; *North American Oil Co. v. Forsyth*, 48 Pa. St. 291; *Yerkes v. Richards*, 170 Pa. St. 346, 37 W. N. C. (Pa.) 69; *Keifer v. Eldred Tp.*, 110 Pa. St. 1.

On a reservation as to whether there is any evidence upon which a party may recover, where a controverted point is submitted to the jury, the court cannot enter a judgment *non ob-*

Sufficiency of Reservation. — The reservation of controlling legal questions should always be made matter of record at the time, and the record must show the question of law distinctly stated and properly reserved.¹ The facts, as well as the questions of

stante veredicto because it deems the weight of the evidence to be against the verdict. *North American Oil Co. v. Forsyth*, 48 Pa. St. 291; *Butts v. Armor*, 164 Pa. St. 73.

1. *Kentucky*. — *Hann v. Field*, Litt. Sel. Cas. (Ky.) 376; *Evans v. Bell*, 6 Dana (Ky.) 479.

Pennsylvania. — *Elkins v. Susquehanna Mut. F. Ins. Co.*, 3 Penny. (Pa.) 367; *Yerkes v. Richards*, 170 Pa. St. 346; *Buckley v. Duff*, 111 Pa. St. 227; *Wilson v. Steamboat Tuscarora*, 25 Pa. St. 317; *Wilde v. Trainor*, 59 Pa. St. 439; *Keifer v. Eldred Tp.*, 110 Pa. St. 3; *Johnston v. Board*, 44 Leg. Int. (Pa.) 27; *Richboro Dairymen's Assoc. v. Ryan*, 16 W. N. C. (Pa.) 383; *Henry v. Heilman*, 114 Pa. St. 499; *Fayette City v. Huggins*, 112 Pa. St. 1.

United States. — *Smith v. Delaware Ins. Co.*, 7 Cranch (U. S.) 434.

"To authorize the court to enter judgment *non obstante veredicto*, the record must show the point and the facts on which it arises. *Irwin v. Wickersham*, 25 Pa. St. 316. The question reserved must be distinctly put on the record. The parties have a right to except not only to the judgment on the reserved question, but also to the manner in which the question itself be reserved. The specific reservation should therefore be made a matter of record at the time of the reservation." *Buckley v. Duff*, 111 Pa. St. 227 [*citing* *Ferguson v. Wright*, 61 Pa. St. 258; *Wilde v. Trainor*, 59 Pa. St. 439; *Patton v. Pittsburgh*, etc., R. Co., 96 Pa. St. 169; *Elkins v. Susquehanna Mut. F. Ins. Co.*, 14 Pittsb. L. J. (Pa.) 420; *Inquirer Printing*, etc., Co. v. Rice, 106 Pa. St. 623].

Reason for Rule. — "Many evil consequences might follow the omission of the entry on record; but none could result from making the entry. To indulge a reserved point of this kind in memory only, might frequently leave the rights of the parties to much hazard, and in danger of being forgotten or incorrectly remembered; so that judgment at last might be rendered wrongfully, even with the best intentions existing on the part of the court. We therefore conceive the point re-

served in this instance ought to have been stated on the record, and without it the verdict and judgment cannot be supported." *Hann v. Field*, Litt. Sel. Cas. (Ky.) 378.

Point Appearing in Bill of Exceptions. — "It has been attempted to support the judgment upon the notion that it may be regarded as entered upon a reserved point. But the record shows no reservation. Properly, wherever there is a point or points reserved at the trial, the verdict should be taken subject to the opinion of the court, upon the reserved points. The record then shows the ground upon which the final judgment *non obstante veredicto* is based. But a loose practice has prevailed, and been sanctioned by this court, according to which it is considered sufficient that the reserved point or points should appear on the bill of exceptions, bringing, thereby, the facts on the record. We have here five bills of exceptions — three by the plaintiffs and two by the defendant — to the admission and rejection of evidence, but as there does not appear any reservation, of course there is no exception on that head, nor was there any exception to the final judgment, as is necessary, wherever there is a judgment entered upon a reserved point or points. No such exception was requisite here, for the judgment is without warrant and erroneous on its face." *Farmers', etc., Bank v. Lefever*, 74 Pa. St. 52.

Statement of Reservation in Opinion Not Sufficient. — "The omission to make the point reserved a matter of record is not cured by a statement of the reservation in the opinion of the court filed long afterwards, on entering judgment. That opinion is no part of the record proper." *Buckley v. Duff*, 111 Pa. St. 227.

Illustrations of Insufficient Reservation. — The reservation cannot be as to whether on the whole case a plaintiff is entitled to recover. *Keifer v. Eldred Tp.*, 110 Pa. St. 3.

In *Edmonson v. Nichols*, 22 Pa. St. 79, it was said: "We are frequently embarrassed by the imperfect manner in which points are reserved by the courts below. When a verdict is taken

law arising thereon which are reserved, must be stated in the record.¹

(3) *On Special Findings Against General Verdict.* — A judgment upon the special findings of a jury, but against their general verdict, is not really a judgment *non obstante veredicto*, although often inaccurately so called. A motion for judgment *non obstante veredicto* is a motion for judgment on the pleadings without regard to the verdict; but a motion for a judgment on the special finding of the facts, notwithstanding the general verdict, has no reference whatever to the pleadings in the cause, and proceeds upon the theory that the special finding of facts by the

subject to the opinion of the court upon points reserved, the facts should be distinctly stated, as well as the questions raised upon them; and the judgment to be pronounced upon the solution of the questions of law thus reserved should also be specified as in a case stated." To the same effect are *Clark v. Wilder*, 25 Pa. St. 314; *Irwin v. Wickersham*, 25 Pa. St. 316; *Wilson v. Steamboat Tuscarora*, 25 Pa. St. 318; *Winchester v. Bennett*, 54 Pa. St. 510, and other cases. In *Clark v. Wilder*, 25 Pa. St. 314, it was said: "When we look at the record, we find no point reserved. The verdict was given subject to the opinion of the court on the whole case whether the plaintiffs were entitled to recover. It is impossible for the human imagination to conceive of anything more unlike a point." See also *Yerkes v. Richards*, 170 Pa. St. 352.

A reservation of "the question whether there is any evidence in this case to be submitted to the jury, upon which the plaintiff is entitled to recover," is not a proper reservation of a question of law. *Yerkes v. Richards*, 170 Pa. St. 346; *Buckley v. Duff*, 111 Pa. St. 227; *Wilson v. Steamboat Tuscarora*, 25 Pa. St. 317; *Wilde v. Trainor*, 59 Pa. St. 439.

"In the present case the record is fatally defective. In the charge of the court to the jury the learned judge says: 'There is a little law question, although I have not much doubt about it myself; still the learned counsel want to be heard on it, and I will take your verdict for the plaintiff subject to the opinion of the court on the question of law reserved.' What that question of law was, or on what questions of fact it arose, the record wholly fails to show. No search thereof could give

the slightest information." *Buckley v. Duff*, 111 Pa. St. 227.

Presumptions on Appeal. — "But it is contended by the counsel for the defendant in error that, as the points of law upon which the court decided the cause against the plaintiff are not stated on the record, this court must presume everything in favor of the judgment, and should not reverse, unless the points were reserved and exhibited on the record. We cannot go so far in presuming in favor of the judgment. A verdict was found for the plaintiff; it was the duty of the court to render a judgment thereon for the plaintiff, unless some good ground existed to prevent it. The record states that points of law were brought up in the argument of the case, and upon these points of law, without stating what they were, judgment was rendered for the defendant. As the record is intended to preserve a history of the case, those points of law should have been stated. Enough should, at least, be shown to support the judgment, especially when the judgment is rendered against the party for whom the verdict is found. And so this court settled in the case of *Hann v. Field*, Litt. Sel. Cas. (Ky.) 376, in a state of case very similar to the one under consideration." *Evañs v. Bell*, 6 Dana (Ky.) 479.

1. *Elkins v. Susquehanna Mut. F. Ins. Co.*, 3 Penny. (Pa.) 367; *Fayette City v. Huggins*, 112 Pa. St. 1; *Inquirer Printing, etc., Co. v. Rice*, 106 Pa. St. 623; *Miller v. Bedford*, 86 Pa. St. 454; *Patton v. Pittsburgh, etc., R. Co.*, 96 Pa. St. 169; *Buckley v. Duff*, 111 Pa. St. 223; *Johnston v. Board*, 44 Leg. Int. (Pa.) 27; *Irwin v. Wickersham*, 25 Pa. St. 316; *Yerkes v. Richards*, 170 Pa. St. 346; *Keifer v. Eldred Tp.*, 110 Pa. St. 3.

jury is so inconsistent with their general verdict that the former should control the latter and the court should give judgment accordingly.¹

IV. FORM OF JUDGMENT — 1. Sufficiency in General — a. WHAT LAW GOVERNS. — The language and form of the record of a judgment are regulated by the law of the state and the practice of the court in which it is rendered;² and a record which is good in the court where rendered is sufficient in another court although it would have been insufficient had it been rendered in the latter court.³

b. NECESSITY OF WRITING. — A judgment must be reduced to writing,⁴ and cannot exist merely in the memory of the officers of the court.⁵

c. LANGUAGE OF JUDGMENT. — The technical language in rendering a judgment is, if for the plaintiff, that "It is considered by the court that the plaintiff do recover," etc.;⁶ or, if for the defendant, "It is considered by the court that the plaintiff take nothing by his writ, and that the defendant go hence without day," etc.⁷ Another form of words, however, of equivalent

1. *Marion St. R. Co. v. Carr*, 10 Ind. App. 200; *Wright v. Williams*, 83 Ind. 421. See also article SPECIAL FINDINGS.

A motion for judgment *non obstante veredicto* and a ruling thereon will present no question for decision which ought to have been saved and presented by a motion for judgment on the special findings notwithstanding the general verdict and a ruling thereon. *Wright v. Williams*, 83 Ind. 421; *Marion St. R. Co. v. Carr*, 10 Ind. App. 200.

2. *McMillan v. Lovejoy*, 115 Ill. 498; *Taylor v. Runyon*, 3 Iowa 474; *Woodbridge, etc., Engineering Co. v. Ritter*, 70 Fed. Rep. 677.

3. *Schertz v. Chester First Nat. Bank*, 47 Ill. App. 124; *Woodbridge, etc., Engineering Co. v. Ritter*, 70 Fed. Rep. 677.

Proof of Foreign Law and Practice. — A record not corresponding in form to what would be necessary for a judgment in the state where the issue is raised, may be shown by the laws, practices, and usages of the state in which it was rendered to be sufficient to constitute a judgment there. *Taylor v. Runyon*, 3 Iowa 474.

4. *Davidson v. Murphy*, 13 Conn. 213; *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397; *Wiley v. Lewis*, 6 Ohio Dec. 242, 4 Ohio N. P. 212; *Jones v. Walker*, 5 Yerg. (Tenn.) 427; *Boker v. Bronson*, 5 Blatchf. (U. S.) 5.

5. *Balm v. Nunn*, 63 Iowa 641. As to the necessity of entering the judgment in the judgment book or docket, see article RENDITION AND ENTRY OF JUDGMENTS.

6. *Baker v. State*, 3 Ark. 491. Compare *Ware v. Pennington*, 15 Ark. 228. See also *infra*, second succeeding note.

Acquiescence in Clerical Error. — Great indulgence is extended to clerical misprisions, and when they have been acquiesced in for a long time the omission or inaccuracy, if it reasonably appear what was intended, will be supplied by intentment; and therefore, where in the entry of a judgment the words, "it was considered by the court that the plaintiff recover," were omitted, and the defendant afterwards acquiesced in the sufficiency of the entry as a judgment by procuring an injunction restraining the execution of the judgment upon other grounds, and kept up the litigation for twelve years, he will not be permitted then to say there was no formal judgment against him. *Davis v. Hoopes*, 33 Miss. 173.

7. *Darwin v. Tuscumbia, etc.*, R. Co., 4 Port. (Ala.) 160; *Lisle v. Rhea*, 9 Mo. 172; *Jones v. Hoppie*, 9 Mo. 173.

Failure to Provide that Defendant Go Without Day. — An omission to insert in a judgment for the defendant that he go without day does not, under *Minnesota Gen. Stat.*, c. 66, § 107, affect the substantial rights of the adverse party, and is not ground for vacating

meaning, will be sufficient.¹ The use of words in the past instead of the present tense in entering a judgment is wholly immaterial.²

d. WHAT ENTRY MUST SHOW. — **Strict Formality Is Not Essential** to the validity of a judgment, and if the record entry is sufficient in substance, mere want of technical form will not render it either void or voidable.³ But it must appear that that which is offered

the judgment. *Ætna Ins. Co. v. Swift*, 12 Minn. 437.

"It is insisted by defendant that there is no judgment in the lower court which is the subject of review in this. The judgment below is in the following form: 'It is therefore ordered and adjudged by the court that this cause be dismissed, and that defendants recover of plaintiff, W. B. Moody, all costs accrued herein, and have thereof execution. And the jury are, by order of the court, discharged.' In *Bogges v. Cox*, 48 Mo. 278, the judgment was as follows: 'Wherefore the court gave judgment against him for costs.' This case and the one at bar were where the plaintiff took a nonsuit with leave to move to set it aside, and when the motion to set aside was overruled the court rendered the judgments as set out. In *Bogges v. Cox*, 48 Mo. 278, *Wagner, J.*, said: 'When a nonsuit is taken, in order to justify an appeal or writ of error the judgment should be formally set out; that it is by the court, therefore, considered and adjudged that the plaintiff take nothing by his writ, and that the defendant go thereof without day and recover of the plaintiff his costs,' etc. In *Rogers v. Gosnell*, 51 Mo. 466, this was held to be a good judgment, 'that defendant go hence, and that he recover his costs.'" *Moody v. Deutsch*, 85 Mo. 237.

1. In *Baker v. State*, 3 Ark. 491, it was said that a judgment is not the determination and sentence of the judges, but of the law. A determination of record therefore in the words, "ordered by the court that the said defendant," etc., was held not to be a judgment, for it implied an act of the judges, and it was said that if the words, "it is considered," are omitted, there is no judgment, and no appeal will lie. This case was practically overruled in *Ware v. Pennington*, 15 Ark. 226, where it was held that a judgment in the words, "it is ordered, adjudged, and decreed by the court," etc., is not a nullity, the words being of fully equivalent import to the words, "it is considered."

Established Precedents Should Be Fol-

lowed. — Common-law forms should be observed. *Watson v. Hahn*, 1 Colo. 385.

A judgment that plaintiff's demand be rejected at his costs is bad. Every new formula requires a new interpretation; old forms are the best, which with certainty either close the case forever or leave it open for another trial. *Darby v. Miller*, 6 La. Ann. 645; *Birdsale v. Lakey*, 6 La. Ann. 647; *Marsh v. Perry*, 6 La. Ann. 669.

The Word "Recover" is not absolutely essential to the existence of a judgment. *Bradley v. Clark*, 3 Day (Conn.) 502; *Clark v. Moses*, Kirby (Conn.) 144; *La Porte v. Organ*, 5 Ind. App. 369. It is, however, the appropriate and approved word to use. *Needham v. Gil-laspy*, 49 Ind. 245.

A record which recites the trial and verdict, and proceeds: "Therefore it is considered and adjudged by the court that the plaintiff in this action have judgment," etc., is a judgment, the word "have" being equivalent to "do recover." *Potter v. Eaton*, 26 Wis. 382. See also *Schertz v. Chester First Nat. Bank*, 47 Ill. App. 124.

An Approved Form. — In *Pierce v. Wilson*, 48 Ind. 299, the following judgment was pronounced perfect in form: "It is therefore considered by the court now here that the plaintiff do have and recover of and from the defendants the sum of two hundred dollars, and also the costs and charges in this behalf."

2. *Tankersley v. Silburn*, Minor (Ala.) 185.

3. *Alabama.* — *Carroll v. Meeks*, 3 Port. (Ala.) 226; *Sanford v. Richardson*, 1 Ala. 182; *Darwin v. Tuscomb*, etc., R. Co., 4 Port. (Ala.) 160.

California. — *Leviston v. Swan*, 33 Cal. 480.

Colorado. — *Chever v. Horner*, 11 Colo. 68, 7 Am. St. Rep. 217; *Dusing v. Nelson*, 7 Colo. 184; *Alvord v. McGaughey*, 5 Colo. 244; *Stevens v. Solid Muldoon Printing Co.*, 7 Colo. 86.

Georgia. — *McWilliams v. Walthall*, 65 Ga. 109.

Illinois. — *Minkhart v. Hankler*, 19

as the record of a judgment is really such, and not an order for a

Ill. 47; *Johnson v. Gillett*, 52 Ill. 360; *Wells v. Hogan*, 1 Ill. 337; *Coats v. Barrett*, 49 Ill. App. 275; *Chesnut v. Marsh*, 12 Ill. 173.

Iowa. — *Taylor v. Runyon*, 3 Iowa 474; *Church v. Crossman*, 41 Iowa 373.

Kansas. — *Armell v. Layton*, 29 Kan. 576.

Kentucky. — *Harland v. Eastland*, Hard. (Ky.) 599; *Deering v. Halbert*, 2 Litt. (Ky.) 292.

Louisiana. — *Gibson v. Foster*, 2 La. Ann. 503.

Massachusetts. — *Buckfield v. Gorham*, 6 Mass. 445.

Nebraska. — *Black v. Cabon*, 24 Neb. 248; *Crowell v. Johnson*, 2 Neb. 155; *Marsh v. Synder*, 14 Neb. 8; *Lewis v. Watrus*, 7 Neb. 477.

Nevada. — *Humboldt Mill, etc., Co. v. Terry*, 11 Nev. 237; *Terry v. Berry*, 13 Nev. 514.

New York. — *Decker v. Kitchen*, 26 Hun (N. Y.) 173.

Pennsylvania. — *Hartley v. White*, 94 Pa. St. 31.

South Carolina. — *Lyles v. McClure*, 1 Bailey L. (S. Car.) 7; *Lanier v. Griffin*, 11 S. Car. 584.

Tennessee. — *Wells v. Griffin*, 2 Head (Tenn.) 568; *Lindsley v. James*, 3 Coldw. (Tenn.) 486.

Texas. — *Hamman v. Lewis*, 34 Tex. 474; *Scott v. Burton*, 6 Tex. 322.

Washington. — *Huntington v. Blake-ney*, 1 Wash. Ter. 111.

United States. — *Friedenstein v. U. S.*, 125 U. S. 224; *Deadrick v. Harrington*, Hempst. (U. S.) 50.

Compare Baker v. State, 3 Ark. 491; *Ware v. Pennington*, 15 Ark. 226.

Irregularity in form does not render a judgment void, but can only be taken advantage of by a party on motion. *Bennett v. Couchman*, 48 Barb. (N. Y.) 73.

Error in matter of form, although apparent on the face of the decree, is not sufficient ground for reversal. *Foote v. Lefavour*, 6 Ind. 473.

Degree of Formality Required. — "There may be error in the form or substance of a judgment as well as in the proceedings preliminary to the judgment." *Hoehne v. Trugillo*, 1 Colo. 161, citing *Martin v. Barnhardt*, 39 Ill. 12.

"This court has before held, with reference to judgments rendered in this state, that no particular form of words

is necessary, and we are not inclined to apply a more stringent rule to the judgments of other states, when prosecuted in our courts. We should, therefore, not hesitate to enforce a judgment because the word *decreed* or *resolved* should be used, instead of *considered*. But we cannot but think that there should be something more than appears in this case, to show that a court has acted, in applying the law to a cause or action before it; something to show more clearly that there has been a judicial determination, decision, or adjudication. While there is no particular form necessary, yet there must be some form, something to show that the judgment stated or indicated by the court has been entered by the clerk." *Taylor v. Runyon*, 3 Iowa 474.

Tautology and the unskilful use of language in an effort to conform to law in the entry of a judgment on a verdict in replevin, where there is a substantial compliance with the statute, requiring a nice criticism upon the language employed to pronounce it erroneous, will not render the judgment erroneous. *Butler v. Benton*, 46 Miss. 118.

In *Black v. Cabon*, 24 Neb. 248, the judgment rendered was as follows: "It is the opinion of the court that Anton Cabon is indebted to the plaintiff in the sum of \$117.90 and attorney's fee. It is therefore considered by me, and adjudged, that the plaintiff have and recover from the defendant, Anton Cabon, the sum of \$117.90 and \$3.46 attorney's fees, together with the costs of this suit, \$4.25." The court said: "The judgment, although informal, is not void. The question was before this court in *Marsh v. Synder*, 14 Neb. 8. In that case the judgment was: 'I hereby render judgment against plaintiffs for costs herein. Judgment rendered against plaintiffs for costs.' *Crowell v. Johnson*, 2 Neb. 155; *Vangeazel v. Hillyard*, 1 Houst. (Del.) 515. In *McNamara v. Cabon*, 21 Neb. 589, the identical question now involved was presented to the court, and the judgment was held to be irregular, but not void. *Lewis v. Watrus*, 7 Neb. 477; *Taylor v. Runyon*, 3 Iowa 474; *Minkhart v. Hankler*, 19 Ill. 47; *Fish v. Emerson*, 44 N. Y. 376; *Ransdell v. Putnam*, 15 Neb. 642. The motion to dismiss should have been overruled."

judgment or mere memoranda from which the judgment was to be drawn.¹

To Be Sufficient in Itself. — Each judgment entered during a term must be of itself full and in proper form, and the imperfections of one cannot be corrected by reference to another.²

Adjudication of Issues. — The entry must show that the issues

A Clerical Error in Entitling a Cause on the record does not affect the judgment. *McClelland v. Com.*, Hard. (Ky.) 297.

It is not necessary that the entry of a judgment should be preceded by the name of the case, so that the insertion of a wrong name will not be ground for reversal. *Grimball v. Mississippi*, etc., R. Co., 3 Smed. & M. (Miss.) 38.

It is sufficient if the memorandum of the style of the cause, made by the clerk, indicates with reasonable certainty to what suit it relates. Thus a description of it by a partnership name is sufficient. *Collins v. Hyslop*, 11 Ala. 508.

If the body of a judgment shows the case in which it was rendered, the judgment is valid although the style of the case is wrong. *Woollard v. Shannon Novelty Works*, Jackson (Tenn.) 1875, cited in *King's Tenn. Dig.*, § 3386, par. 8.

That the heading or title of a judgment in the body of which a claim is allowed against the decedent's estate names only one of the two administrators, does not invalidate the judgment. *Tewalt v. Irwin*, 164 Ill. 592.

A Separate Placita is not necessary for each judgment. *MacVeagh v. Locke*, 23 Ill. App. 606; *McMillan v. Lovejoy*, 115 Ill. 498.

See also article **RENDITION, ENTRY, AND RECORD OF JUDGMENT.**

1. *Alabama.* — *Hinson v. Wall*, 20 Ala. 298.

Colorado. — *Stevens v. Solid Muldoon Printing Co.*, 7 Colo. 86; *Dusing v. Nelson*, 7 Colo. 184.

Florida. — *Williams v. Hutchinson*, 26 Fla. 513.

Georgia. — *Tift v. Keaton*, 78 Ga. 235.

Illinois. — *Martin v. Barnhardt*, 39 Ill. 9.

Iowa. — *Traer v. Whitman*, 56 Iowa 443; *Taylor v. Runyon*, 3 Iowa 474.

Michigan. — *Whitwell v. Emory*, 3 Mich. 84.

Wisconsin. — *Eaton v. Woydt*, 26 Wis. 383; *Lincoln v. Cross*, 11 Wis. 91; *Dean v. Williams*, 1 Chand. (Wis.) 22;

Wheeler v. Scott, 3 Wis. 362; *Rape v. Heaton*, 9 Wis. 328; *Remington v. Cummings*, 5 Wis. 138; *Wadsworth v. Willard*, 22 Wis. 238; *Potter v. Eaton*, 26 Wis. 382.

See also *supra*, p. 828.

An Order in the words: "Ordered judgment in this action," etc., is not a judgment, although signed by the judge, and will not justify the issuing of an execution. *Lincoln v. Cross*, 11 Wis. 91. Compare *Tift v. Keaton*, 78 Ga. 235, where an order in the words: "There being no issuable defense filed, ordered that the plaintiffs have leave to enter up judgment against the defendant," signed by the presiding judge, in a suit on a promissory note, where the pleadings were good, was held a sufficient judgment for the plaintiff.

A Mere Memorandum of the Minutes of the judge, from which the record of the cause is afterwards to be drawn up, does not constitute a judgment. *Taylor v. Runyon*, 3 Iowa 474. See also *Balm v. Nunn*, 63 Iowa 641; *Reeside v. Walker*, 11 How. (U. S.) 272.

2. *Tombeckbee Bank v. Strong*, 1 Stew. & P. (Ala.) 187; *Tombeckbee Bank v. Godbold*, 3 Stew. (Ala.) 240.

Reference to Documents and Records. — Where a map or other paper is referred to in a judgment it should be identified by the judgment and made part of it. It should not be referred to as a paper recorded elsewhere. *Emeric v. Alvarado*, 64 Cal. 529.

An entry of judgment is sufficient where, though not perfect in itself, it is capable of being made so by reference to other parts of the record or to papers on file in the case. *Haines v. People*, 19 Ill. App. 354.

A Note at the Foot of a judgment is a part of the judgment. *Jones v. Overstreet*, 4 T. B. Mon. (Ky.) 547. Compare *Fugate v. Glasscock*, 7 Mo. 577.

A Memorandum on the Margin of a judgment which does not disturb it, probably made by the clerk for his own convenience, will not affect it. *Iglehart v. Hobart*, 19 Ill. 637.

between the parties have been adjudicated,¹ and should show with certainty the matters determined.²

Relief Granted and Parties. — It must show the nature of the relief granted,³ and the parties for and against whom it is rendered.⁴

Judicial Determination. — It must also appear to be the judicial determination of a court.⁵

Unnecessary Recitals. — A judgment record need not recite the particulars of the decision on which the judgment is founded,⁶ nor the appearance of the parties,⁷ nor show that the clerk

1. *Stevens v. Solid Muldoon Printing Co.*, 7 Colo. 86; *Dusing v. Nelson*, 7 Colo. 184; *Alvord v. McGaughey*, 5 Colo. 244; *Scott v. Burton*, 6 Tex. 322.

In *Pickering v. Templeton*, 2 Mo. App. 424, where the judgment assessed the damages of the plaintiff, it was held that the omission between the words "doth" and "assess" of the words "find the issues for the plaintiff, and" did not render the judgment invalid, and that if it were a defect it was cured by the statute of jeofails.

A Judgment Merely that the Defendant Recover His Costs is not a final judgment, because it does not show that the matters in issue have been adjudicated. *Scott v. Burton*, 6 Tex. 322; *Overton v. National Bank*, (Supreme Ct.) 3 N. Y. St. Rep. 169. Compare *Flanagan v. Hutchinson*, 47 Mo. 237, where it was held that a judgment in favor of the defendant for costs, and the awarding of an execution therefor, although informal, nevertheless constituted a final judgment. See also *Huntington v. Blakeney*, 1 Wash. Ter. 111; *Houston v. Clark*, 36 Kan. 415.

2. *Bevington v. Buck*, 18 Ind. 414; *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506; *Dray v. Crich*, 3 Oregon 298.

In a Case Involving Many Items, the judgment of the court, like the report of a referee, should show upon what items the judgment is given. *Philadelphia v. Second, etc.*, Sts. Pass. R. Co., 2 Pa. Dist. Rep. 705.

3. *Spence v. Simmons*, 16 Ala. 828; *Coats v. Barrett*, 49 Ill. App. 275; *Moody v. Deutsch*, 85 Mo. 237.

4. See *infra*, IV. 6. *Designation of Parties*.

5. *Illinois*. — *Faulk v. Kellums*, 54 Ill. 188; *Martin v. Barnhardt*, 39 Ill. 9; *Coats v. Barrett*, 49 Ill. App. 275.

Iowa. — *Thompson v. Cook*, 21 Iowa 472; *Taylor v. Runyon*, 3 Iowa 474.

Pennsylvania. — *McGlue v. Philadelphia*, 105 Pa. St. 236.

Wisconsin. — *Wheeler v. Scott*, 3 Wis. 362.

Wyoming. — *Union Pac. R. Co. v. Byrne*, 2 Wyoming 109.

In *Faulk v. Kellums*, 54 Ill. 188, an entry was made upon the verdict of a jury as follows: "Whereupon the court enters judgment upon the verdict." This was held insufficient. The court said: "There is also an objection to the form of this judgment, if judgment it may be called, which is well taken. The *ideo consideratum est* is wanting; it has no element of a judgment other than a bare recognition of the finding of the jury. No action of the court was had upon that finding."

A judgment must show by what court it is rendered. *Bevington v. Buck*, 18 Ind. 414. See also *Taylor v. Runyon*, 3 Iowa 474.

A judgment cannot be objected to because it does not appear on its face to have been rendered in open court. That will be presumed in the absence of a showing to the contrary. *Christian v. Lebeschultz*, 18 S. Car. 602.

A Judgment Entered by the Clerk in Vacation, without statutory authority and without any action of the court authorizing or approving such entry, is void. *Townsley v. Morehead*, 9 Iowa 565; *Spear v. Fitchpatrick*, 37 Iowa 127; *Balm v. Nunn*, 63 Iowa 641; *Lee v. Carrollton Sav., etc., Assoc.*, 58 Md. 301.

In some states the clerk of the court may enter judgment by confession. *Grattan v. Matteson*, 54 Iowa 229; *Weinges v. Cash*, 15 S. Car. 44; *Bunn v. Gardiner*, 18 Ill. App. 94. See *infra*, IX. 6. *Entry by Clerk*.

6. *Bunten v. Orient Mut. Ins. Co.*, 8 Bosw. (N. Y.) 448.

"It is not intended to be intimated that when a jury tries a cause it may not be necessary to recite their verdict in the judgment." *Cok v. Hancock*, 20 Tex. 2.

7. *Caldwell v. Brown*, 43 Tex. 216; *Green v. Swift*, 50 Cal. 454.

assessed damages,¹ nor whether the action was *ex contractu* or *ex delicto*.² A judgment for property lost need not provide for the protection of the defendant if it should be subsequently found again, as title passes to the defendant on payment of the judgment.³ That a judgment recites the names of only eleven jurors is immaterial.⁴

e. SUMMARY STATEMENT OF RULE. — A record of a judgment is sufficient if the time, place, parties, matter in dispute, and the result are clearly stated.⁵ While no particular form of words is

1. Gregory *v.* McNéaly, 12 Fla. 578.

2. Whether the action was *ex contractu* or *ex delicto* is to be determined from the pleadings in the case. McDaniel *v.* Johnston, 110 Ala. 526 [citing Tecumseh Iron Co. *v.* Mangum, 67 Ala. 246; McAllister *v.* McDow, 26 Ala. 453; Reid *v.* Gordon, 2 Stew. (Ala.) 469; Galle *v.* Lynch, 21 Ala. 579; Williams *v.* Perkins, 1 Port. (Ala.) 471; Meredith *v.* Holmes, 68 Ala. 190; Williams *v.* Bowden, 69 Ala. 433; Penton *v.* Diamond, 92 Ala. 610; Stuckey *v.* McKibbin, 92 Ala. 624; McLaren *v.* Anderson, 81 Ala. 107].

3. Saint Louis, etc., R. Co. *v.* McKinsey, 78 Tex. 298.

4. Marlin *v.* Stockbridge, 14 Tex. 165.

5. Barrett *v.* Garragan, 16 Iowa 47; Lyles *v.* McClure, 1 Bailey L. (S. Car.) 7.

Other Judicial Statements of Rule — Alabama. — "The material requisites of a sufficient judgment are well settled. As said in Spence *v.* Simmons, 16 Ala. 828, 'a judgment should show the plaintiff who recovers, the defendant against whom the recovery is had, and the specific thing or amount of money recovered.' This statement of the general rule, however, must not be understood as meaning that only the mere entry of what the court considered or adjudged, disconnected from the other parts of the record, can be looked to, and that such entry itself must show, in terms, the material requisites. In the absence of statutory or positive regulations, each department of the judiciary may establish its own formula of proceeding. In Freeman on Judgments, § 50, speaking of the tests of the sufficiency of a judgment, the author observes: 'I think, however, that from the cases this general statement may be safely made: That whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal, if it show first, the relief granted; and, secondly, that the grant

was made by the court in whose records the entry is written. In specifying the relief granted, the parties of and for whom it is given must, of course, be sufficiently identified.' While a judgment must designate the party in whose favor and the party against whom it is given, with such certainty that the proper officer may know for whom and against whose property to issue execution, it is not necessary that the names of the parties should be stated in the body of the judgment. Whenever the judgment entry is not clear and perfect on its face, it should be interpreted in the light of the pleadings and of the entire record. The judgment roll, as understood in the American practice, must be looked to, and not merely a fragment; and if from the whole the date and amount, the parties between and against whom the judgment is given, and the court in which it was rendered appear, the judgment is not defective. Fowler *v.* Doyle, 16 Iowa 534; Carr *v.* Anderson, 24 Miss. 188; *In re* Boyd, 4 Sawy. (U. S.) 270; Little *v.* Birdwell, 27 Tex. 688; Burnham *v.* Webster, 1 Woodb. & M. (U. S.) 172; Collins *v.* Hyslop, 11 Ala. 508. The rule is correctly stated in Alexander *v.* Wheeler, 69 Ala. 332, as follows: 'The rule of law is that every judgment of a court of justice must either be perfect in itself or capable of being made perfect by reference to the pleadings, or to the papers on file in the cause, or else to other pertinent entries on the court docket.' Flack *v.* Andrews, 86 Ala. 396. See also Turner *v.* Dupree, 19 Ala. 198.

Colorado. — "As we said in Alvord *v.* McGaughey, 5 Colo. 244, 'while a strict compliance with forms is not essential in the entry of judgments, yet, to constitute a final judgment, the record must not only indicate that an adjudication took place, but the entry must have been intended as the entry of a judgment.' This intention must

necessary, there must be something to show that the judgment stated or indicated by the court has been entered by the clerk.¹

be fairly deducible from the language employed in the entry. Thus tested, a final judgment will show, in intelligible language, a determination of the rights of the parties to the action, what relief has been granted, if any, or that the defendant has been dismissed without day. The supposed judgment in this case, not conforming to the above requirements, must be held to be interlocutory merely." *Dusing v. Nelson*, 7 Colo. 184. See also *Stevens v. Solid Muldoon Printing Co.*, 7 Colo. 87.

Illinois. — Whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal if it shows (1) the relief granted, and (2) that the grant was made by the court in whose record the entry was written. In specifying the relief granted, the parties of whom and for whom it is given must be sufficiently identified. It must show the plaintiff who recovers, the defendant against whom the recovery is had, and the specified thing or amount of money recovered. *Coats v. Barrett*, 49 Ill. App. 275. To the same effect is *Moody v. Deutsch*, 85 Mo. 237. See also *McMillan v. Lovejoy*, 115 Ill. 498 [*Phillips v. Webster*, 85 Ill. 146; *Gunn v. Plant*, 94 U. S. 664].

Indiana. — A paper purporting to be a judgment, but not stating by what court rendered, nor when, nor for what cause of action, is a nullity. *Bevington v. Buck*, 18 Ind. 414.

Missouri. — To make a record valid upon its face it is only necessary for it to appear that the court had jurisdiction of the subject-matter of the action and the parties, and that a judgment has in fact been rendered; all else is form only. *Pickering v. Templeton*, 2 Mo. App. 424 [*citing Grignon v. Astor*, 2 How. (U. S.) 319; *Maxwell v. Stewart*, 22 Wall. (U. S.) 77; *Martin v. McLean*, 49 Mo. 361]. See also the *Illinois* cases *supra* in this note.

Texas. — A judgment final should contain: (1) The facts judicially ascertained, with the manner of ascertaining them entered of record. (2) The recorded declarations of the court, pronouncing the legal consequences of the facts thus judicially ascertained. *Fitzgerald v. Evans*, 53 Tex. 461.

1. *Taylor v. Runyon*, 3 Iowa 474, holding that in the absence of some

showing of the existence in a foreign jurisdiction of some particular statute, rule, or usage, a record of a judgment in such jurisdiction not showing by whom the judgment was rendered or against whom or for what amount, is not sufficient.

Forms of Entries Held Sufficient. — In the following cases, some of which were direct and others collateral attacks, various forms of record entries were held to constitute judgments and to be sufficient, although some of them were pronounced informal.

Alabama. — *Hamner v. Eddins*, 3 Stew. (Ala.) 192; *Huffaker v. Boring*, 8 Ala. 87; *Flack v. Andrews*, 86 Ala. 395.

Arkansas. — *Luttrell v. Reynolds*, 63 Ark. 254.

Colorado. — *Dusing v. Nelson*, 7 Colo. 184.

Idaho. — *Ollis v. Kirkpatrick*, 2 Idaho 976.

Illinois. — *Schermerhorn v. Mitchell*, 15 Ill. App. 418; *Schertz v. Chester First Nat. Bank*, 47 Ill. App. 124; *Coats v. Barrett*, 49 Ill. App. 275; *Johnson v. Miller*, 50 Ill. App. 60; *Minkhart v. Hankler*, 19 Ill. 47.

Indiana. — *La Porte v. Organ*, 5 Ind. App. 369.

Iowa. — *Taylor v. Runyon*, 3 Iowa 474.

Kansas. — *Houston v. Clark*, 36 Kan. 412.

Kentucky. — *Patrick v. Newel*, 1 Bibb (Ky.) 323.

Michigan. — *Whitwell v. Emory*, 3 Mich. 84.

Mississippi. — *Miller v. Patton*, 3 Smed. & M. (Miss.) 463.

Missouri. — *Rogers v. Gosnell*, 51 Mo. 466; *Black v. Rogers*, 75 Mo. 441.

Nebraska. — *McNamara v. Cabon*, 21 Neb. 589; *Gatz v. Cabon*, 21 Neb. 591.

New York. — *Card v. Meincke*, 70 Hun (N. Y.) 382; *Fish v. Emerson*, 44 N. Y. 376.

North Carolina. — *Neal v. Hussey*, 3 Jones L. (N. Car.) 70; *Bond v. Wool*, 113 N. Car. 20; *Davis v. Shaver*, Phil. L. (N. Car.) 18; *Sharpe v. Rintels*, Phil. L. (N. Car.) 34; *Osborne v. Toomer*, 6 Jones L. (N. Car.) 440; *State v. McAlpin*, 4 Ired. L. (N. Car.) 140.

South Carolina. — *Wood v. Babb*, 16 S. Car. 427.

In Inferior Courts. — No particular

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2. Determining Provisions in Advance. — Before an action is ready for judgment it is not proper to bind the court by an order granted on special motion requiring it to enter particular provisions in the judgment.¹

3. But One Judgment Should Be Rendered. — The final determination of all the issues as to all the parties should be contained in one judgment record.² Thus, where two defendants are sued jointly and the verdict is against one and in favor of the other, it is error to render two several judgments signed at different times. There should be but one judgment and one judgment record in the case.³ So where for any reason a recovery is had by both parties

form is required in the proceedings of an inferior court to render its order a judgment. It is sufficient if it be final and the party may be injured. *Johnson v. Gillett*, 52 Ill. 358. See also *Ollis v. Kirkpatrick*, 2 Idaho 976; *Fox v. Hoyt*, 12 Conn. 498; *Wyatt v. Judge*, 7 Port. (Ala.) 37.

Forms of Entries Held Insufficient. — In the following cases various forms of record entries were held insufficient to constitute judgments.

Alabama. — *Hinson v. Wall*, 20 Ala. 298.

Colorado. — *Hoehne v. Trugillo*, 1 Colo. 161.

Illinois. — *Martin v. Barnhardt*, 39 Ill. 13; *Meyer v. Teutopolis*, 131 Ill. 552.

Iowa. — *Taylor v. Runyon*, 3 Iowa 474.

Missouri. — *Catiche v. Circuit Ct.*, 1 Mo. 608.

South Carolina. — *Wood v. Babb*, 16 S. Car. 430.

Texas. — *Scott v. Burton*, 6 Tex. 322.

Wisconsin. — *Wheeler v. Scott*, 3 Wis. 362; *Rape v. Heaton*, 9 Wis. 328; *Lincoln v. Cross*, 11 Wis. 91.

1. *East River Sav. Inst. v. Bucki*, 77 Hun (N. Y.) 329.

2. *Kennedy v. Aldridge*, 5 B. Mon. (Ky.) 144; *Simpson v. McKay*, 3 Thomp. & C. (N. Y.) 65; *Holler v. Apa*, (C. Pl.) 18 N. Y. Supp. 588.

Two Judgments which are distinct and separate, such as one reversing a justice's judgment and one at a subsequent term awarding damages, cannot coexist. *Phillips v. Geesland*, 1 Chand. (Wis.) 57, 2 Pin. (Wis.) 120.

In dissolving a temporary injunction against the collection of a judgment, it is error to render a second judgment for part of that one which was sought to be enjoined. *Harris v. Beaven*, 11 Bush (Ky.) 256.

Where a claim already reduced to judgment becomes the property in equity of another, by assignment, the assignee will not be entitled to a second judgment, but can only enforce the first by remedies provided by law. *Smith v. Belmont, etc., Iron Co.*, 11 Bush (Ky.) 391.

A judgment dissolving an injunction, and directing the sheriff to sell, on a twelve months' bond, and ordering the plaintiff to pay the like amount *in solido*, with two other persons, is a double judgment against the same party for the same debt, *ultra petitionem*, and will be reversed. *Hennen v. Wood*, 16 La. Ann. 263.

Where two final judgments are entered in the same suit to sell the same land, the last, being rendered without supplemental proceedings, is void. *Bethel v. Bethel*, 6 Bush (Ky.) 68. Compare *Morner v. Cooper*, 35 Iowa 257, where after judgment upon a general verdict the court, on motion, without having first set aside such judgment, rendered a judgment for the opposite party upon a special verdict, and it was held that such final judgment was valid. See also *Greff v. Fickey*, 30 Md. 75, holding that the omission of the record to state that a judgment has been stricken out is not material and does not affect the validity or regularity of the judgment subsequently rendered.

Where a petition embraces several causes of action, and there is a separate assessment of damages on each, all the assessments must be blended in one judgment. *Mooney v. Kennett*, 19 Mo. 551.

3. *Hundhausen v. Bond*, 36 Wis. 29. But see *Webb v. Bulger*, 4 Hill (N. Y.) 588, holding the rule that there can be but one record to be a mere matter of form, and that where only one of two

of some amount, but one judgment should be entered, and execution should be awarded for the excess, to whichever party it belongs.¹ Where, however, the defendant admits or offers to allow judgment as to part of the claim, judgment may be entered for such part, and subsequently another judgment may be entered for the amount found due upon further litigation.² Where several distinct actions are brought together for convenience, there must be a separate entry of judgment in each case.³

4. Certainty⁴ — General Rule. — A judgment must be specific and certain, and such as the defendant may readily understand and be capable of performing.⁵ And where the record entry is

defendants was found guilty, and he made a bill of exceptions and the other entered judgment for costs, the judgment might stand, deducting costs of entering it.

1. Where the defendant recovers costs, the amount thereof should be set off against the plaintiff's recovery, and the judgment should be entered and execution awarded only for the excess. *Johnson v. Farrell*, 10 Abb. Pr. (N. Y. Supreme Ct.) 384; *Warden v. Frost*, 35 Hun (N. Y.) 141, 1 How. Pr. N. S. (N. Y.) 364, 7 Civ. Pro. Rep. (N. Y.) 242; *Crim v. Cronkhite*, 15 How. Pr. (N. Y. Supreme Ct.) 250. See also *Fobes v. Meigs*, 3 Wend. (N. Y.) 308; *Canfield v. Gaylord*, 12 Wend. (N. Y.) 235.

In an action on account aided by attachment, judgment for a defendant who admits the account and recovers the full penalty in a cross-action on the bond for the wrongful suing out of the attachment should be for the difference between the amount of such account and the amount of the penalty. *Union Mercantile Co. v. Chandler*, 90 Iowa 650.

2. *Hoe v. Sanborn*, 24 How. Pr. (N. Y. Supreme Ct.) 26; *Drake v. Irvine*, 10 Pa. Co. Ct. Rep. 486.

In **Pennsylvania**, under the Act of May 31, 1893, two judgments may be entered against a defendant in the same suit, one for the amount admitted by the affidavit to be due, and one for the amount subsequently found by the jury to be due; or a judgment may be entered against the defendant for the amount admitted to be due, with costs up to date, and a judgment against the plaintiff for subsequent costs on his failure to establish his right to the residue claimed. *Gardner v. Chester*, 2 Pa. Dist. Rep. 704.

3. *Kitter v. People*, 25 Ill. 42; *Bogan v. Sprott*, 37 S. Car. 605.

Separate judgments should be entered in an action by a trustee to foreclose a mortgage and an action subsequently commenced to vacate the appointment of such trustee, in the latter of which the plaintiff is unsuccessful, although the two actions are tried and a single decision and order for judgment are rendered. *New York Security, etc., Co. v. Saratoga Gas, etc., Co.*, 88 Hun (N. Y.) 569.

Upon the consolidation of several actions to enforce mechanics' liens upon the same property, a single judgment determining all the issues should be rendered, and not separate judgments in each of the original cases. *Willamette Steam Mills Lumbering, etc., Co. v. Los Angeles College Co.*, 94 Cal. 229.

4. See also article DECREEs, vol. 5, p. 1063 *et seq.*

5. **Alabama.** — *Tankersley v. Silburn, Minor* (Ala.) 185; *Dickerson v. Walker*, 1 Ala. 48.

California. — *Gregory v. Blanchard*, 98 Cal. 311.

Idaho. — *Alexander v. Leland*, 1 Idaho 425.

Illinois. — *People v. Pirfenbrink*, 96 Ill. 68.

Indiana. — *Morris v. State*, 1 Blackf. (Ind.) 37.

Maryland. — *Stirling v. Garritee*, 18 Md. 468.

New York. — *U. S. Life Ins. Co. v. Jordan*, 46 Hun (N. Y.) 201.

Tennessee. — *Harman v. Childress*, 3 Yerg. (Tenn.) 327; *Boyken v. State*, 3 Yerg. (Tenn.) 426; *Steamer Mollie Hamilton v. Paschal*, 9 Heisk. (Tenn.) 203.

Texas. — *Stafford v. King*, 30 Tex. 257.

Certainty in Amount. — See *infra*, IV. 5. *b. Certainty.*

Judicial Statements of Rule. — A judg-

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wholly uncertain, repugnant, or contradictory, it is at least erroneous, and has been held in many cases to be absolutely void.¹

Certainty on the Whole Record. — An obscure judgment entry may, however, be construed with reference to the pleadings and record, and where upon the whole record its sense can be clearly ascertained, the judgment will be upheld.²

ment, to be binding, must be certain and complete in itself, without reference to anything else by which to ascertain its meaning. *Dickerson v. Walker*, 1 Ala. 48. See also *Harman v. Childress*, 3 Yerg. (Tenn.) 327.

A judgment, to be valid, must be certain and conclusive as to the subject-matter and parties to the action, and must be capable of execution. *Alexander v. Leland*, 1 Idaho 425.

There must be a reasonable certainty in every judgment, that the defendant may be able to plead it in bar to any subsequent suit for the same cause of action. *Stirling v. Garritee*, 18 Md. 468.

A judgment must be so certain that the clerk can issue an execution by inspection of it, without reference to other entries. *Boyken v. State*, 3 Yerg. (Tenn.) 426. See also *Steamer Mollie Hamilton v. Paschal*, 9 Heisk. (Tenn.) 203; *Stafford v. King*, 30 Tex. 257.

Judgment for a surety suing before payment to be indemnified under the *Louisiana* Civil Code, art. 3026, that he be "fully indemnified" by the defendant, is too indefinite. It should decree the particular sum due the creditor, with the proviso that the amount realized on execution be paid to him. *Mudd v. Rogers*, 10 La. Ann. 648.

Form of Entry Held Sufficiently Certain.

— See *Moore v. Hubbard*, 4 Ala. 187; *Kopperl v. Nagy*, 37 Ill. App. 23; *Fish v. Emerson*, 44 N. Y. 376.

A judgment annulling a former judgment, described by number of suits, names of parties, and court in which rendered, and declaring the title of the plaintiff in lands described, superior to that of the defendant, and annulling certain muniments of title and conveyances described by names and dates, is sufficiently certain. *Morrison v. Loftin*, 44 Tex. 17.

A judgment in the words "that the dam erected by plaintiff on his plantation, across the prong of Bayou Paul, be torn down, and the same prong be replaced in a state of nature," is not ambiguous. *Avery v. Police Jury*, 15 La. Ann. 223.

See also *Lyman v. Ramseur*, 113 N. Car. 503, where a judgment entry was held not to be ambiguous, and not to order the defendant to pay the same sum twice.

1. *Alabama*. — *Mobile, etc., R. Co. v. Talman*, 15 Ala. 472; *Hooks v. Montgomery Branch Bank*, 18 Ala. 451.

California. — *Gage v. Downey*, 94 Cal. 241.

Connecticut. — *Knowles v. State*, 2 Root (Conn.) 282.

Illinois. — *Hofferbert v. Klinkhardt*, 58 Ill. 450.

Kentucky. — *Ballard v. Davis*, 1 J. J. Marsh. (Ky.) 377; *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 525; *Mudd v. Carrico*, 4 Litt. (Ky.) 16.

Louisiana. — *Foucher v. Leeds*, 2 La. 405; *King v. Bowen*, 7 La. Ann. 151. But see *Kellogg v. McMillan*, 9 La. Ann. 225; *McManus v. Stevens*, 10 La. Ann. 177.

Tennessee. — *Harman v. Childress*, 3 Yerg. (Tenn.) 327.

Texas. — *Luter v. Rose*, 16 Tex. 52; *Thompson v. Griffis*, 19 Tex. 115; *Campbell v. Townsend*, 26 Tex. 511.

Virginia. — *Humphreys v. West*, 3 Rand. (Va.) 516.

2. *Idaho*. — *Moore v. Taylor*, 1 Idaho 630.

Illinois. — *Benedict v. Dillehunt*, 4 Ill. 287; *Hofferbert v. Klinkhardt*, 58 Ill. 450.

Indiana. — *Furry v. O'Connor*, 1 Ind. App. 580; *Foot v. Glover*, 4 Blackf. (Ind.) 313; *Gentry v. Purcell*, 84 Ind. 84.

Iowa. — *Finnagan v. Manchester*, 12 Iowa 521; *Fowler v. Doyle*, 16 Iowa 534.

Kansas. — *Clay v. Hildebrand*, 34 Kan. 694.

Kentucky. — *Mudd v. Carrico*, 4 Litt. (Ky.) 16.

Louisiana. — *McManus v. Stevens*, 10 La. Ann. 177; *Bell v. Massey*, 14 La. Ann. 843; *Peniston v. Somers*, 15 La. Ann. 679; *Barus v. Bidwell*, 23 La. Ann. 296.

Texas. — *Luter v. Rose*, 16 Tex. 52; *Dunlap v. Southerlin*, 63 Tex. 38; *Torrey v. Cameron*, 73 Tex. 583.

5. Designation of Amount — *a*. NECESSITY. — All judgments for money must specify the amount for which they are rendered,¹ and a judgment which fails to do so is at least erroneous, if not absolutely void.²

United States. — New Orleans, etc., *R. Co. v. New Orleans*, 14 Fed. Rep. 373.

Every judgment, when ambiguous as to the party or parties in favor of or against whom it is rendered, must be read in the light of the entire record of the case in which it was rendered. *Dunlap v. Southerlin*, 63 Tex. 38.

It is only when the terms of a judgment are of doubtful construction that resort may be had to the pleadings or to the reasoning for judgment adduced by the court in obedience to the Constitution. *Avery v. Police Jury*, 15 La. Ann. 223.

Where a Judgment Admits of Two Constructions, that one will be adopted which will support the judgment. *Pelham v. State Bank*, 4 Ark. 202; *Davis v. Lezinsky*, 93 Cal. 126; *Peniston v. Somers*, 15 La. Ann. 679.

In Louisiana it has been held, in construing a judgment, that although the court is not permitted to look into the evidence in the suit to determine how the facts ought to have been decided, yet it may do so to learn the issues, in the absence of reasons given for the decree, and to ascertain what matters were presented for adjudication at the time the decree was rendered. *Bonvillain v. Bourg*, 16 La. Ann. 365.

A general judgment perpetuating an injunction may, by reference to the facts existing at the time of its rendition, be restricted in meaning. *Bonvillain v. Bourg*, 16 La. Ann. 365.

As to the Construction of Judgments Generally, see Am. and Eng. Encyc. of Law (2d ed.), title *Judgments*.

1. *Pittsburgh, etc., R. Co. v. Chicago*, 53 Ill. 80; *Needham v. Gillaspay*, 49 Ind. 245; *Taylor v. Runyon*, 3 Iowa 474; *Park v. Holmes*, 147 Pa. St. 497, 29 W. N. C. (Pa.) 492; *Rape v. Heaton*, 9 Wis. 328.

Construction as to Amount. — Where the clerk entered judgment for the amount of the verdict, "less \$600 to be remitted," there was a valid judgment for the amount of the verdict, although the plaintiff had offered to enter a remittitur of the \$600. *Rothberger v. Wonderly*, 66 Ill. 390.

The petition described an instrument

promising to pay \$212.50. The instrument was written "two twelve 50-100 dollars" judgment by agreement by the plaintiff, no sum being mentioned. The clerk entered judgment for "two twelve 50-100" dollars and interest. The defendant brought a writ of error. The court construed the words "two twelve" to mean two hundred and twelve, and judgment was so entered. *Moseley v. Brigham*, 12 Tex. 104.

2. *Kentucky.* — *Ballard v. Davis*, 1 J. J. Marsh. (Ky.) 376, 3 J. J. Marsh. (Ky.) 656; *White v. Guthrie*, 1 J. J. Marsh. (Ky.) 503; *Booth v. Rogers*, 2 J. J. Marsh. (Ky.) 515; *Stagner v. Fox*, 1 J. J. Marsh. (Ky.) 556; *Noland v. Richards*, 1 J. J. Marsh. (Ky.) 582; *Southerland v. Crawford*, 2 J. J. Marsh. (Ky.) 369; *Ward v. Davidson*, 2 J. J. Marsh. (Ky.) 443; *Downing v. Dean*, 3 J. J. Marsh. (Ky.) 378; *Lowe v. Baber*, 3 J. J. Marsh. (Ky.) 423; *Bartlett v. Blanton*, 4 J. J. Marsh. (Ky.) 426; *Terrill v. Herron*, 4 J. J. Marsh. (Ky.) 519; *Clarkson v. White*, 4 J. J. Marsh. (Ky.) 529; *Taylor v. Morton*, 5 J. J. Marsh. (Ky.) 65; *Harrison v. Lee*, 7 J. J. Marsh. (Ky.) 171.

Louisiana. — *Peet v. Whitmore*, 14 La. Ann. 410.

Mississippi. — *Douglass v. Hendricks*, Walk. (Miss.) 230; *Claughton v. Black*, 24 Miss. 185.

Texas. — *Barnett v. Caruth*, 22 Tex. 173; *Brown v. Horless*, 22 Tex. 645.

It is sufficient if the sum recovered can be definitely ascertained by an inspection of the record. *Wilbur v. Abbot*, 58 N. H. 272.

Where the amount recovered is left blank the judgment is erroneous, and will be reversed. *Nichols v. Stewart*, 21 Ill. 106; *Rigglesworth v. Reed*, 1 Morr. (Iowa) 19; *Hann v. Gosling*, 9 N. J. L. 248; *Frost v. Flint*, 2 How. Pr. (N. Y. Supreme Ct.) 125; *Blane v. Sansum*, 2 Call (Va.) 495.

Void When Amount Is Left Blank. — In the following cases a judgment for an amount left blank was declared absolutely void: *School Directors v. Newman*, 47 Ill. App. 364; *Giddings v. Giddings*, 70 Iowa 486; *Easterling v. State*, 35 Miss. 210, holding that the

b. CERTAINTY. — A judgment must not only state the amount for which it is rendered, but the amount must be stated with certainty.¹ Where the amount for which the judgment was rendered is wholly uncertain the judgment is void.²

c. FORM OF PROVISION—(1) *In General.* — A judgment should state the precise amount for which it is rendered, and not leave it to be ascertained by calculation; but if such data are given that the amount may be ascertained with certainty, the judgment will be upheld.³ A judgment for a sum to be there-

successor of the judge who made the record could not look beyond the record to ascertain for what amount, if any, it was intended to render judgment, and that the affidavit of the plaintiff's attorney could not be received for that purpose.

An entry that a verdict of guilty was rendered, and that the state recovered of the defendant — dollars, is no judgment, and therefore the court may afterwards render judgment on the verdict thus recorded. *Easterling v. State*, 35 Miss. 210.

The Failure of the Clerk to Fill In the Amount of the judgment, in blank spaces left for that purpose, until fourteen months after entry of the judgment, did not render it invalid on collateral attack, though it might sustain a writ of error. *Lind v. Adams*, 10 Iowa 398. But see *Case v. Plato*, 54 Iowa 64; *Giddings v. Giddings*, 70 Iowa 486.

1. *Alabama.* — *Dinsmore v. Austill*, Minor (Ala.) 89; *Tankersley v. Silburn*, Minor (Ala.) 185.

Illinois. — *Pittsburgh, etc., R. Co. v. Chicago*, 53 Ill. 80; *Carpenter v. Sherfy*, 71 Ill. 429.

Kentucky. — *Brittenham v. Cummins*, 1 Bibb (Ky.) 488; *Downing v. Dean*, 3 J. J. Marsh. (Ky.) 380; *Mason v. Chambers*, 4 J. J. Marsh. (Ky.) 426.

Louisiana. — *Decker v. Bradford*, 4 Martin (La.) 312.

Texas. — *Mussina v. Goldthwaite*, 34 Tex. 125.

Judgments Held Certain as to Amount. — A judgment for a certain sum of money and interest from a certain day is sufficiently definite. *Wilbur v. Abbot*, 58 N. H. 272.

Where the amount is recited in the commencement of the judgment, the judgment is sufficiently certain. *Burge v. Shirk*, 10 Ind. 396.

A judgment of affirmation not stating the amount is sufficiently certain if it can be made certain by reference to the

original judgment. *Benedict v. Dillehunt*, 4 Ill. 287.

A judgment that the plaintiff recover \$205.79, his damages assessed by the jury, less \$5.79 remitted by the plaintiff, is in effect a judgment for \$200, and is sufficiently certain. *Guild v. Hall*, 91 Ill. 223.

For other illustrations see *Hansen v. Rounsavell*, 74 Ill. 238; *Warbington v. Norris*, 3 How. (Miss.) 227.

Judgments Held Uncertain as to Amount. — Where the judgment entirely omits the sum adjudged, and makes no reference to the verdict, it is erroneous for uncertainty although the entry commences by a recital of the verdict, which is for a sum certain. *Barnett v. Caruth*, 22 Tex. 173.

Where the verdict was for \$90 and interest, a judgment entered thereon for \$90 and interest was reversed and rendered for the aggregate, it being uncertain, as the interest should run to the date of judgment and then draw interest as principal. *Tankersley v. Silburn*, Minor (Ala.) 185.

See also *infra*, VII. *Interest*.

A judgment subject to an uncertain credit is erroneous. The amount of the credit should be first ascertained by a writ of inquiry, and judgment should be rendered for the balance. *Early v. Moore*, 4 Munf. (Va.) 262.

2. *Jones v. Acre*, Minor (Ala.) 5; *Lightsey v. Harris*, 20 Ala. 409; *Pittsburgh, etc., R. Co. v. Chicago*, 53 Ill. 80; *King v. Bowen*, 7 La. Ann. 151; *Berry v. Anderson*, 2 How. (Miss.) 649; *Spiva v. Williams*, 20 Tex. 442.

3. *Illinois.* — *Nichols v. Stewart*, 21 Ill. 106; *Smith v. Trimble*, 27 Ill. 152; *Washington Park Club v. Baldwin*, 59 Ill. App. 61; *Phillips v. Edsall*, 127 Ill. 535; *Morrison v. Smith*, 130 Ill. 304.

Indiana. — *Biddle v. Pierce*, 13 Ind. App. 239.

Iowa. — *Anderson v. Reed*, 11 Iowa 177.

Kentucky. — *Downing v. Dean*, 3 J.

after ascertained by a ministerial officer is erroneous.¹ The amount for which a judgment is rendered may be fixed by reference to the pleadings in the case² or to the verdict.³ A judgment may be for two sums separately, or in the aggregate,⁴ and a mere error in aggregating items may be disregarded as surplus-

J. Marsh. (Ky.) 380; Smith v. Wells, 4 Bush (Ky.) 97; Mason v. Chambers, 4 J. J. Marsh. (Ky.) 426; Landerman v. McKinson, 5 J. J. Marsh. (Ky.) 234.

Louisiana. — Mudd v. Rogers, 10 La. Ann. 648.

Mississippi. — Berry v. Anderson, 2 How. (Miss.) 652.

Pennsylvania. — Clarkson v. States, (Pa. C. Pl.) 1 Lack. Leg. N. 119, 4 Pa. Dist. Rep. 428; Lewis v. Smith, 2 S. & R. (Pa.) 142.

Tennessee. — Tompkins v. Roscoe, Nashville, 1877, cited in King's Tenn. Dig., § 3386, par. 11.

Virginia. — Early v. Moore, 4 Munf. (Va.) 262.

See also *infra*, VII. *Interest*.

Illustrations. — In Downing v. Dean, 3 J. J. Marsh. (Ky.) 380, it was held that a decree for ten per cent. damages, without ascertaining their aggregate amount, was irregular.

In Mason v. Chambers, 4 J. J. Marsh. (Ky.) 426, it was held that a decree upon the dissolution of an injunction must state the amount of damages or the sum upon which they are given and the rate of damages. See also, to the same effect, Landerman v. McKinson, 5 J. J. Marsh. (Ky.) 234.

In Lewis v. Smith, 2 S. & R. (Pa.) 142, it was held that on confession it is sufficient to render judgment generally, without stating the amount, where the demand is in the nature of a debt that can be ascertained by calculation.

The court is not required to state the exact amount coming to each party in an action by an heir for a distributive share, if such amounts can be readily found by a mere calculation. Biddle v. Pierce, 13 Ind. App. 239.

A decree containing the necessary data from which, by mere computation, the amount to be paid can be determined, is sufficiently certain to cause the running of interest thereon. Phillips v. Edsall, 127 Ill. 535.

1. Wernwag v. Brown, 3 Blackf. (Ind.) 457; Anderson v. Reed, 11 Iowa 177; Landerman v. McKinson, 5 J. J. Marsh. (Ky.) 234; Codwise v. Taylor, 4 Sneed (Tenn.) 346; Hart v. Hart, 31 W.

Va. 688. But compare Adickes v. Allison, 21 S. Car. 259, wherein the decision of the circuit judge disposed of all the issues, directed judgment for the balance due on a former judgment particularly stated in the record, and ordered execution to issue, but referred it to the clerk to calculate the interest and ascertain the balance. This was held to constitute a final judgment in proper form. See also Young v. Mackall, 3 Md. Ch. 398, wherein it was held that a judgment rendered for the penalty of the bond in a suit to be released on payment of such a sum as a person named shall find due is a final judgment, and may be set up as a claim against the estate of the defendant, although the referee did not ascertain the amount due till after the defendant's death.

When the sum on which the damages are decreed is not stated in the decree, but is left to be ascertained by a calculation by the clerk, under directions which might, from the manner in which they are given, be readily misapprehended, the decree is erroneous. Landerman v. McKinson, 5 J. J. Marsh. (Ky.) 234.

2. Melancon v. Duhamel, 3 Martin N. S. (La.) 7; Decker v. Bradford, 4 Martin (La.) 312; Ladnier v. Ladnier, 64 Miss. 368.

3. Ellis v. Dunn, 3 Ala. 632; Dyer v. Hatch, 1 Ark. 339; Barnett v. Caruth, 22 Tex. 173.

Thus, a judgment for "said sum of — dollars, so assessed as aforesaid," referring to a verdict for a definite sum, has been upheld. Ellis v. Dunn, 3 Ala. 632. See also Dyer v. Hatch, 1 Ark. 339.

4. Dickinson v. Mobile Branch Bank, 12 Ala. 54; Hinckley v. Stebbins, (Cal. 1892) 29 Pac. Rep. 52; Kamp v. Branch Crooks Saw Co., 47 Ill. App. 548.

If judgment is rendered for two sums separately, instead of the aggregate of them, and yet by this informality the defendant is not subject to the payment of more, either in debt, damages, or costs, than he would be by a judgment entered with technical formality, it is not error. Deering v. Halbert, 2 Litt. (Ky.) 292.

age.¹ A judgment for one amount, to be discharged by the payment of a larger amount, is erroneous,² as is also, except in the case of penal bonds, a judgment for one amount, to be discharged by a lesser amount.³

(2) *Specifying Denomination.* — In specifying the amount of recovery the judgment must contain some word or character indicating the denomination of money intended.⁴ Judgments for a numerical amount, without any word or sign indicating what units of value are intended, have been held void,⁵ but a

1. Thus where in the entering up of judgment the verdict of the jury was correctly followed, but a mistake in calculation was made at the conclusion in stating what the damages, costs, and charges amounted to in all, the words specifying such total sum were disregarded as surplusage. *Longstreet v. Lafitte*, 2 Spears L. (S. Car.) 664.

2. *Fowler v. Cowper*, Sneed (Ky.) 58.

3. *Steinback v. Lisa*, 1 Mo. 228, holding further that the clause in regard to the lesser amount could not be disregarded as surplusage, leaving the judgment to stand for the larger amount.

In *Ross v. Gill*, 1 Wash. (Va.) 91, the judgment was for one amount to be discharged by a lesser amount. This last clause was held surplusage, and unwarranted by law, but, as the plaintiff did not complain, it was regarded as a release of so much of the judgment. At all events, it was a defect of which the defendant could not complain.

4. *Avery v. Babcock*, 35 Ill. 175; *Carr v. Anderson*, 24 Miss. 188.

Illustration. — "The judgment, as appears by the record before us, is not for any definite sum of money. The judgment is for four hundred and sixty-one and 53-100 damages. Whether this amount is cents, mills, or what, we are left entirely to conjecture. We have no right to indulge in presumptions as to what was found by the court; we must take the record as it reads. A judgment should be for a certain and definite sum of money. This judgment is not for any sum of money, and can only be regarded as a nullity." *Carpenter v. Sherfy*, 71 Ill. 427. See also *Lawrence v. Fast*, 20 Ill. 338; *Pittsburgh, etc., R. Co. v. Chicago*, 53 Ill. 81.

A Judgment for One Mill was set aside, there being no such currency. *Brown v. Smith*, 3 Cai. (N. Y.) 81.

5. *Peter v. Hill*, 13 Ill. App. 36; *Carpenter v. Sherfy*, 71 Ill. 427.

"The ground relied upon for a re-

versal is that the judgment is indefinite and uncertain. There is no word, mark, or character which in any manner indicates for what the judgment is rendered. It is true that there are the figures '383.18,' but whether they are intended to represent that number of American, English, or German coins we are left entirely to conjecture. Nor is anything found in the record from which it can be certainly inferred. It may be said that indebtedness is usually for dollars and decimal fractions of a dollar, but we know it is not of unfrequent occurrence that agreements are made for sums in other coins, especially when made in other countries. The decisions of this court are uniform that, in a judgment for money, the sum must be specified in words or figures with some mark or character designating the precise sum. *Lawrence v. Fast*, 20 Ill. 338; *Lane v. Bommelmänn*, 21 Ill. 143; *Eppinger v. Kirby*, 23 Ill. 521; *Dukes v. Rowley*, 24 Ill. 211; *Baily v. Doolittle*, 24 Ill. 577. This case falls clearly within the rule announced in these cases, and no reason is perceived why it should not be governed by it." *Avery v. Babcock*, 35 Ill. 175.

Judgment for Taxes. — This rule has been applied with special strictness in the case of judgments for taxes.

California. — *Braley v. Seaman*, 30 Cal. 619; *People v. San Francisco Sav. Union*, 31 Cal. 132; *People v. Empire Gold, etc., Min. Co.*, 33 Cal. 171.

Illinois. — *Peter v. Hill*, 13 Ill. App. 38; *Lawrence v. Fast*, 20 Ill. 338; *Lane v. Bommelmänn*, 21 Ill. 143; *Dukes v. Rowley*, 24 Ill. 210; *Avery v. Babcock*, 35 Ill. 175; *Chickering v. Faile*, 38 Ill. 342; *Cook v. Norton*, 43 Ill. 391; *Potwin v. Oades*, 45 Ill. 366, holding that this rule had become a rule of property in *Illinois* and should not be disturbed; *Elston v. Kennicott*, 46 Ill. 189; *Pittsburgh, etc., R. Co. v. Chicago*, 53 Ill. 80; *Carpenter v. Sherfy*, 71 Ill. 427.

more reasonable view prevails in some states, and such judgments are upheld where it appears clearly from the record what was intended.¹

(3) *Words, Figures, and Signs.* — The amount of a judgment should be expressed in words rather than figures,² and it has been held insufficient and erroneous to enter the amount in figures;³ but it would seem to be the better opinion that a judgment for a sum of money so expressed is valid against collateral attack at least, and according to some decisions it is not even erroneous.⁴

d. COSTS. — Costs form no part of the relief sought, but are a mere incident of the judgment, and when not included in it are usually lost.⁵ It has been held correct to enter judgment for a certain amount, including costs.⁶ In some states the amount of costs must be stated,⁷ and where the amount of costs is left

Indiana. — Hopper *v.* Lucas, 86 Ind. 43.

Minnesota. — Tidd *v.* Rines, 26 Minn. 201.

New Hampshire. — Cahoon *v.* Coe, 52 N. H. 524.

Tennessee. — Randolph *v.* Metcalf, 6 Coldw. (Tenn.) 408.

United States. — Woods *v.* Freeman, 1 Wall. (U. S.) 398.

1. Dyer *v.* Hatch, 1 Ark. 339; Gutzwiller *v.* Crowe, 32 Minn. 70; Carr *v.* Anderson, 24 Miss. 188; Gregory *v.* Gregory, 10 Mo. App. 589.

Illustrations. — A judgment for "ninety-two and 90-100," not specifying what, may be regarded as a judgment for dollars where, in adding damages at a certain per cent. for delay, they are reckoned at so many dollars, and where the total costs, in all equaling so many dollars, are for an amount which calls for exactly the whole of the several items. Trogon *v.* Cleveland Stone Co., 53 Ill. App. 206.

Where, upon application for \$100 alimony, an order for alimony to the amount of "seventy-five" is made, the omission of the word "dollars" will be supplied by intentment. Gregory *v.* Gregory, 10 Mo. App. 589.

2. Linder *v.* Monroe, 33 Ill. 388; Randolph *v.* Metcalf, 6 Coldw. (Tenn.) 400.

In Tankersley *v.* Silburn, Minor (Ala.) 186, the court said: "As to the entries of verdict and judgment, it would have been most proper that the amount should have been expressed in words, which were less liable to alteration than figures."

3. *Illinois.* — Linder *v.* Monroe, 33 Ill. 388.

New Jersey. — Cole *v.* Petty, 2 N. J. L. 57; Walton *v.* Vanderhoof, 2 N. J. L. 69; Potter *v.* Platt, 2 N. J. L. 70; Neal *v.* Collins, 2 N. J. L. 80; M'Calla *v.* Wood, 2 N. J. L. 81; Falkenburgh *v.* Woodmansie, 2 N. J. L. 86; Steelman *v.* Ackley, 2 N. J. L. 92; Lloyd *v.* Hance, 16 N. J. L. 127; Smith *v.* Miller, 8 N. J. L. 175, 14 Am. Dec. 418.

4. *Alabama.* — Tankersley *v.* Silburn, Minor (Ala.) 185; Davis *v.* McCary, 100 Ala. 545.

California. — Dyke *v.* Orange Bank, 90 Cal. 397.

Illinois. — Avery *v.* Babcock, 35 Ill. 175; Pittsburgh, etc., R. Co. *v.* Chicago, 53 Ill. 80.

Indiana. — Hopper *v.* Lucas, 86 Ind. 43.

Missouri. — Fullerton *v.* Kelliher, 48 Mo. 542; Moore *v.* Whitcomb, 48 Mo. 543.

Tennessee. — Warder *v.* Millard, 8 Lea (Tenn.) 581; Chadwell *v.* Jones, 1 Tenn. Ch. 495.

Texas. — Cave *v.* Houston, 65 Tex. 619.

5. See articles COSTS, vol. 5, p. 109; OPENING, VACATING, AND AMENDING JUDGMENTS.

6. Jackson *v.* Cummings, 15 Ill. 449; Palmer *v.* Glover, 73 Ind. 529.

In Hay *v.* Imley, 3 N. J. L. 401, it was stated that all the precedents in debt, assumpsit, etc., include the costs with the sum recovered, and form one entire judgment.

7. In *New Jersey*, if a judgment be rendered for the amount of the debt or

blank, no judgment for costs is rendered.¹ In other jurisdictions the amount of costs may be left blank and be filled in afterwards by the clerk.² In *Missouri* the practice is to render judgment for costs generally, and the clerk thereafter computes their amount and indorses it upon the execution.³

e. SPECIFYING MEDIUM OF PAYMENT — (1) *Foreign or Domestic Money.* — A judgment should be for domestic dollars and cents, and not for foreign money.⁴ Foreign currency is regarded

damages, and for costs, without stating the amount of costs, execution can issue only for the debt or damages. *Cook v. Brister*, 19 N. J. L. 73.

Separate Statement of Costs. — A judgment of a justice of the peace was as follows: "It is therefore considered by me that the plaintiff recover from the defendant the sum of \$7.48 and his costs herein expended, taxed at \$37.55, as follows: See margin." The court held that this was correct in form in its reference to costs, as it only allowed recovery by the plaintiff of his costs expended in the suit; and, further, that separately stating or entering the costs in itemized tables on the margin of the record was a sufficient compliance with the requirements of the law in regard to separate taxing and entering the costs on the record. *Kissinger v. Staley*, 44 Neb. 783.

1. *Costello v. Wilhelm*, 13 Kan. 232.

In *Linton v. Housh*, 4 Kan. 535, a judgment for the plaintiff for a sum certain "and costs of suit, taxed at \$—," was held regular, and, the amount of costs being left blank, not a judgment in favor of the plaintiff for more than his own costs, as it could not be presumed that any of the defendant's costs would be taxed; if so, the error could be corrected on motion. See also *Clippinger v. Ingram*, 17 Kan. 584.

A judgment which purports to be for costs only, and in which the amount thereof is left blank, is erroneous. *Mosher v. Uinta County*, 2 Wyoming 462. Compare *Palmer v. Glover*, 73 Ind. 529; *Frankel v. Chicago, etc., R. Co.*, 70 Iowa 424.

2. *Calhoun v. Porter*, 21 Conn. 530; *Frankel v. Chicago, etc., R. Co.*, 70 Iowa 424; *Leyde v. Martin*, 16 Minn. 38; *Cotes v. Smith*, 29 How. Pr. (N. Y. Supreme Ct.) 326.

Blank for Costs — Effect on Judgments. — A judgment is not rendered irregular by failure to fill the blank for costs where the right to costs has been waived by the failure of the party en-

titled thereto to file a memorandum thereof within the time prescribed by statute. *Cantwell v. McPherson*, 2 Idaho 1044.

A judgment is unaffected by the taxation of costs until the actual entry of the costs therein. *Leyde v. Martin*, 16 Minn. 38. See also, generally, *Richardson v. Rogers*, 37 Minn. 461.

The adjustment of the costs by the clerk without notice is not sufficient ground to justify setting aside a judgment otherwise regular. *Macomber v. New York*, 17 Abb. Pr. (N. Y. Super. Ct.) 35; *Hoffnung v. Grove*, 18 Abb. Pr. (N. Y. Supreme Ct.) 14, 142, 42 Barb. (N. Y.) 548. At least, unless that objection was specified in the notice of motion. *Graham v. Pinckney*, 7 Robt. (N. Y.) 147. At the most, the omission is only ground for striking the costs from the judgment. *Petrie v. Fitzgerald*, 2 Abb. Pr. N. S. (N. Y. C. Pl.) 354.

3. *McKnight v. Spain*, 13 Mo. 538; *Bobb v. Graham*, 15 Mo. App. 290; *Beedle v. Mead*, 81 Mo. 304; *Flynn v. Edwards*, 36 Fed. Rep. 873.

4. *Erlanger v. Avegno*, 24 La. Ann. 77; *Mitchell v. Henderson*, 63 N. Car. 644; *Patten's Case*, 15 Ct. of Cl. 288. See also *Warder v. Whitall*, 1 N. J. L. 98.

In *Telfair v. Stead*, 2 Cranch (U. S.) 407, a decree in pounds, shillings, and pence was held valid. See also *Skipwith v. Baird*, 2 Wash. (Va.) 166; *Scott v. Call*, 1 Wash. (Va.) 115; *Butts v. Shreve*, 1 Cranch (C. C.) 40; *Bond v. Grace*, 1 Cranch (C. C.) 96.

Demands Due in Confederate Notes. — A judgment on the contract payable in Confederate notes should be for their value in United States legal tender at the date and place of payment. *Thorington v. Smith*, 8 Wall. (U. S.) 1; *Stewart v. Salamon*, 94 U. S. 434; *Bissell v. Heyward*, 96 U. S. 580; *Rives v. Duke*, 105 U. S. 132; *Effinger v. Kenney*, 115 U. S. 566. But see *Dearing v. Rucker*, 18 Gratt. (Va.) 426.

merely as a commodity, and in an action upon a demand due in foreign currency the judgment should be entered for its value in domestic money.¹

(2) *Coin or Currency* — (a) *In Absence of Contract*. — In the absence of a contract stipulating for payment in coin, it is usually held that the judgment should be entered generally, and that a judgment for coined dollars is erroneous.² Thus it has been held

Judgment for Property. — In *Ransom v. Stanberry*, 22 Iowa 334, it was held that a judgment upon a promissory note, payable in county orders, should be for such property, and not for money, unless the notes have become money demands.

In *Betts v. Butler*, 1 Idaho 185, a judgment for a given amount in "clean Boise Basin gold dust at sixteen dollars per ounce" was held bad.

As to Form of Judgment on Obligations Payable in State Currency or Bank Bills, see:

Arkansas. — *Ellett v. Chilton*, 5 Ark. 181.

Indiana. — *Duerson v. Bellows*, 1 Blackf. (Ind.) 217.

Kentucky. — *Hay v. McKinney*, 7 J. J. Marsh. (Ky.) 442; *Eastham v. Hart*, 3 J. J. Marsh. (Ky.) 285; *Feemster v. Johnson*, 1 J. J. Marsh. (Ky.) 68; *Waggener v. Allen*, 5 J. J. Marsh. (Ky.) 242; *Schooler v. Wilkins*, 5 J. J. Marsh. (Ky.) 313; *Gentry v. Barnett*, 2 J. J. Marsh. (Ky.) 317; *Neal v. Durrett*, 7 J. J. Marsh. (Ky.) 101; *Stockton v. Scobie*, 1 J. J. Marsh. (Ky.) 6; *Carson v. Pearl*, 4 J. J. Marsh. (Ky.) 92; *Gatewood v. Gatewood*, 3 J. J. Marsh. (Ky.) 117; *Speak v. Warner*, 5 J. J. Marsh. (Ky.) 68; *Hays v. Duerson*, 5 J. J. Marsh. (Ky.) 285; *Griffith v. Miller*, 6 J. J. Marsh. (Ky.) 329.

Louisiana. — *Marshall v. Grand Gulf R., etc., Co.*, 5 La. Ann. 361.

New Jersey. — *Warder v. Whitall*, 1 N. J. L. 98.

Texas. — *Rice v. Powell*, Dall. (Tex.) 413.

1. *Kentucky*. — *Pollock v. Colglazure*, Sneed (Ky.) 2.

Maryland. — *Marburg v. Marburg*, 26 Md. 8.

Michigan. — *Sheehan v. Dalrymple*, 19 Mich. 239.

New York. — *Colton v. Dunham*, 2 Paige (N. Y.) 267; *Robinson v. Hall*, 28 How. Pr. (N. Y. Sixth Dist. Ct.) 342; *Fabbri v. Kalbfleisch*, 52 N. Y. 28.

Pennsylvania. — *Mather v. Kinike*, 51 Pa. St. 425.

Virginia. — *Scott v. Hornsby*, 1 Call (Va.) 41; *Taylor v. Mc'Clean*, 3 Call (Va.) 557.

Wisconsin. — *Hawes v. Woolcock*, 26 Wis. 629.

Gold or Currency. — In an action on a foreign judgment the premium on gold cannot be added to the normal amount of the debt, although, had the judgment been paid abroad, it would have been paid in a currency equal to gold. *Swanson v. Cooke*, 45 Barb. (N. Y.) 574. On a debt due in francs, a judgment payable only in gold cannot be rendered. *Olanyer v. Blanchard*, 18 La. Ann. 616.

Contra. — On a demand due in pounds sterling of Great Britain, a decree was rendered for United States coin in *Forbes v. Murray*, 3 Ben. (U. S.) 498; *Surplus, etc., of Ship Edith*, 5 Ben. (U. S.) 146. See also *The Vaughan*, 14 Wall. (U. S.) 258.

2. *California*. — *Curiac v. Abadie*, 25 Cal. 502; *Fox v. Minor*, 32 Cal. 130; *Howard v. Roeben*, 33 Cal. 399; *Noonan v. Hood*, 49 Cal. 293; *Williston v. Perkins*, 51 Cal. 554.

Illinois. — *Belford v. Woodward*, 158 Ill. 122.

Oregon. — *Davis v. Mason*, 3 Oregon 154.

Texas. — *Leer v. Sutherland*, 36 Tex. 151; *Gilleland v. Drake*, 36 Tex. 676; *Calhoun v. Pace*, 37 Tex. 454.

A person who deposits gold with a banker is only entitled to recover the amount in dollars and cents in the circulating medium of the country. *Gumbel v. Abrams*, 20 La. Ann. 568.

In *Thompson v. Butler*, 95 U. S. 694, a judgment for coin was entered upon a verdict for an amount in gold, in an action for damages for failure to accept goods under a contract of sale. Its regularity, however, was not considered, as the case went off on a jurisdictional question.

Condemnation Proceedings. — In *North Pac. R. Co. v. Reynolds*, 50 Cal. 280, the point was raised, but not decided, whether in proceedings to condemn land

that, in actions for torts, judgments for damages cannot be for gold coin.¹

Loss or Conversion of Coin.— But where gold coin is lost or converted it has been held in some cases that the judgment should be entered for gold dollars,² while in other cases it is said that the judgment should be for the value of the gold coin in currency.³

for public use the court could find its value in gold coin and render a judgment in gold coin.

1. *Chamberlin v. Vance*, 51 Cal. 75; *Livingston v. Morgan*, 53 Cal. 23.

The *Vaughan*, 14 Wall. (U. S.) 258, was a libel against a carrier for the loss of barley. The place of shipment was a port in Canada, and the value of the barley lost was estimated in currency of Canada which was equivalent in value to the gold coin of the United States. In the District Court the decree was rendered generally, and it was admitted that the decree was solvable in legal-tender notes, which were then largely depreciated, but it was held that this was an incident of the suit in the forum where it was brought, and that the result was unavoidable. On appeal the Circuit Court applied the same rule of damages, but the decree gave the value of the Canada currency in legal-tender notes, allowing for their depreciation. On an appeal to the Supreme Court, this judgment was affirmed, although the legal-tender notes had so largely appreciated in value that the libelants received almost twice the value of the barley. This was on the ground that the decree was right when rendered, and therefore could not be disturbed. Chief Justice Chase rendered a dissenting opinion, in which Justices Clifford and Field concurred, holding that the judgment should have been for gold coin. The chief justice said: "This case strikingly illustrates the evil consequences of rendering judgments payable in legal-tender currency. Hardly anything fluctuates in value more than such judgments. Every day witnesses a change. The judgment debtor gains by depreciation and loses by appreciation. Doubtless, if the legal-tender clauses of the Currency Acts are constitutional, such judgments may be rendered; but there is nothing in those acts which requires that judgments for damages estimated in coin shall be entered otherwise than for coin. On the

contrary, we have decided in several cases that judgments for coin debts may be rendered payable in coin. In the present case the amount of indemnity was ascertained in gold, and, in our judgment, the decree should have been for that amount payable in coin. This would have done exact justice between the parties and would have been in harmony with the principles of the cases referred to. It would have given indemnity, and not double indemnity."

In *Nevada*, by a statute, a judgment in gold coin for damages in an action of tort is proper. *Clark v. Nevada Land, etc., Co.*, 6 Nev. 203; *Treadway v. Sharon*, 7 Nev. 37.

2. *Phillips v. Speyers*, 49 N. Y. 653, holding that judgment in an action for conversion of gold should be for gold dollars, and not for the value of such gold in currency, *following Kellogg v. Sweeney*, 46 N. Y. 291.

In *Independent Ins. Co. v. Thomas*, 104 Mass. 192, an insurance agent had failed to pay over to his principal premiums collected in gold. The action was brought sounding in contract, and judgment was rendered for the face amount in currency of the gold converted. This judgment was reversed on appeal, and judgment was directed to be rendered for gold.

3. *Kellogg v. Sweeney*, 46 N. Y. 291, 1 Lans. (N. Y.) 397; *Greentree v. Rosenstock*, 61 N. Y. 583; *Gibson v. Groner*, 63 N. Car. 10, wherein the court said that the plaintiff could only collect currency, but an allowance was made for its depreciation.

In an action against a common carrier for failing to deliver to the plaintiff on demand ninety double eagles of the coinage of the United States, received in a bag from the plaintiff's agent in Mexico, since the passage of the Act of Congress making treasury notes a legal tender for the payment of debts, the measure of damages is the value, computed in such treasury notes, of the coin considered as a commodity, at the time when and place where it should

Judgments for Duties and Taxes which are payable only in gold and silver may be specifically rendered for gold and silver coin, as nothing else is legal tender therefor.¹

(b) **Contracts to Pay in Coin** — *aa. EARLY CONFLICTING CASES.* — The earlier decisions in the various courts are very conflicting and contradictory as to the form of the judgment to be entered upon a contract providing for payment in gold or silver coin. In a number of states the validity of such contracts was denied,² and such contracts were held to amount to nothing more than contracts to pay the nominal value in any money which was a legal tender, and consequently the judgments to be entered thereon were required to be for money generally, without specifying the kind.³ In other cases it was held that the judgment on a con-

have been delivered, with interest on such amount from the date of demand. *Cushing v. Wells*, 98 Mass. 550.

In *State Bank v. Burton*, 27 Ind. 426, judgment was rendered for the value in currency of a special deposit of gold coin which had been converted. *Compare Frothingham v. Morse*, 45 N. H. 545, where, in a similar case, judgment was rendered in currency for only the face amount of the special deposit converted.

1. *Cheang-Kee v. U. S.*, 3 Wall. (U. S.) 320; *Lane County v. Oregon*, 7 Wall. (U. S.) 71.

A judgment rendered at a time when coin and currency are equal in value, for the recovery of a five per cent. tax on interest paid in coin by a railroad company to foreign bondholders, may be simply a general judgment for the amount due, although the law imposing the tax provided for its collection in legal-tender currency according to the value of the coined money in currency. *U. S. v. Erie R. Co.*, 107 U. S. 1.

2. As to the validity of contracts to pay in a specific kind of money, see *Am. and Eng. Encyc. of Law* (2d ed.), title *Illegal Contracts*.

3. **For Money Without Specifying Kind** — *California*. — *Carpentier v. Atherton*, 25 Cal. 564; *Reed v. Eldredge*, 27 Cal. 346.

Idaho. — *Betts v. Butler*, 1 Idaho 185.

Illinois. — *Hull v. Kohlsaat*, 36 Ill. 130; *Whetstone v. Colley*, 36 Ill. 328; *McGoon v. Shirk*, 54 Ill. 410.

Indiana. — *Thayer v. Hedges*, 23 Ind. 141; *Brown v. Welch*, 26 Ind. 116; *State Bank v. Burton*, 27 Ind. 426.

Kentucky. — *Johnson v. Vickers*, 1 Duv. (Ky.) 266; *Riley v. Sharp*, 1 Bush

(Ky.) 348; *Smith v. Dilland*, 2 Duv. (Ky.) 152.

Louisiana. — *Galliano v. Pierre*, 18 La. Ann. 16; *Qlanyer v. Blanchard*, 18 La. Ann. 616.

Massachusetts. — *Tufts v. Plymouth Gold Min. Co.*, 14 Allen (Mass.) 407.

Michigan. — *Buchegger v. Shultz*, 13 Mich. 420.

Missouri. — *Henderson v. McPike*, 35 Mo. 255; *Appel v. Woltmann*, 38 Mo. 194.

Nevada. — *Maynard v. Newman*, 1 Nev. 271; *Burling v. Goodman*, 1 Nev. 314; *Milliken v. Sloat*, 1 Nev. 573; *Hastings v. Burning Moscow Co.*, 2 Nev. 93; *Clark v. Burning Moscow Co.*, 2 Nev. 97; *Miller v. Cherry*, 2 Nev. 165.

New Hampshire. — *Frothingham v. Morse* 45 N. H. 545.

New York. — *Wilson v. Morgan*, 30 How. Pr. (N. Y. Super. Ct.) 386.

North Carolina. — *Gibson v. Groner*, 63 N. Car. 10.

Pennsylvania. — *Mather v. Kinike*, 51 Pa. St. 425; *Shollenberger v. Brinton*, 52 Pa. St. 9; *Dutton v. Pailaret*, 52 Pa. St. 109.

Texas. — *Shaw v. Trunslar*, 30 Tex. 390; *Flournoy v. Healy*, 31 Tex. 590.

Wisconsin. — *Warner v. Sauk County Bank*, 20 Wis. 492.

The Premium on Gold cannot be added to the face amount due on the contract. *Spear v. Alexander*, 42 Ala. 572; *Frothingham v. Morse*, 45 N. H. 545.

In the Absence of Statute a court has no power to annex to the judgment rendered an order or direction specifying the kind of money in which payment must be made in satisfaction of the judgment. *Reed v. Eldredge*, 27 Cal. 347; *Sibert v. Kelly*, 6 T. B. Mon. (Ky.) 669. *Compare Webb v. Moore*, 4 T. B. Mon. (Ky.) 483.

tract calling for gold or silver should be for the value of the coin in currency;¹ while in still other cases it was held that the judgment should be in the alternative, for the coin or its value in currency.²

bb. PRESENT ESTABLISHED DOCTRINE. — Subsequently to the decision of most of the cases cited in the preceding section, the validity of express contracts to pay coined dollars of a kind specified was sustained in the federal courts as not being within the Legal Tender Acts, and the doctrine was established that such contracts can be satisfied only by the tender of payment of coined dollars of the kind specified, and judgments in suits brought on such contracts should be entered for coined dollars and parts of dollars.³ These decisions of the United States Supreme Court are controlling upon the state courts, and in effect overrule all previous inconsistent decisions.⁴ They have been followed in practically every state decision since rendered, and the rule is now well established.⁵ The rule established by the foregoing

1. For Value of Coin in Currency. — *Prince Edward's Island Bank v. Trumbull*, 53 Barb. (N. Y.) 459, 4 Abb. Pr. N. S. (N. Y.) 82; *Dutton v. Pailaret*, 52 Pa. St. 109.

It was held in *Essex Co. v. Pacific Mills*, 14 Allen (Mass.) 389, that when rent was payable in silver of a certain fineness, its value should be estimated in treasury notes, because these notes are the most common currency in use and most easily procured, and the currency by which it is to be presumed that the debtor will satisfy the judgment.

In *Sears v. Dewing*, 14 Allen (Mass.) 413, which was an action to recover rent due upon a lease, in which the lessee agreed to pay "the yearly rent of four ounces, two pennyweights, and twelve grains of pure gold, in coined money," it was held by a majority of the court that, though the gold was by the terms of the contract to be paid in the form of money, yet the contract regarded it as a commodity, and the value of the gold should be estimated in treasury notes, and the judgment rendered for its value in treasury notes. See also *Cushing v. Wells*, 98 Mass. 550.

2. For Coin or Value in Currency Alternatively. — *Holt v. Given*, 43 Ala. 612; *Glass v. Pullen*, 6 Bush (Ky.) 351.

3. Ruling Federal Cases. — *Bronson v. Rodes*, 7 Wall. (U. S.) 229; *Butler v. Horwitz*, 7 Wall. (U. S.) 258; *Bronson v. Kimpton*, 8 Wall. (U. S.) 444; *Trebilcock v. Wilson*, 12 Wall. (U. S.) 687.

4. Federal Decisions Binding on State Courts. — *Phillips v. Dugan*, 21 Ohio St. 466; *Belford v. Woodward*, 158 Ill. 122; *Trebilcock v. Wilson*, 12 Wall. (U. S.) 687.

But see *Grund v. Pendergast*, 58 Barb. (N. Y.) 216, holding that the state courts are not bound by the rule laid down in the federal cases, and that in actions on contracts payable in coin the judgments may be expressed in currency.

5. Judgments Rendered for Coin—California. — *Wallace v. Eldredge*, 27 Cal. 498; *Harding v. Cowing*, 28 Cal. 212; *Lane v. Gluckauf*, 28 Cal. 288; *Meyer v. Kohn*, 29 Cal. 278; *Bradbury v. Cronise*, 46 Cal. 287.

Colorado. — *Hittson v. Davenport*, 4 Colo. 169.

Georgia. — *Myers v. Kaufman*, 37 Ga. 600; *Whitaker v. Dye*, 56 Ga. 380.

Idaho. — *Emery v. Langley*, 1 Idaho 694.

Illinois. — *McGoon v. Shirk*, 54 Ill. 408; *Belford v. Woodward*, 158 Ill. 122.

Indiana. — *Churchman v. Martin*, 54 Ind. 380.

Kentucky. — *Webb v. Moore*, 4 T. B. Mon. (Ky.) 483.

Maryland. — *Chesapeake Bank v. Swain*, 29 Md. 506.

Massachusetts. — *Independent Ins. Co. v. Thomas*, 104 Mass. 192; *Warren v. Franklin Ins. Co.*, 104 Mass. 518; *Paddock v. Commercial Ins. Co.*, 104 Mass. 521; *Stark v. Coffin*, 105 Mass. 328.

Missouri. — *Foster v. Atlantic, etc., R. Co.*, 1 Mo. App. 390, 3 Mo. App. 566.

cases, however, does not prevent the rendition of a judgment for the value of the coin in currency where the creditor consents to or seeks such recovery.¹

cc. SPECIFIC CONTRACT ACTS. — Before the present established doctrine became settled by the decisions, it was specifically incorporated in the statutes of some of the states. These statutes were known as Specific Contract Acts, and provided in substance that when contracts were made payable in a specific kind of money, or in an action for the recovery of money received in a fiduciary capacity, or for the use of another, judgments should be entered for the amount due in the kind specified or received.² These

Montana. — *Knox v. Gerhauser*, 3 Mont. 267.

Nevada. — *Linn v. Minor*, 4 Nev. 462; *Wells v. Van Sickle*, 6 Nev. 45; *Jones v. Childs*, 8 Nev. 121.

New York. — *Quinn v. Lloyd*, 1 Sweeney (N. Y.) 253; *Cram v. Webb*, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 245; *Chrysler v. Renois*, 43 N. Y. 209; *Kellogg v. Sweeney*, 46 N. Y. 291; *Commonwealth Bank v. Van Vleck*, 49 Barb. (N. Y.) 508.

Ohio. — *Phillips v. Dugan*, 21 Ohio St. 466.

Oregon. — *Davis v. Mason*, 3 Oregon 154.

Pennsylvania. — *McCalla v. Ely*, 64 Pa. St. 254.

Texas. — *Calhoun v. Pace*, 37 Tex. 454; *Smith v. Wood*, 37 Tex. 616.

United States. — *Cheang-Kee v. U. S.*, 3 Wall. (U. S.) 320; *Bronson v. Rodas*, 7 Wall. (U. S.) 229; *Butler v. Horwitz*, 7 Wall. (U. S.) 258; *Bronson v. Kimp-ton*, 8 Wall. (U. S.) 444; *Drewing v. Sears*, 11 Wall. (U. S.) 379; *Trebilcock v. Wilson*, 12 Wall. (U. S.) 687; *The Vaughan*, 14 Wall. (U. S.) 258; *The Emily Souder*, 17 Wall. (U. S.) 666; *Thompson v. Butler*, 95 U. S. 694.

1. *Belford v. Woodward*, 158 Ill. 122; *Prince Edward's Island Bank v. Trumbull*, 53 Barb. (N. Y.) 459; *Greentree v. Rosenstock*, 61 N. Y. 583; *Gregory v. Morris*, 96 U. S. 619, wherein the court said: "While we have decided that a judgment upon a contract payable in gold may be for payment in coined dollars, we have never held that in all cases it must be so. 'While gold coin is in one sense money, it is in another an article of merchandise.'"

2. In California the validity of such a statute was uniformly upheld. *Carpenter v. Atherton*, 25 Cal. 569; *Otis v. Haseltine*, 27 Cal. 82; *More v. Del Valle*, 28 Cal. 170; *Harding v. Cowing*,

28 Cal. 212; *Spencer v. Prindle*, 28 Cal. 276; *McComb v. Reed*, 28 Cal. 281; *Reese v. Stearns*, 29 Cal. 273; *Meyer v. Kohn*, 29 Cal. 278; *Fox v. Minor*, 32 Cal. 130; *Burnett v. Stearns*, 33 Cal. 469. As to the construction and application of the California act, see *Hathaway v. Brady*, 26 Cal. 581; *Lamping v. Hyatt*, 27 Cal. 99; *Reed v. Eldredge*, 27 Cal. 347; *Gay v. Hamilton*, 33 Cal. 686; *Price v. Reeves*, 38 Cal. 457.

A guest who has deposited with an innkeeper his money, consisting of gold coin, is entitled, under the Specific Contract Act, to recover judgment therefor payable in gold coin only. *Pinkerton v. Woodward*, 33 Cal. 557.

Under the Specific Contract Act a promise in writing to pay in United States gold and silver coin is enforceable by judgment for the payment of gold and silver coin, and a judgment for gold coin only is erroneous. *Burnett v. Stearns*, 33 Cal. 468.

A judgment is a contract within the meaning of the Specific Contract Act. *Wallace v. Eldredge*, 27 Cal. 498.

In Nevada such a law was held unconstitutional and in conflict with the laws of Congress. *Milliken v. Sloat*, 1 Nev. 573; *Mitchell v. Bromberger*, 1 Nev. 604; *Fox v. Barstow*, 1 Nev. 612; *Sigismund v. Troianovich*, 1 Nev. 612. But its validity was afterwards recognized. *Linn v. Minor*, 4 Nev. 462. And finally it was held that the necessity for such a law did not exist, as without it courts possessed the power in question. *Wells v. Van Sickle*, 6 Nev. 50.

In Idaho a similar statute was pronounced void as being in conflict with the Legal Tender Acts. *Betts v. Butler*, 1 Idaho 185, following *Milliken v. Sloat*, 1 Nev. 573, which, as seen in the preceding note, was subsequently overruled.

In Kentucky an early statute provided

statutes and the decisions thereunder are not of much present importance, as the right to render such judgments is now established independently of statute.

(c) **Contracts for Coin or Equivalent Currency.** — It has been held that the judgment upon a contract payable in coin or its equivalent in currency should be in the alternative, for coin or currency.¹ In other cases it has been held that the judgment should be in currency for an amount equal to the face value plus the premium of the coin,² while in still other cases it has been held that the judgment should be for gold alone.³

(d) **Conformity to Pleadings and Verdict — Pleadings and Issues.** — Judgments for a specific kind of coin must be supported by the case made by the pleadings.⁴ This rule was applied under the Spe-

that when a contract was made payable in gold or silver, the judgment should specify that fact. This statute was recognized and enforced in *Webb v. Moore*, 4 T. B. Mon. (Ky.) 483, but it does not seem to have been noticed in later cases. See *Johnson v. Vickers*, 1 Duv. (Ky.) 266; *Riley v. Sharp*, 1 Bush (Ky.) 348.

1. *Wells v. Van Sickle*, 6 Nev. 45.

In *Atkinson v. Lanier*, 69 Ga. 460, it was held that the judgment on such a contract should be for gold, or its equivalent in currency at the time of the rendition of judgment, and that it was error to render judgment for the value of the gold in currency at the time of maturity of the contract, and *Bond v. Greenwald*, 4 Heisk. (Tenn.) 453, where an exactly opposite conclusion was reached, was disapproved. Compare *The Vaughan*, 14 Wall. (U. S.) 258. See also *Lane v. Gluckauf*, 28 Cal. 288.

2. *Mitchell v. Henderson*, 63 N. Car. 643.

In *Jones v. Smith*, 48 Barb. (N. Y.) 552, it was held that, on a contract for specie or its equivalent, the judgment should be merely for the face amount in legal-tender notes. This case was overruled in *Church v. Howard*, 17 Hun (N. Y.) 5, where it was held that the judgment in such a case should be for the value of the specie in legal-tender notes. This case was reversed in *Church v. Howard*, 79 N. Y. 415, but upon other points, and the question here discussed was not considered.

3. *Burnett v. Stearns*, 33 Cal. 468; *Reese v. Stearns*, 29 Cal. 273, holding that, in an action on a contract to pay another a specific number of dollars in gold coin, or its equivalent in legal

currency, a judgment made payable in the alternative, in gold coin or its equivalent in legal-tender notes, was erroneous, and that the Specific Contract Act did not authorize the entry of alternative judgments upon such contracts. Compare *Lane v. Gluckauf*, 28 Cal. 288, where it was said that if a note is made payable in the alternative, either in gold or legal-tender notes, a judgment rendered on it may also be in the alternative or may be rendered payable in gold alone.

4. *Watson v. San Francisco, etc.*, R. Co., 50 Cal. 523; *Chamberlin v. Vance*, 51 Cal. 75; *Emery v. Langley*, 1 Idaho 694; *Belford v. Woodward*, 158 Ill. 122.

Disregarding Prayer. — "Inasmuch as United States legal-tender notes were the general standard of commercial value in the country at the time the action was brought, it was no uncommon error to suppose that the only way to obtain the full benefit of a contract expressly payable in coin was to procure a judgment for an amount of equivalent value, payable in such notes. The plaintiff, it is true, fell into this mistake in the form of the judgment asked in his petition, but it embraced the substance of the remedy to which he was entitled, the full value of his note. It is, however, sufficient to say that in cases where parties have sought the same form of remedy on coin contracts as that claimed in this, the Supreme Court of the United States have decided that it was the duty of the court, in order that the legal rights of parties may be preserved, to render judgments expressly payable in coin. This ruling we feel bound to follow." *Phillips v. Dugan*, 21 Ohio St. 472.

Immaterial Variance. — It is not a

cific Contract Acts.¹ Where the pleadings or process do not specify gold, a judgment by default or *nil dicit* for gold is erroneous.²

Verdict or Findings. — A coin judgment must likewise be sustained by the verdict or findings.³ So, where the verdict is for gold or legal tender in the alternative, a judgment for legal tender only is not in accordance with the verdict.⁴

(e) **Costs.** — It has been held in several cases that, although judgment for the principal sum is properly rendered payable in gold, the judgment for costs must be rendered payable in currency,⁵ but there is one case to the effect that where a contract is made payable in a specific kind of money, the judgment enforcing it may enforce the payment of costs and interests in the kind of money mentioned in the contract, for the reason that costs and interest become a component part of the judgment.⁶

(f) **Effect of Unauthorized Judgment for Coin.** — A judgment for gold or silver coin in a case where such a judgment is not authorized is irregular and erroneous, but it is not in any event void.⁷

sufficient variance between a decree and the bill, in a foreclosure suit to render the decree erroneous, that the bill alleges that the bonds were to be paid in gold coin, and the decree is for payment in lawful money. *Wallace v. Loomis*, 97 U. S. 146.

1. *McComb v. Reed*, 28 Cal. 281; *Goldsmith v. Sawyer*, 46 Cal. 209; *Watson v. San Francisco, etc., R. Co.*, 50 Cal. 523. See *supra*, IV. 5. c. (2) (b) *cc. Specific Contract Acts.*

2. **Default Judgments.** — *Lamping v. Hyatt*, 27 Cal. 99; *Wallace v. Eldredge*, 27 Cal. 495; *Belford v. Woodward*, 158 Ill. 122.

If the complaint in an action on a judgment avers that the judgment sued on was rendered payable in gold coin, and the defendant makes default, the clerk should enter judgment payable in the same kind of money. *Wallace v. Eldredge*, 27 Cal. 498. To the same effect see *Harding v. Cowing*, 28 Cal. 212.

3. *North Pac. R. Co. v. Reynolds*, 50 Cal. 280; *McDonald v. Mission View Homestead Assoc.*, 51 Cal. 210.

Verdict Not Supported by Pleadings. — Where there is no issue made as to whether the plaintiff's demand is made payable in gold coin, but a verdict is found for an amount in gold coin, the words "gold coin" in the verdict are surplusage, and should be disregarded in entering judgment. *Watson v. San Francisco, etc., R. Co.*, 50 Cal. 523;

Chamberlin v. Vance, 51 Cal. 75; *Belford v. Woodward*, 158 Ill. 122.

In Ejectment if the court finds the value of the use and occupation of the premises in both gold and currency, a general judgment may be rendered for the currency value. *Carpentier v. Small*, 35 Cal. 346 [*citing Carpentier v. Atherton*, 25 Cal. 564; *Spencer v. Prindle*, 28 Cal. 276; *Reese v. Stearns*, 29 Cal. 273].

On Verdict Not Specifying Medium of Payment. — In *Winans v. Hassey*, 48 Cal. 634, it was held that if the complaint alleges that the contract sued on called for payment in gold coin, and the answer admits the allegation, the plaintiff, if he recovers, is entitled to a judgment payable in gold coin, and the verdict of the jury need not specify the kind of currency or money to be recovered.

4. *Knox v. Gerhauser*, 3 Mont. 267.

5. *More v. Del Valle*, 28 Cal. 170; *Phillips v. Speyers*, 49 N. Y. 653; *Wild v. New York, etc., Silver Min. Co.*, 59 N. Y. 644; *Phillips v. Dugan*, 21 Ohio St. 466.

6. *Carpentier v. Atherton*, 25 Cal. 564.

7. *Weil v. Howard*, 4 Nev. 384; *Hazard v. Cole*, 1 Idaho 276, holding that such a judgment, if irregular, is subject to modification only, either in the same court on motion or on appeal by the Supreme Court.

In *Flournoy v. Healy*, 31 Tex. 590, it

6. Designation of Parties — *a.* IN GENERAL. — A judgment should designate the parties for and against whom it is rendered,¹ and they should be described with sufficient certainty to enable the clerk to issue execution.²

Variance. — The record must show the identity of the parties mentioned in various stages of the suit; or, in other words, there must not be a variance between the parties for or against whom the judgment is rendered and the parties indicated by the pleadings.³ The principle of *idem sonans* may be invoked, however,

was held that the words "in specie" might be regarded as surplusage and struck out on appeal.

In *Belford v. Woodward*, 158 Ill. 122, it was held that a default judgment ordering payment in gold coin of the amount adjudged is void as to such a provision where the complaint alleged no promise to pay in coin, but that this did not invalidate the judgment as a whole.

In *Windisch v. Gussett*, 30 Tex. 744, it was held that an erroneous judgment for gold or silver should be corrected by a writ of error, and that an injunction against it would not lie.

1. *Sutton v. Louisville*, 5 Dana (Ky.) 28; *Moody v. Deutsch*, 85 Mo. 237; *McClellan v. Cornwell*, 2 Coldw. (Tenn.) 298; *Alston v. Emmerson*, 83 Tex. 231; *Smith v. Chenault*, 48 Tex. 455; *Maxwell v. Stewart*, 22 Wall. (U. S.) 79.

More specifically as to the sufficiency of a judgment in this regard see *infra*, IV. 6. *b. In Whose Favor*; and *infra*, IV. 6. *c. Against Whom*.

In *Johnson v. Richardson*, 52 Tex. 481, it was held that although a judgment should set forth the full names of the parties for and against whom it is rendered, a failure in this respect will not be cause for reversal in the absence of an assignment of error pointing out the defect.

Reference to the Caption or to the Pleadings, Process, or Proceedings in a case may be made in determining the sufficiency of a judgment in respect to naming the parties. *Taylor v. Branham*, 35 Fla. 297.

The style of the cause is sufficient if the memorandum made by the clerk indicates with reasonable certainty to what suit it relates. *Collins v. Hyslop*, 11 Ala. 508.

In *Smith v. Redus*, 9 Ala. 99, it was held that where the names of the parties to the suit are not fully stated upon

the margin of the judgment entry, the defect is amendable by reference to the papers in the case, and may be considered as amended, although the amendment is not in point of fact made; and, for the purpose of informing the court that the judgment was intended to apply to the particular cause, extrinsic evidence is admissible.

2. *Joseph v. Joseph*, 5 Ala. 280; *Spence v. Simmons*, 16 Ala. 829; *Turner v. Dupree*, 19 Ala. 198; *Steamer Mollie Hamilton v. Paschal*, 9 Heisk. (Tenn.) 203.

A judgment omitting the Christian names of the parties is good between the parties. *McGaughey v. Woods*, 106 Ind. 380.

3. *Arkansas*. — *Webster v. State Bank*, 4 Ark. 423.

California. — *Sutter v. Cox*, 6 Cal. 415; *Haynes v. Backman*, (Cal. 1892) 31 Pac. Rep. 746.

Delaware. — *McNamee v. Huffman*, 3 Harr. (Del.) 425.

Iowa. — *Griffith v. Milwaukee Harvester Co.*, 92 Iowa 634.

Missouri. — *Sweazy v. Nettles*, 2 Mo. 6; *Ellis v. Jones*, 51 Mo. 180.

North Carolina. — *Brooks v. Ratcliff*, 11 Ired. L. (N. Car.) 321.

Texas. — *Hopson v. Schoelkopf*, (Tex. Civ. App. 1894) 27 S. W. Rep. 283; *Austin Water, etc., Co. v. Makemson*, (Tex. Civ. App. 1894) 27 S. W. Rep. 588.

United States. — *Conrad v. Griffey*, 11 How. (U. S.) 480.

Illustrations. — Where one of the defendants was sued by the name of John Cox, and the service was returned upon James Cox, and the judgment was rendered against J. Cox, this was held to be erroneous unless there was something in the record to show that the person served was the person sued. *Sutter v. Cox*, 6 Cal. 415.

Where a suit is commenced in the name of J. T. D. and three others, and

to obviate a variance in the names of the parties to the judgment,¹ and where, upon an inspection of the whole record, the identity of the parties named in the judgment and the pleading is clear, the apparent variance will be held to be a clerical misprision and immaterial, or at least amendable.²

The Transposition of the words "plaintiff" and "defendant" in a judgment is not fatal.³

b. IN WHOSE FAVOR. — A judgment not designating in whose favor it is rendered is void for uncertainty.⁴

the judgment is rendered in the name of J. T. D. & Co., the judgment is not void. *Ellis v. Jones*, 51 Mo. 180.

The fact that a certain corporation is named as defendant in a complaint, while judgment is rendered against another not named, does not render the judgment irregular, where the latter appeared and filed an answer which, if true, showed the identity of the two. *Haynes v. Backman*, (Cal. 1892) 31 Pac. Rep. 746. See also *Austin Water, etc., Co. v. Makemson*, (Tex. Civ. App. 1894) 27 S. W. Rep. 588.

A variance between the writ and declaration, and verdict and judgment, as to the Christian name of the defendant, is fatal, and avoids the judgment. *Sweazy v. Nettles*, 2 Mo. 6.

Statute of Jeofails and Amendments. — Where the writ, pleadings, and contract speak only of Frederick D. Conrad, and judgment is for the plaintiff against Daniel Frederick Conrad, the defendant, the defect is cured by the statute of jeofails. *Conrad v. Griffey*, 11 How. (U. S.) 480.

Where an action was brought in the name of J. Brooks, W. E. Colton, and W. E. Churchill, partners trading under the name and firm of "Brooks, Colton and Company," and the judgment was in the name of "Brooks, Colton & Co.," it was held that this was a variance for which at common law the judgment might have been reversed, but that the error was cured by the statute of amendments. *Brooks v. Ratcliff*, 11 Ired. L. (N. Car.) 321.

1. *Iowa.* — *Mallory v. Riggs*, 76 Iowa 748.

Kansas. — *Rowe v. Palmer*, 29 Kan. 337.

Pennsylvania. — *Jenny v. Zehnder*, 101 Pa. St. 297.

Texas. — *Eichman v. State*, 22 Tex. App. 137; *Selman v. Orr*, 75 Tex. 528.

Entering a judgment against "Zehnder" for "Zehnder" is not a fatal error. *Jenny v. Zehnder*, 101 Pa. St. 297.

2. *Alabama.* — *Patterson v. Burnett*, 6 Ala. 844; *Crawford v. Whittlesey*, 8 Ala. 806.

Arkansas. — *Webster v. State Bank*, 4 Ark. 423.

California. — *Sutter v. Cox*, 6 Cal. 415.

Delaware. — *McNamee v. Huffman*, 3 Harr. (Del.) 425.

Illinois. — *Kerr v. Swallow*, 33 Ill. 379. *North Carolina.* — *Brooks v. Ratcliff*, 11 Ired. L. (N. Car.) 321.

Texas. — *Terry v. French*, 5 Tex. Civ. App. 120; *Halsell v. McMurphy*, 86 Tex. 100.

Illustrations. — In an action against James L. Thompkins and Gilbert L. McMurphy, the name "Gabriel" was used in the judgment instead of the name "Gilbert." It was held that as it clearly appeared from the entire record that the name "Gabriel" was a clerical error, such error did not affect the sale upon execution against the real defendants. *Halsell v. McMurphy*, 86 Tex. 100.

The misspelling of the Christian name of one of the defendants in the title of the cause in the judgment record is not material where the name was correctly spelled in prior proceedings. *Kerr v. Swallow*, 33 Ill. 379.

Where an action was brought in the name of A, B, and C, copartners, under the name of "A B & Co.," and judgment was rendered and execution was issued in favor of "A B & Co.," the variance was held not fatal, as the true names were once given in the pleadings. *McNamee v. Huffman*, 3 Harr. (Del.) 425; *Brooks v. Ratcliff*, 11 Ired. L. (N. Car.) 321.

The Complaint Should Be Looked To for the purpose of identifying the parties. *Collins v. Hyslop*, 11 Ala. 508; *Flack v. Andrews*, 86 Ala. 395; *McDaniel v. Johnston*, 110 Ala. 531.

3. *Bowman v. Green*, 6 T. B. Mon. (Ky.) 341.

4. *Alabama.* — *Turner v. Dupree*, 19

The Parties Need Not Be Designated by Name in the judgment where the entry of judgment in connection with the record of the cause leaves no doubt as to the parties in whose favor it was rendered.¹ Accordingly, a judgment rendered in favor of the "plaintiffs," without other designation, is sufficient, as the pleadings show who the plaintiffs are.² Where there are several plaintiffs, the use

Ala. 198; *Hughes v. Mitchell*, 19 Ala. 268; *Gilbreath v. Manning*, 24 Ala. 418.

Florida. — *Brett v. Ming*, 1 Fla. 498.

Illinois. — *Martin v. Barnhardt*, 39 Ill. 9; *Coats v. Barrett*, 49 Ill. App. 275; *Fuller Watchman's Electrical Detector Co. v. Louis*, 50 Ill. App. 428.

Missouri. — *Moody v. Deutsch*, 85 Mo. 237.

Texas. — *Johnson v. Richardson*, 52 Tex. 481.

United States. — *Maxwell v. Stewart*, 22 Wall. (U. S.) 79.

In the following cases the judgment was held good as against the objection that it failed sufficiently to indicate the parties for whom it was rendered; *State v. Stanford*, 20 Ark. 145; *Vangeazel v. Hillyard*, 1 Houst. (Del.) 515; *Lancaster v. Richmond*, 83 Me. 534; *Crowell v. Johnson*, 2 Neb. 146; *Paris, etc., R. Co. v. Greiner*, 84 Tex. 443.

A Judgment Nisi which does not designate in whose favor it was rendered is insufficient to support a final judgment. *Spence v. Simmons*, 16 Ala. 828.

A Decree in Favor of a Fictitious Person is void. *U. S. v. Samperyac, Hempst.* (U. S.) 118.

Illustrations of Insufficient Designations. — A judgment in favor of the "officers of the Circuit Court of Mobile" is a nullity, and no writ of error can be sued out upon it. *Patterson v. Circuit Ct.*, 11 Ala. 740.

The words, "whereupon it is considered by this court have and recover of said defendant the sum of," etc., do not constitute a judgment, there being no decision for or in favor of anybody. *Fuller Watchman's Electrical Detector Co. v. Louis*, 50 Ill. App. 428.

A judgment in favor of "Rawlings and Son" was reversed because the plaintiffs were not named with sufficient certainty. *Rhea v. Rawlings*, 3 Cranch (C. C.) 256.

A decree that money should be paid to "the owners of the said judgment," without determining who those owners were, is objectionable. *De Wolf v. Long*, 7 Ill. 679.

"Legatees," "Representatives," "Descendants," or "Heirs." — A judgment in favor of "legatees" or "legal representatives" of a deceased person is void for uncertainty. *Betts v. Blackwell*, 2 Stew. & P. (Ala.) 373; *Joseph v. Joseph*, 5 Ala. 280; *Kyle v. Mays*, 22 Ala. 673.

A judgment for the "descendants" or "heirs" of a deceased person has been held not to be void for uncertainty, although perhaps erroneous. *Shackleford v. Fountain*, 1 T. B. Mon. (Ky.) 252; *Parsons v. Spencer*, 83 Ky. 305; *Stevenson v. Flournoy*, 89 Ky. 561.

1. *Yarborough v. Judge*, 15 Ala. 556; *Vangeazel v. Hillyard*, 1 Houst. (Del.) 515; *Grimball v. Mississippi, etc., R. Co.*, 3 Smed. & M. (Miss.) 38; *McCartey v. Kittrell*, 55 Miss. 253; *Little v. Birdwell*, 27 Tex. 688.

The Insertion of the Names of the parties in the entry of the final judgment is unnecessary if there be enough in it to connect it with the other parts of the record in which the names are entered, so as to make the judgment a part of the record; and hence, if the clerk in making the entry err in the name of the plaintiff, as, for instance, by using "Brandon Bank" for "Mississippi and Alabama Railroad Company," it will be immaterial, and the judgment good. *Grimball v. Mississippi, etc., R. Co.*, 3 Smed. & M. (Miss.) 38.

And so where the declaration sets out the names of the partners, a judgment which merely states the firm name and recites that "the plaintiffs recover of the defendant," etc., is good. *Presley v. Anderson*, 42 Miss. 274.

2. *Collins v. Hyslop*, 11 Ala. 508; *Presley v. Anderson*, 42 Miss. 274; *Smith v. Chenault*, 48 Tex. 455.

Reference to Other Parts of Record. — A judgment for the plaintiffs generally, without mention of names, may be explained by reference to the caption, record, or pleadings. *Collins v. Hyslop*, 11 Ala. 508; *Finnagan v. Manchester*, 12 Iowa 521; *McCartey v. Kittrell*, 55 Miss. 253; *Wilson v. Nance*, 11 Humph. (Tenn.) 189; *Hays v. Yar-*

of the singular "plaintiff" instead of the plural "plaintiffs" in the judgment will be intended to be merely a clerical error, and the judgment will be good in favor of all the plaintiffs.¹

A Clerical Error in the plaintiff's Christian name is not necessarily fatal,² and judgments have been held good where the plaintiff's Christian name was entirely omitted.³

Nominal and Beneficial Plaintiffs. — Where the action is in the name of one for the use of another, it has been held that the judgment must be entered in the name of the record plaintiff.⁴

c. AGAINST WHOM. — A judgment must designate with certainty the party against whom it is rendered.⁵

borough, 21 Tex. 487; *Little v. Birdwell*, 27 Tex. 688.

The complaint should be looked to for the purpose of determining the capacity in which the plaintiff recovered judgment. *Rhodes v. Walker*, 44 Ala. 213, cited with approval in *McDaniel v. Johnston*, 110 Ala. 531.

1. *Ellis v. Dunn*, 3 Ala. 632; *Brents v. Barnett*, 3 Bibb (Ky.) 251. Compare *Aultman v. Wirth*, 45 Ill. App. 614, where a judgment for the "plaintiff," upon a verdict for the "plaintiffs," in an action by two persons, without specifying which plaintiff, was held fatally defective.

2. *Ballew v. Casey*, (Tex. 1888) 9 S. W. Rep. 189.

Mistake in Middle Initial. — Where the action is by the guardian of a minor, a judgment in favor of the guardian by name is not erroneous because of a variance as to the middle initial of the minor as stated in the pleadings and judgment. *Crawford v. Wilcox*, 68 Tex. 109.

The Word "Junior" Is No Part of a Name, and where a plaintiff in the summons and declaration affixed the letters "Jr." to his name, the omission of those letters in the record of judgment is immaterial. *Loveland v. Sears*, 1 Colo. 433.

3. *Condry v. Henley*, 4 Stew. & P. (Ala.) 9; *Marshall v. Hill*, 8 Yerg. (Tenn.) 101; *Hays v. Yarrowborough*, 21 Tex. 487; *Wyche v. Clapp*, 43 Tex. 543. Cases of this sort occur most frequently in actions by partners. See article PARTNERSHIP.

4. *Souder v. Stout*, 3 N. J. L. 8; *McCormick v. Fulton*, 19 Ill. 570. Compare *Leftwick v. Thornton*, 18 Iowa 56, where trustees had brought a suit in their own name in behalf of a church, and a judgment in the corporate name of the church was held correct.

A judgment in favor of a nominal plaintiff "for the use of the estate of Saunders, deceased," will not be disturbed in the Supreme Court on the assignment that it does not show for whom it was rendered. *Dowell v. Mills*, 32 Tex. 440.

Where the action is in the name of one for the use of another, a judgment entered for the beneficial plaintiff only is a judgment for him alone, and for the other there is a discontinuance. *Hobson v. McCambridge*, 130 Ill. 367.

5. *Illinois*. — *Martin v. Barnhardt*, 39 Ill. 9; *Aultman v. Wirth*, 45 Ill. App. 614; *Coats v. Barrett*, 49 Ill. App. 275. *Iowa*. — *Rigglesworth v. Reed*, 1 Morr. (Iowa) 19; *Taylor v. Runyon*, 3 Iowa 474.

Missouri. — *Moody v. Deutsch*, 85 Mo. 237.

Pennsylvania. — *Park v. Holmes*, 29 W. N. C. (Pa.) 492, 147 Pa. St. 497.

Tennessee. — *Cheatham v. Jones*, 5 Hayw. (Tenn.) 37; *Hubbard v. Birdwell*, 14 Humph. (Tenn.) 220.

Texas. — *Johnson v. Richardson*, 52 Tex. 481.

Wisconsin. — *Rape v. Heaton*, 9 Wis. 328.

United States. — *Maxwell v. Stewart*, 22 Wall. (U. S.) 79.

A Judgment Against Attached Property, instead of against the defendant, is erroneous. *Conover v. Conover*, 17 N. J. L. 187.

In *Crowell v. Johnson*, 2 Neb. 146, a judgment which first found the amount due from the defendant to the plaintiff, and then ordered the sum found in his favor to be paid from the proceeds of the attached property, which was then in the custody of the law, was held very informal, but neither erroneous nor void.

Illustration of Sufficient Designation. — A judgment against "James and Wil-

A Judgment Against the "Defendants," without naming them, is sufficient, because the pleadings and record may be looked to in order to ascertain who are the defendants.¹ A judgment against the "defendants" will be presumed to be against all the defendants² against whom it could have been properly rendered ;

liam H." is not void. *Downard v. Sluder*, 5 Blackf. (Ind.) 559.

Where a defendant is equally well known by either of two names, a judgment against him in either name is good as against him. *Isaacs v. Mintz*, (City Ct.) 11 N. Y. Supp. 423.

Where an infant defendant to a bill of revivor is described as the deceased defendant's only infant son, whose name is unknown, the decree rendered against him is not void for uncertainty, and cannot be collaterally impeached, especially when the infant, by a subsequent bill to redeem the land sold under the decree, shows that he is the person against whom the bill of revivor was filed. *Preston v. Dunn*, 25 Ala. 507.

See also *Coolbaugh v. Huether*, 6 Kulp (Pa.) 209, where a judgment entry was held sufficient to show a judgment against all three defendants.

Where the Defendant Was Sued in a Fictitious Name, as authorized by statute, it was held that the complaint must be amended before judgment, by inserting the true name, or it would be reversed. *San Francisco v. Burr*, (Cal. 1894) 36 Pac. Rep. 771.

Representative Character of Defendant.

— In the following cases the judgment entry was held sufficient to show a judgment against the defendant in a representative capacity. *Sharpe v. Morgan*, 44 Ill. App. 346; *Sturgis v. Rogers*, 26 Ind. 1; *Dougherty v. McManus*, 36 Iowa 657; *Prichard v. Bixby*, 71 Wis. 422; *Clapp v. Walters*, 2 Tex. 130.

Addition of Words Descriptio Personæ.

— Where a judgment is properly rendered against a defendant in his individual capacity the mere addition of words descriptive of the person, such as "tax collector," *Stewart v. Atlanta Beef Co.*, 93 Ga. 12; or "agent," *Lenon v. Walker*, 2 Tex. Unrep. Cas. 568; will not render the judgment erroneous. See also *Waldsmith v. Waldsmith*, 2 Ohio 156; *Stevens v. Morris*, 35 Tex. 709.

1. *Collins v. Hyslop*, 11 Ala. 508; *Benedict v. Dillehunt*, 4 Ill. 287; *Fink v. Disbrow*, 69 Ill. 76; *Hendry v. Crandall*, 131 Ind. 42; *Toliver v. Mor-*

gan, 75 Iowa 619; *Wilson v. Nance*, 11 Humph. (Tenn.) 189; *Smith v. Chénault*, 48 Tex. 455.

In an action against Frederick D. Conrad, a judgment against "Daniel Frederick Conrad, the defendant," is good, as the name may be considered as surplusage, the party being sufficiently identified by the words "the defendant." *Conrad v. Griffey*, 11 How. (U. S.) 480.

A judgment is operative against all of the parties to the action, even where the names are incorrectly given in the judgment or are altogether omitted from it. *McCartey v. Kittrell*, 55 Miss. 253.

Reference to Other Parts of Record.—

A judgment against defendants generally, without mention of names, may be explained by reference to the caption, record, or pleadings. *Collins v. Hyslop*, 11 Ala. 508; *Finnagan v. Manchester*, 12 Iowa 521; *Toliver v. Morgan*, 75 Iowa 619; *Rood v. School Dist. No. 7*, 1 Dougl. (Mich.) 502; *Overall v. Pero*, 7 Mich. 315; *McCartey v. Kittrell*, 55 Miss. 253; *Hays v. Yarbrough*, 21 Tex. 487; *Little v. Birdwell*, 27 Tex. 688.

In Louisiana a judgment creates no lien against the property of a defendant whose name is not mentioned in the judgment entry. *Ford v. Tilden*, 7 La. Ann. 533.

2. *Kirby v. Holmes*, 6 Ind. 33; *Robertson v. Winchester*, 85 Tenn. 171; *Dousman v. Hooe*, 3 Wis. 466.

Construction with Reference to Verdict.

— In *Taylor v. Taylor*, 64 Ind. 356, the verdict was against "the defendant." The judgment was rendered against "defendants." The word "defendant" was subsequently used in the entry. It was held that the letter "s" in "defendants" was a mere mispension of the clerk, and did not include one made a party defendant on his own motion.

See also *Lamar v. Williams*, 39 Miss. 342, where the verdict was in favor of a part of the defendants, and against the others, and a judgment entered thereon against "the defendants" was held not erroneous, as the judgment

that is to say, it will be limited to those defendants who have been served with process or who have appeared.¹

A Judgment Against "the Defendant" has been held good against all the defendants, where the use of the singular number was evidently a clerical error.² In other cases a judgment against "the defendant," where there were several, has been held bad as to all for uncertainty,³ except where the record showed which one of the several was meant.⁴

Christian Name or Initials. — In a judgment against a party, omitting his Christian name⁵ or using the initials only of his Christian name⁶ is a mere irregularity and will not render the judgment void.

would be construed with reference to the verdict upon which it was rendered, and would be deemed to be against only those defendants against whom the verdict was given.

1. *Arkansas*. — *Woolford v. Howell*, 2 Ark. 1.

Georgia. — *McBride v. Bryan*, 67 Ga. 584.

Illinois. — *Stephens v. Sweeney*, 7 Ill. 375; *Laffin v. White*, 38 Ill. 340.

Indiana. — *Cahill v. Vanlaningham*, 7 Ind. 540; *Lemen v. Young*, 14 Ind. 3.

Kentucky. — *Morgan v. Morgan*, 2 Bibb (Ky.) 390; *Clagget v. Blanchard*, 8 Dana (Ky.) 43; *Clarke v. Finnell*, 16 B. Mon. (Ky.) 329; *Kountz v. Brown*, 16 B. Mon. (Ky.) 585; *Waller v. Martin*, 17 B. Mon. (Ky.) 188.

Michigan. — *Barnes v. Michigan Air Line R. Co.*, 54 Mich. 243.

Mississippi. — *Lamar v. Williams*, 39 Miss. 342.

Tennessee. — *Cheatham v. Jones*, 5 Hayw. (Tenn.) 37; *Boyd v. Baynham*, 5 Humph. (Tenn.) 386; *Winchester v. Beardin*, 10 Humph. (Tenn.) 247.

2. *Kentucky*. — *Thomas v. Warford*, 1 Bibb. (Ky.) 262; *M'Couns v. Holmes*, 4 Litt. (Ky.) 390; *Com. v. Miller*, 6 Dana (Ky.) 315; *Clagget v. Blanchard*, 8 Dana (Ky.) 43.

New Mexico. — *New Mexico, etc., R. Co. v. Madden*, 7 N. Mex. 215; *Union Trust Co. v. Atchison, etc., R. Co.*, (N. Mex. 1895) 42 Pac. Rep. 89.

Tennessee. — *Myers v. Hammond*, 6 Baxt. (Tenn.) 61; *Gunn v. Boone*, 7 Heisk. (Tenn.) 8.

Virginia. — *Roach v. Blakey*, 89 Va. 767.

Compare Henry v. Halsey, 5 Smed. & M. (Miss.) 573, wherein it was held that where one of two defendants makes default, and the other pleads and a verdict is found against him on

his plea, a judgment entered in the singular number against "the defendant" will be construed to be against the one who pleaded alone, and not to embrace the other, and the judgment will therefore be erroneous in not disposing of the case as against the defendant who had not pleaded.

3. *O'Conner v. Mullen*, 11 Ill. 116; *Zimmer v. Bantel*, (Supreme Ct.) 28 N. Y. St. Rep. 899, 8 N. Y. Supp. 374.

4. *Finnagan v. Manchester*, 12 Iowa 521; *Louisville, etc., R. Co. v. Barrett*, 13 Ky. L. Rep. 232.

A judgment that the plaintiff recover from "the defendant" so much damages, "together with his costs," etc., is, upon its face, a judgment against the defendant remaining of record only, the action as to the codefendant having been dismissed. *Haines v. Amerine*, 48 Ill. App. 570.

5. *Garland v. Bartels*, 2 N. Mex. 1; *Von Hatten v. Scholl*, 1 N. Y. App. Div. 32; *Goodgion v. Gilreath*, 32 S. Car. 388; *Bradford v. Rogers*, 2 Tex. Unrep. Cas. 57; *Newcomb v. Peck*, 17 Vt. 302; *Olson v. Veazie*, 9 Wash. 481.

Omission of Middle Initial. — The omission of the initial of the middle name of the defendant, in the entry and docket of a judgment recovered against him, does not render the judgment invalid, or prevent its becoming a lien upon his real estate as against subsequent purchasers from him in good faith. *Clute v. Emmerich*, 26 Hun (N. Y.) 10; *Hopper v. Lucas*, 86 Ind. 43. *Compare Wood v. Reynolds*, 7 W. & S. (Pa.) 406.

6. *Oakley v. Pegler*, 30 Neb. 628.

The Use of Initial Letters for the corporate name of the defendant in the caption of the minute entry of a judgment is not a material error, where the name is fully stated in the summons,

Where a Party Is Sued in a Wrong Name, his failure to plead the misnomer in abatement operates as an estoppel to object to the judgment.¹

Miscellaneous Cases. — A judgment against "the owners" of a boat, without any other designation or personal identification, is erroneous.² A judgment against "the administrator of A B, who was administrator of C D," is good where the record shows who is meant.³ A judgment for the plaintiff is equivalent to a judgment against the defendant, where there is but one.⁴ A judgment for the defendant, in a suit by an attorney in fact, is a judgment against the attorney in fact.⁵

7. Description of Property. — Where a judgment affects the title to property, real or personal, the property must be described, and the description should be specific and certain.⁶ An impossible,⁷ wrong,⁸ or uncertain description, or no description at all, renders the judgment erroneous and void.⁹

complaint, and all other papers in the case. *Lampkin v. Louisville, etc., R. Co.*, 106 Ala. 287.

In *Bridges v. Layman*, 31 Ind. 384, it was said that the judgment should contain not only the defendant's Christian name, but also his surname, but that the omission of the Christian name, by giving only the initials, would render the proceedings merely irregular, and not void.

1. Failure to Plead Misnomer — *Florida*. — *L'Engle v. Florida Cent., etc., R. Co.*, 21 Fla. 353.

Indiana. — *Kingen v. Stroh*, 136 Ind. 610; *Bloomfield R. Co. v. Burress*, 82 Ind. 83; *Vogel v. Brown Tp.*, 112 Ind. 299, 2 Am. St. Rep. 187.

Iowa. — *Peterson v. Little*, 74 Iowa 223; *Lindsey v. Delano*, 78 Iowa 350.

Maryland. — *Baltimore First Nat. Bank v. Jagers*, 31 Md. 38.

Missouri. — *Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51.

Vermont. — *Newcomb v. Peck*, 17 Vt. 302, 44 Am. Dec. 340.

United States. — *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404.

England. — *Smith v. Patten*, 6 Taunt. 115.

2. Church v. Chambers, 3 Dana (Ky.) 274.

A judgment against "the captain and master of the steamboat Mollie Hamilton," without more, is void. *Steamer Mollie Hamilton v. Paschal*, 9 Heisk. (Tenn.) 203.

3. Thomas v. Sterns, 33 Ala. 137.

4. Aldrich v. Maitland, 4 Mich. 205.

5. Herndon v. Bartlett, 7 T. B. Mon. (Ky.) 449.

6. Lawless v. Barger, 9 Bush (Ky.) 666; *Runyon v. Darnall*, 10 Bush (Ky.) 69; *Ross v. Adams*, 13 Bush (Ky.) 370.

In *Knowles v. Torbitt*, 53 Tex. 557, it is said that under the modern practice in ejectment a general description of the premises sued for is good, unless a different rule is prescribed by statute.

7. Gerlach v. Walsh, 41 Ill. App. 83.

8. Where a decree purporting to be for six hundred acres of land, to which quantity only the plaintiff was entitled, proved, by calculating the corners and distances, to be for more than six hundred acres, such a decree was held erroneous. *Kennedy v. Duncan, Hard. (Ky.)* 373.

A Manifest Mistake in a decree by a misdescription of the premises, otherwise sufficiently identified and described on the face of the decree, does not prejudice the party's right. The words of misdescription are surplusage. *Laverty v. Moore*, 33 N. Y. 658.

9. California. — *Kelley v. McKibben*, 53 Cal. 13.

Indiana. — *Ratliff v. Stretch*, 117 Ind. 526.

Kentucky. — *Woolry v. Clay*, 3 A. K. Marsh. (Ky.) 135; *Tribble v. Davis*, 3 J. J. Marsh. (Ky.) 633; *Smith v. Peyton*, 6 T. B. Mon. (Ky.) 265; *Noland v. Noland*, 12 Bush (Ky.) 427.

Louisiana. — *McManus v. Stevens*, 10 La. Ann. 177.

Minnesota. — *Keith v. Hayden*, 26 Minn. 212.

Texas. — *Miller v. Moss*, (Tex. 1888) 9 S. W. Rep. 257; *Devine v. Keller*, 73

The Description Is Sufficient where the property which is the subject of the judgment is described with sufficient certainty to identify it.¹

Ordinarily the Judgment Should Follow the Complaint in its description of the property involved.²

Reference to Pleadings or Report.—A description of property in the judgment by a reference to the pleadings is sufficient where the description in the pleadings is sufficient.³ A reference to

Tex. 364; *Hurt v. Moore*, 19 Tex. 269; *Hearne v. Erhard*, 33 Tex. 60.

United States.—*Schofield v. Horse Springs Cattle Co.*, 65 Fed. Rep. 433.

1. *Alabama.*—*Gayle v. Singleton*, 1 Stew. (Ala.) 566.

Arkansas.—*Jones v. Minogue*, 29 Ark. 637.

District of Columbia.—*Anderson v. Tinney*, 5 Mackey (D. C.) 335.

Indiana.—See *Cincinnati, etc., R. Co. v. Clifford*, 113 Ind. 460, and authorities therein cited.

Kentucky.—*Tribble v. Davis*, 3 J. J. Marsh. (Ky.) 633.

Louisiana.—*McManus v. Stevens*, 10 La. Ann. 177.

Texas.—*Devine v. Keller*, 73 Tex. 364; *Hurt v. Moore*, 19 Tex. 269; *Murray v. Land*, 27 Tex. 89; *Hearne v. Erhard*, 33 Tex. 60; *Allday v. Whitaker*, 66 Tex. 669.

Question for Jury.—The sufficiency of the description within the rule stated above is a question for the jury. *Birdseye v. Rogers*, (Tex. Civ. App. 1894) 26 S. W. Rep. 841.

Description of Land Held Sufficiently Certain—*California.*—*Gaskill v. Moore*, 4 Cal. 233; *Rosenthal v. Matthews*, 100 Cal. 81.

Illinois.—*Tilton v. Pearson*, 67 Ill. App. 372.

Indiana.—*Ruston v. Grimwood*, 30 Ind. 364; *Thain v. Rudisill*, 126 Ind. 272.

Iowa.—*Citizens' Sav. Bank v. Stewart*, 90 Iowa 467.

Kentucky.—*McClure v. Bigstaff*, 18 Ky. L. Rep. 601, (Ky. 1896) 37 S. W. Rep. 294 [rehearing denied in (Ky. 1896) 38 S. W. Rep. 431, 18 Ky. L. Rep. 607]; *McGuire v. Kirk*, (Ky. 1894) 26 S. W. Rep. 585.

Massachusetts.—*Adams v. Frothingham*, 3 Mass. 364.

South Carolina.—*State v. Pinckney*, 22 S. Car. 510.

Texas.—*Thompson v. Jones*, (Tex. 1889) 12 S. W. Rep. 77; *Lumpkin v. Draper*, (Tex. 1891) 18 S. W. Rep. 1058;

Slater v. Wilkins, 37 Tex. 667; *Rogers v. McLaren*, 53 Tex. 423; *Broxson v. McDougal*, 63 Tex. 193; *Allday v. Whitaker*, 66 Tex. 669; *Kelly v. Gibbs*, 84 Tex. 143; *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574.

Utah.—*Wilson v. Hull*, 7 Utah 90.

Description of Land Held Insufficient—*California.*—*Diggins v. Hartshorne*, 108 Cal. 154.

Kentucky.—*Runyon v. Darnall*, 10 Bush (Ky.) 69; *Smith v. Cornett*, (Ky. 1897) 38 S. W. Rep. 689, 18 Ky. L. Rep. 818.

Minnesota.—*Keith v. Hayden*, 26 Minn. 212.

Texas.—*Hearne v. Erhard*, 33 Tex. 60.

2. *Holman v. Vallejo*, 19 Cal. 498; *Foster v. Wilson*, 5 Mont. 58.

Where a judgment of foreclosure gives the distance of certain lines different from that set forth in the pleadings, but still calls for the same well-known corners as those described in the pleadings, it will be a good and sufficient judgment, operating on all the land included within the corners. *Taylor v. Carter*, 62 Tex. 489.

Where There Is an Evident Omission in the general description of the property named in a declaration in ejectment, but which description is immediately followed by a correct and particular description, it is no misprision of the clerk to follow the latter description in entering the judgment. *Anderson v. Tinney*, 5 Mackey (D. C.) 335.

3. *Hogue v. Fanning*, 73 Cal. 54; *Jones v. Belt*, 2 Gill (Md.) 106; *Lemmon v. Hartsook*, 80 Mo. 13; *Martin v. Teal*, (Tex. Civ. App. 1895) 29 S. W. Rep. 691; *Haws v. Victoria Copper Min. Co.*, 160 U. S. 303. Such a reference is to the amended complaint, if there be one. *Kelly v. McKibben*, 54 Cal. 192.

Certainty.—In an action to recover possession of personal property, a reference in the judgment to the findings, and in the findings to the com-

the report of a commissioner for a description is sufficient.¹

8. **Date.** — A judgment should show with certainty the time of its rendition.² The omission of the date, however, is a mere irregularity, and will not render the judgment void.³ The date may be expressed in figures.⁴

Presumption as to Date. — At common law, where the date of a judgment did not appear, it was presumed to have been entered

plaint, for a description of the property, is inexcusably circuitous, but the description is not uncertain. *Certum est quod certum reddi potest.* Kelly v. McKibben, 54 Cal. 192.

Where the description in the pleadings is so vague that the property cannot be identified, a judgment generally that the plaintiff be put in "possession of the land sued for" will be set aside. Williams v. Kelso, 7 La. 409.

Where the judgment simply directs the sale of "the tract of land * * * described in the petition," and the petition seeks to enforce a lien on two tracts of land therein described, a sale under the judgment will be set aside. Lawless v. Barger, 9 Bush (Ky.) 665.

A judgment for the possession of personal property which merely describes it as "two stallion horses," and does not refer to any pleading or any other paper for further description, is bad for uncertainty and will be reversed. Cooke v. Aguirre, 86 Cal. 479.

Description by Reference Held Bad. — In Hilliard v. Rountree, (Ky. 1894) 24 S. W. Rep. 607, it was held that a judgment for the sale of the land "set out and described in the petition" is insufficient. Citing Lawless v. Barger, 9 Bush (Ky.) 665. See also Ross v. Adams, 13 Bush (Ky.) 370, wherein it is said that the description should be so certain and specific as to enable the officer to perform his duties without reference to or inspection of any other pleading in the cause.

1. Posey v. Green, 78 Ky. 162.

2. Jones v. Acre, Minor (Ala.) 5; Bevington v. Buck, 18 Ind. 414.

Where a warrant was dated as of a certain day, and an execution dated the same day with the warrant, it was held that a judgment on the same piece of paper with them was thereby made sufficiently certain as to the time of its rendition. Clayton v. Fulp, 7 Jones L. (N. Car.) 444.

A judgment entry need not specify the particular hour. Wilson v. Greenwood, 5 Houst. (Del.) 519.

The caption of an order or decree, unless otherwise directed by the court, should correspond with the time of the actual entry of the decree. Barclay v. Brown, 7 Paige (N. Y.) 245.

Clerical Error May Be Shown. — A judgment recited its date as June 14, 1874. The suit was instituted March 29, 1875. The judgment appeared in the proceedings of the court for June 14, 1876. It was held that the date 1874 was manifestly in error, and that it was competent to read the entry preceding the judgment to show the clerical mistake. Sloan v. Thompson, 4 Tex. Civ. App. 419.

Judgment Nunc Pro Tunc. — A judgment entered *nunc pro tunc* as of the time when judgment *nisi* was taken, pursuant to a rule of court, should have expressed therein the date of the actual entry of the rule for final judgment, and the execution should be indorsed to the effect that interest shall be recovered from the date of the judgment *nisi*. McNamara v. New York, etc., R. Co., 56 N. J. L. 56.

3. **Omission of Date.** — Reed v. Lane, 96 Iowa 454; Clark v. Melton, 19 S. Car. 509.

The omission of the date which is established by law is immaterial, and it may be proved *aliunde*. Drake v. Drake, 7 La. Ann. 545.

The date of a judgment may be fixed by reference to the record of proceedings in the case. Cooper v. Cooper, 14 La. Ann. 675.

In Wiley v. Southerland, 41 Ill. 25, it was held that the date of a judgment is as material as any other part of it.

4. Warder v. Millard, 8 Lea (Tenn.) 581.

Tennessee Code (1896), § 64a, provides that "Roman numerals and Arabic figures are to be taken as part of the English language, and are always sufficient to express dates and amounts, unless otherwise imperatively directed by law." See also Chadwell v. Jones, 1 Tenn. Ch. 495.

as of the first day of the term at which it was rendered.¹ In some states, where the date does not appear, judgments are presumed to have been entered on the last day of the term.²

9. Stating Facts of Case. — As a general rule a judgment need not recite the facts upon which it is founded. It is sufficient if they be stated in the pleadings and ascertained by the judgment.³ Under the old equity practice it was the rule to recite the pleadings and the evidence in the decree, but this is not the rule generally in the United States, and in this respect there is no distinction between judgments at law and decrees in equity.⁴

10. Provisions as to Enforcement. — Ordinarily a Judgment Should Not Order Execution or Other Process provided by law for its enforcement.⁵

1. *Farley v. Lea*, 4 Dev. & B. L. (N. Car.) 169; *Norwood v. Thorp*, 64 N. Car. 682; *Withers v. Carter*, 4 Gratt. (Va.) 407; *Yates v. Robertson*, 80 Va. 475.

2. *Chase v. Gilman*, 15 Me. 64; *Herring v. Polley*, 8 Mass. 113; *Goodall v. Harris*, 20 N. H. 363; *Bradish v. State*, 35 Vt. 452.

3. *Alabama*. — *Price v. Gillespie*, 28 Ala. 279.

Indiana. — *Stebbens v. Cubberly*, 70 Ind. 301.

Iowa. — *Gallinger v. Vale*, 6 Iowa 387.

Missouri. — *Ervin v. Brady*, 48 Mo. 560.

Texas. — *Patton v. Mills*, Dall. (Tex.) 364; *Sears v. Green*, 1 Tex. Unrep. Cas. 727; *Hamilton v. Ward*, 4 Tex. 356; *Hoffman v. Bowen*, 17 Tex. 507; *Cook v. Hancock*, 20 Tex. 3.

Where the entry of judgment was to the effect that the parties waived a jury and submitted the cause to the judgment of the court, and that, upon inspection of the pleadings, the court rendered judgment for the plaintiff, etc., it was held that the recital did not render the judgment erroneous as showing that it was rendered without evidence. *Cook v. Hancock*, 20 Tex. 2.

In *Texas*, by statute, it is provided that where judgment is rendered after an *ex parte* hearing, and on service by publication, the record shall include a statement of the facts. Pasch. Dig., art. 1488. In *Byrnes v. Sampson*, 74 Tex. 79, it was held that this statute applies in the case of a judgment against unknown heirs served by publication, whether or not there has been an appointment of an attorney in their behalf, as required in case of their failure to appear. In *Hill v. Baylor*, 23 Tex. 261, it was held that the incorporation of a statement of facts into the

judgment is a compliance with this statute.

Facts Should Be Stated Specifically where necessary to be stated at all, and not by reference to matter in a pleading. *Quigley v. Birdseye*, 11 Mont. 439.

4. *Arkansas*. — *Hartfield v. Brown*, 8 Ark. 283.

Connecticut. — *Samson v. Hunt*, 1 Root (Conn.) 207, 521.

Illinois. — *Nichols v. Thornton*, 16 Ill. 113; *Trenchard v. Warner*, 18 Ill. 142; *Moore v. School Trustees*, 19 Ill. 83; *Grob v. Cushman*, 45 Ill. 119; *Walker v. Carey*, 53 Ill. 470.

Iowa. — *Campbell v. Ayres*, 6 Iowa 339.

Missouri. — *Judge v. Booge*, 47 Mo. 544.

New York. — *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182.

Tennessee. — *Burdine v. Shelton*, 10 Verg. (Tenn.) 41.

Texas. — *Patton v. Mills*, Dall. (Tex.) 364; *Hamilton v. Ward*, 4 Tex. 356; *Cook v. Hancock*, 20 Tex. 2.

Wisconsin. — *Dousman v. Hooe*, 3 Wis. 466.

See also article DECREEs, vol. 5, p. 1038.

5. *California*. — *Reed v. Eldredge*, 27 Cal. 347.

Connecticut. — *Bradley v. Clark*, 3 Day (Conn.) 503.

Illinois. — *Highway Com'rs v. East Lake Fork Special Drainage Dist.*, 127 Ill. 581; *Livingston v. People*, 48 Ill. App. 109; *McBane v. People*, 50 Ill. 503; *Danville v. Mitchell*, 63 Ill. App. 647.

Missouri. — *Houck v. Cross*, 67 Mo. 151.

Harmless Error. — An erroneous award of execution will not avoid a judgment otherwise valid. *McBane v. People*, 50 Ill. 503.

The judgment should simply be that the one party or the other recover his debt or damages, as the case may be, without any order or direction specifying how the money should be paid by the debtor or made by the officer.¹ After judgment the law, and not the court, directs what proceedings should be had for the purpose of satisfying the amount adjudged to be due.²

A General Judgment Should Not Limit Its Collection to certain property or funds.³

An award of execution, in a suit for benefits assessed against highways in drainage proceedings, is a harmless error and a nullity. *Highway Com'rs v. East Lake Fork Special Drainage Dist.*, 127 Ill. 581.

A Judgment Against a City for damages to property should not include a clause awarding execution. *Danville v. Mitchell*, 63 Ill. App. 647.

1. *Reed v. Eldredge*, 27 Cal. 347.

A judgment for liquidated damages for breach of a contract to purchase real estate, the amount of which has been deposited in a bank, and a certificate of deposit delivered to a third person to be delivered up on the joint order of the parties, should require the purchaser to give an order for such certificate, and direct the holder to deliver it to the plaintiff and the bank to pay it upon presentation. *Pellas v. Motley*, 143 N. Y. 657, 62 N. Y. St. Rep. 272.

Validity of Provisions as to Enforcement.

— A judgment containing a clause requiring the defendant to pay "forthwith" will not be reversed, since such clause is a mere nullity, and the judgment can be enforced only by execution. *Simmons v. Craig*, 137 N. Y. 550.

In a proceeding by a widow to compel an administrator to charge himself with certain property of the estate it is error, upon rendering a judgment against the defendant, to require that he give a bond to secure the judgment, and, in default of so doing, that a judgment shall issue against his property. *Pea v. Pea*, 35 Ind. 387.

In *Houck v. Cross*, 67 Mo. 151, a direction in the judgment as to its enforcement was held superfluous.

2. *Reed v. Eldredge*, 27 Cal. 347.

Courts should not render judgments which cannot be enforced by any process known to the law. *Johnson v. Malloy*, 74 Cal. 430.

3. Limitation to Certain Funds. — In *East St. Louis v. Canty*, 65 Ill. App.

325, the court were of the opinion that the part of a judgment which limited the collection thereof to certain funds should be rejected as surplusage, as the plaintiff was either entitled to a judgment to be specified in the ordinary manner, or to no judgment at all.

In *Horton v. Garrison*, 1 Tex. Civ. App. 31, the court said that no distinction could properly be made, by the court rendering the judgment, between real and personal property, as both were equally subject to the debt, and it was not necessary for the judgment to define what property was to be levied on further than to indicate that it was to be satisfied out of the property of the defendant.

In *State v. Vogel*, 14 Mo. App. 187, it was said: "It is not only the right, but the duty, of the clerk to look to the record in issuing execution to determine the legal effect of the judgment. So where, in judgment on *scire facias* to revive judgment against an executor, the judgment directed a levy upon goods and chattels, and said nothing about the lands of the testator, it was held that the execution did not depart from the judgment in requiring a levy upon lands, because, the nature of the judgment being apparent, the manner of enforcing it is prescribed by law. *Houck v. Cross*, 67 Mo. 152. Where a general judgment was rendered in attachment, where there was service by publication only, and the court had jurisdiction of the *res*, but not of the person of the defendant, though the judgment was general in form, it was held to be the duty of the clerk to look to the nature of the proceedings and the jurisdiction of the court, and to issue only that special execution which the law and the character of the service warrants. The general judgment might have been corrected by a *nunc pro tunc* entry, but until this was done it would authorize the issuing of a special execution only. *Massey v. Scott* 49 Mo. 278; *Clark v. Holliday*, 9

The Lien of a Judgment Need Not Be Declared in terms, as it exists by law independently of any provision therefor in the judgment.¹

Stay of Execution. — A judgment may, however, provide that execution shall be stayed in a proper case.²

Collection Without Relief, etc. — Or it may provide that the judgment shall be collected without relief from valuation or appraisement laws.³

In Equity Cases the court may, and usually does, prescribe and supervise the manner of the performance of its decrees.⁴

11. Exceptions and Saving Clauses. — A judgment at law upon the merits cannot be rendered without prejudice to the rights of the parties to bring another action upon the same grounds.⁵

Mo. 711." See also generally *Jackson v. Miles*, 94 Ga. 484.

When Limitation to Certain Funds Necessary and Proper. — Where a mutual insurance company is divided into several distinct and independent classes, the court, on motion, will limit the execution to run only against the property and funds belonging to the class in which the plaintiff was insured; and as the provisions of the charter that each class shall bear its own losses are a matter of public concern, no mere neglect of the defendants, as by failing to move for such a limitation, can be construed as a waiver. *Judkins v. Union Mut. F. Ins. Co.*, 39 N. H. 172. See also generally *Farley v. Cammann*, 43 Mo. App. 168.

1. "The Lien of a Judgment is in fact no part or portion of it, but only an effect or incident of it. It is invisible, of course, even on the face or in the body of it, and exists only in the binding force, effect, and operation which the law accords to it." *Capelle v. Baker*, 3 Houst. (Del.) 344.

A decree for alimony should not be made a lien upon specific real estate, and the land ordered sold for its payment, since *Neb. Comp. Stat.*, c. 25, § 4a, making such a decree a lien upon real estate and enforceable in the same manner as a judgment at law. *Nygren v. Nygren*, 42 Neb. 408.

A judgment against the receiver of a railroad company, in an action for damages against him officially, should not prescribe any particular fund on which it should constitute a lien. *Brown v. Brown*, 71 Tex. 355.

2. Staying Execution. — See SUPERSEDEAS AND STAY OF PROCEEDINGS.

A provision in the charter of a mutual insurance company that no execution shall issue upon any judgment

against the company until three months after the rendition thereof will be enforced by the court although the judgment be founded upon a foreign judgment rendered long before. *Judkins v. Union Mut. F. Ins. Co.*, 39 N. H. 172.

3. *Mansfield v. Shipp*, 128 Ind. 55; *Duckwall v. Kisner*, 136 Ind. 99.

4. *Rorebeck v. Van Eaton*, 90 Iowa 82; *U. S. Life Ins. Co. v. Oswego Canal Co.*, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 307, 57 Hun (N. Y.) 204; *Markey v. Markey*, (C. Pl.) 38 N. Y. St. Rep. 173, 13 N. Y. Supp. 925.

Compare *St. Stephen Church Cases*, 25 Abb. N. Cas. (N. Y. C. Pl.) 258, wherein a writ of mandamus was granted, and a referee was appointed to see that the writ was fully obeyed and to act as inspector of election and judge of qualification of voters at an election ordered by such writ. See also *Mr. Abbott's note* to this case, contrasting the power of chancery and common-law courts to enforce and superintend the proper execution of their adjudications, and giving forms and precedents.

5. *Evans v. Schafer*, 86 Ind. 135; *Bostick v. Abbott*, 40 Barb. (N. Y.) 331. See also *Fisher v. Williams*, 56 Vt. 586; *Burton v. Burton*, 58 Vt. 414.

An order final in its nature cannot be given an effect other than that of a final order by a saving clause in the words "without prejudice." Such a saving has function only in chancery. *William Skinner Mfg. Co. v. Sinsheimer*, 37 Ill. App. 467.

In *Porter v. Morere*, 30 La. Ann. 230, it was said that the words "without prejudice," inserted in a judgment dissolving an injunction, do not, without more, convert the judgment into one of nonsuit.

The defendant in a sequestration suit

In an Equity Cause, however, the chancellor may make exceptions or reserve control over his decree.¹

12. Surplusage. — The mere presence of unauthorized provisions in a judgment entry does not necessarily render the judgment either erroneous or void. Such provisions may frequently be disregarded as surplusage.²

13. Signing by Judge or Clerk — By Judge. — Generally a judgment is not required to be signed by the judge of the court rendering it, and his failure to sign the judgment will not invalidate it.³ In a few cases, however, it has been held that judg-

is allowed to tender the sequestered property, in payment of its value, to the proper officer within ten days after judgment, and a provision to that effect is not required to be in the judgment. The defendant can avail himself of this privilege without any order of the court. *Mills v. Hackett*, 65 Tex. 580.

A Court of Law Will Not Reserve Equities of the parties in its entry of judgment. Such a reservation, if entered, would not avail to give chancery jurisdiction. *Barney v. Dimitt*, Wright (Ohio) 44.

1. *Upjohn v. Ewing*, 2 Ohio St. 13; *Cross v. Bloomer*, 6 Baxt. (Tenn.) 74; *Tipton v. State Bank*, 11 Heisk. (Tenn.) 141.

Leave to Apply for Further Directions.

— As to the construction of such a reservation, and the proceedings thereunder, see *Lee v. Pindle*, 12 Gill & J. (Md.) 288; *Hollingsworth v. Campbell*, 28 Minn. 18; *Butler v. Halsey*, 4 Sandf. Ch. (N. Y.) 354; *Duclos v. Benner*, (Supreme Ct.) 25 N. Y. St. Rep. 413.

2. *California.* — *Wallace v. Eldredge*, 27 Cal. 495.

Georgia. — *Saffold v. Banks*, 69 Ga. 289.

Idaho. — *Hazard v. Cole*, 1 Idaho 276.

Illinois. — *Board of Education v. Hoag*, 25 Ill. App. 558; *Peddlicord v. Security Live Stock Ins. Co.*, 26 Ill. App. 407; *East St. Louis v. Canty*, 65 Ill. App. 325; *Helmuth v. Bell*, 150 Ill. 263; *Belford v. Woodward*, 158 Ill. 122.

Indiana. — *Kearns v. State*, 3 Blackf. (Ind.) 334; *Thorn v. Tyler*, 3 Blackf. (Ind.) 504.

Maine. — *Lancaster v. Richmond*, 83 Me. 534.

Missouri. — *Steinback v. Lisa*, 1 Mo. 228.

Nevada. — *Weil v. Howard*, 4 Nev. 384.

New York. — *Simmors v. Craig*, 137 N. Y. 550.

South Carolina. — *Longstreet v. Lafitte*, 2 Spears L. (S. Car.) 664.

Texas. — *French v. Olive*, 67 Tex. 400; *Cook v. Crawford*, 10 Tex. 71; *Windisch v. Gussett*, 30 Tex. 744; *Flournoy v. Healy*, 31 Tex. 590.

Vermont. — *Hall v. Dana*, 2 Aik. (Vt.) 381.

Virginia. — *Ross v. Gill*, 1 Wash. (Va.) 90; *Orange, etc., R. Co. v. Fulvey*, 17 Gratt. (Va.) 366.

What May Be Disregarded as Surplusage

— **Illustrations.** — An unauthorized clause limiting the collection of a judgment to certain funds (*East St. Louis v. Canty*, 65 Ill. App. 325), or requiring payment to be made in gold or silver coin (*Wallace v. Eldredge*, 27 Cal. 495; *Belford v. Woodward*, 158 Ill. 122; *Windisch v. Gussett*, 30 Tex. 744; *Flournoy v. Healy*, 31 Tex. 590), or providing that the amount may be discharged by payment of a lesser sum (*Ross v. Gill*, 1 Wash. (Va.) 91; *contra*, *Steinback v. Lisa*, 1 Mo. 228) or error in aggregating items (*Longstreet v. Lafitte*, 2 Spears L. (S. Car.) 664), or awarding a *retorno* (*Peddlicord v. Security Live Stock Ins. Co.*, 26 Ill. App. 407), or providing that defendants should be jointly and severally liable (*Thorn v. Tyler*, 3 Blackf. (Ind.) 504), or directing the defendant to pay "forthwith" (*Simmons v. Craig*, 137 N. Y. 550), may be disregarded as surplusage.

Where a judgment for a gross sum attempts to distribute the amount among several plaintiffs, such attempt may be regarded as surplusage, and the defect in form is cured by the statute of amendments. *Helmuth v. Bell*, 150 Ill. 263.

3. *California.* — *Clink v. Thurston*, 47 Cal. 29; *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59; *Cook's Estate*, 77 Cal. 220; *Crim v. Kessing*, 89 Cal. 478.

ments must be signed by the judge,¹ and it has been held that the failure of the judge to sign a judgment, where he has been

Georgia. — *Tharpe v. Crumpler*, 63 Ga. 273; *Huckaby v. Sasse*, 69 Ga. 603.

Illinois. — *Habberton v. Habberton*, 58 Ill. App. 99.

Iowa. — *Childs v. McChesney*, 20 Iowa 431; *Traer v. Whitman*, 56 Iowa 443.

Kansas. — *French v. Pease*, 10 Kan. 51; *Gordon v. Bodwell*, 55 Kan. 131.

Minnesota. — *Cathcart v. Peck*, 11 Minn. 45.

Missouri. — *Fontaine v. Hudson*, 93 Mo. 62.

Nebraska. — *Scott v. Rohman*, 43 Neb. 618.

New York. — *Loeschigk v. Addison*, 3 Robt. (N. Y.) 331; *De Laney v. Blizard*, 7 Hun (N. Y.) 66; *Rousseau v. Bleau*, (Supreme Ct.) 29 N. Y. St. Rep. 334; *Clapp v. Hawley*, 97 N. Y. 611.

North Carolina. — *Rollins v. Henry*, 78 N. Car. 342; *Keener v. Goodson*, 89 N. Car. 273.

Texas. — *Canon v. Hemphill*, 7 Tex. 184.

Washington. — *Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877.

Wisconsin. — *Remington v. Cummings*, 5 Wis. 138; *Baker v. Baker*, 51 Wis. 538.

United States. — *Secombe v. Steele*, 20 How. (U. S.) 94.

Meaning of "Signing Judgment" at Common Law. — "It is claimed that at common law judgments were not valid unless they were signed; and authorities are cited to show the same. 'Signing judgment,' however, at common law did not mean such a signing of judgments as we have been considering. None of the authorities cited by counsel for plaintiff in error show that a complete judgment entry, after it was made, needed to be signed, or that it would be invalid if not signed. The words 'signing judgment' and other similar words, as used at common law, meant a very different thing from signing the completed judgment entry. Such words simply meant the allowance or permission by the master, prothonotary, or other proper officer, to the plaintiff or defendant, to have judgment entered in his favor when the cause had reached such a stage that he was entitled to have a judgment rendered in his favor. *Bouv. Law Dict.*, tit. Signing judgment; also, tit. *Postea*;

3 *Bouv. Inst.* 531, No. 3313, § 6. And the common-law authorities nearly always speak of one of the parties, generally the plaintiff, 'signing judgment,' and seldom speak of an officer's 'signing judgment.' *Jac. Law Dict.*, tit. Judgment; 2 *Tidd's Pr.* 465, 469, 903. And the judgment here spoken of as thus 'signed' is in fact no judgment at all. It is not a completed judgment. It has not yet been entered in full. It has not yet become a part of the permanent rolls of the court. It is really only a right and a permission to take judgment, and although an execution may in some cases be issued on it, yet it cannot be used as evidence in any court of justice. 1 *Bouv. Law Dict.*, tit. Judgment; 2 *Phil. Ev.* (3d Am. ed.) 134. It has been held in Pennsylvania that the full or completed judgment may not be made up for years after it is allowed, and then that it may be made up from the skeleton entries on the docket and trial list. *Wilkins v. Anderson*, 11 Pa. St. 399. Now if this is good law, it would not seem necessary that the judge should sign the completed judgment when it is made up. See also *Eastman v. Harteau*, 12 Wis. 267, and the numerous cases there cited by court and counsel. In this state it is the practice and the law (*Civil Code, Gen. Stat.* 707) to enter up all judgments in full, and to make them complete as soon as they are allowed by the court." *French v. Pease*, 10 Kan. 51.

1. *Johnson v. Wells County*, 107 Ind. 15; *Galbraith v. Sidener*, 28 Ind. 142; *Raymond v. Smith*, 1 Metc. (Ky.) 65; *Weed v. People*, 31 N. Y. 465 (a criminal case); *Life, etc., Ins. Co. v. Wilson*, 8 Pet. (U. S.) 291.

In New York it is only where an interlocutory judgment is rendered, with a direction that a final judgment be settled by the court or referee, that the signature of the judge or referee to the final judgment is required. *Clapp v. Hawley*, 97 N. Y. 610.

Sufficiency of Signature. — The signature of the judge to his reasons for judgment is not a signature to the judgment. *Saloy v. Collins*, 30 La. Ann. 63. Neither is his signature to the minutes. *Scott v. Goodrich*, 24 La. Ann. 259.

Where an acting judge signed an

required by statute to do so, will render the judgment void.¹ Other cases, however, have held that such statutes are directory merely, and not mandatory, and that a failure to comply therewith will not render the judgment void.² In *Louisiana* final, but not interlocutory, judgments must be signed by the judge.³

order dated at New Orleans as "Judge of the Second District Court, acting," etc., the signature was held sufficient to show that he signed as acting judge of the Second Judicial District of New Orleans, and not as judge of the Second Judicial District of Louisiana. *Millaudon v. Davis*, 17 La. Ann. 85.

It is no objection to a probate judgment that it is signed by the judge as "parish judge." *Johnson v. Hamilton*, 2 La. Ann. 206.

As to which judge should sign the judgment, where there are several judges of the court, see *Stone v. State*, 20 N. J. L. 404; *Mill Creek Road*, 9 Pa. Co. Ct. Rep. 592.

Where there is no law requiring the signature of a justice of the peace to a judgment entered by him on his docket, his signature by initials to a judgment does not avoid it. *Gunn v. Tackett*, 67 Ga. 725.

The fact that the signature is not at the end of the judgment does not avoid the judgment where there is no contradiction or inconsistency between the clauses which precede and those which follow the signature. *Hurley v. Hewett*, 89 Me. 100.

1. *Indiana*. — *Galbraith v. Sidener*, 28 Ind. 142; *Mitchell v. St. John*, 98 Ind. 598.

Kentucky. — *Raymond v. Smith*, 1 Metc. (Ky.) 65.

Louisiana. — *Asbridge's Succession*, 1 La. Ann. 206; *Hatch v. Arnault*, 3 La. Ann. 482; *Saloy v. Collins*, 30 La. Ann. 63; *State v. Jumel*, 30 La. Ann. 421.

Remedy by Motion or Writ of Error. — In *Remington v. Cummings*, 5 Wis. 138, it was held that error would not lie upon a judgment not signed, as required by law, by a judge or commissioner, because it was in fact no judgment. See also *Moody v. Vreeland*, 9 Wend. (N. Y.) 125, wherein it was held to be no ground of error that a record of judgment in the Common Pleas was signed by a judge not authorized by law to sign it. This was said to be a mere irregularity, to be corrected by motion.

2. *Alabama*. — *Bartlett v. Lang*, 2

Ala. 161; *Frazier v. Praytor*, 36 Ala. 691.

Arkansas. — *Ex p. Slocomb*, 9 Ark. 375.

Georgia. — *Tharpe v. Crumpler*, 63 Ga. 273.

Iowa. — *Childs v. McChesney*, 20 Iowa 431; *Hamilton v. Barton*, 20 Iowa 505.

Kansas. — *Gordon v. Bodwell*, 55 Kan. 131.

New York. — *Sheldon v. Stryker*, 34 Barb. (N. Y.) 120.

North Carolina. — *Rollins v. Henry*, 78 N. Car. 342; *Bond v. Wool*, 113 N. Car. 20.

Virginia. — *Shadrack v. Woolfolk*, 32 Gratt. (Va.) 707.

The requirement that a judge shall sign all judgments rendered in his court is merely directory, and his omission to do so will not avoid the judgment as to strangers, although it might, in connection with other evidence, be proved that the judgment was fraudulent, or had not in fact been rendered by him. *Rollins v. Henry*, 78 N. Car. 342.

The statute in *Arkansas* does not require the circuit judge to sign the record of the preceding day every morning, but only at the close of the term, and the omission of the judge to sign the record at the close of the term will not invalidate judgments or decrees of the term, although such omission would be gross negligence, and would subject the judge to animadversion. *Ex p. Slocomb*, 9 Ark. 375.

3. *Abat v. Michel*, 1 Martin N. S. (La.) 240; *Fox v. Tio*, 1 La. Ann. 334; *Gates v. Bell*, 3 La. Ann. 62; *Brand v. Livaudais*, 3 Martin (La.) 389; *Collerton v. McCleary*, 3 La. 430; *Hatch v. Arnault*, 3 La. Ann. 482; *Ex p. Nicholls*, 4 Rob. (La.) 52; *Sprigg v. Wells*, 5 Martin N. S. (La.) 105; *Smith v. Harathy*, 5 Martin N. S. (La.) 320; *Mechanics'*, etc., *Bank v. Walton*, 7 Rob. (La.) 451; *Babin v. Winchester*, 7 La. 469; *Williams v. Holloway*, 11 La. 517; *Van Winckle v. Flecheaux*, 12 La. 148; *Derbigny v. Trepagnier*, 12 La. Ann. 756; *Burke v. Tregre*, 22 La. Ann. 631; *State v. Judge*, 28 La. Ann. 451.

By Clerk. — It is sometimes held that judgments should be signed by the clerk,¹ but the omission of the clerk to sign the judgment is a mere irregularity which may be corrected at any time, and does not render the judgment void.² And in a few cases it has been held that, in the absence of statutory requirements, the entry of judgment in the judgment book is sufficient without the signature of the clerk.³

14. Alternative Judgments. — As a general rule judgments cannot be in the alternative, for one thing or another, but, as has been seen, must specifically determine the rights of the parties.⁴ A judgment, however, for the specific recovery of property may be in the alternative, for the property or its value,⁵ and in the case of replevin or detinue it seems that the judgment must be in the alternative.⁶

1. *Cathcart v. Peck*, 11 Minn. 45; *De Laney v. Blizzard*, 7 Hun (N. Y.) 66; *Rousseau v. Bleau*, (Supreme Ct.) 29 N. Y. St. Rep. 334.

2. *Jorgensen v. Griffin*, 14 Minn. 466; *Hotchkiss v. Cutting*, 14 Minn. 542; *Van Alstyne v. Cook*, 25 N. Y. 489; *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553; *Lythgoe v. Lythgoe*, 75 Hun (N. Y.) 147; *Clark v. Melton*, 19 S. Car. 509.

3. *Clink v. Thurston*, 47 Cal. 21; *Jorgensen v. Griffin*, 14 Minn. 464.

In *Hardin v. Melton*, 28 S. Car. 38, it was held that a judgment entered and filed, and regular in all particulars except that the formula prescribed by law was not dated or signed by the clerk, is a valid judgment. The court said, *quoting Clark v. Melton*, 19 S. Car. 498: "When entered and filed in the proper office, its existence could be as well ascertained without the date and signature as with them. The entering and filing are the essential facts, and whether this had taken place at a particular time could be discovered by an examination of the office as certainly where the formula had not been dated and signed as if these things had been done."

4. See *supra*, II. 2. *d. Definitiveness*. See also *State v. Bennett*, 4 Dev. & B. L. (N. Car.) 43; *State v. Perkins*, 82 N. Car. 681; *Strickland v. Cox*, 102 N. Car. 411.

Illustrations of Alternative Judgments.

— The finding of the court that the defendant is indebted in one or the other of two different amounts, leaving to be determined in the future the question as to which of the two is proper, is not a judgment. A judgment cannot

be alternative. *Battell v. Lowery*, 46 Iowa 49.

A justice of the peace has no jurisdiction to enforce specific performance of a contract to build a house upon a certain tract of land, by an alternative judgment requiring the defendant to build the house or to pay a certain sum of money, and an execution to enforce such an alternative judgment of a justice is void on its face. *Munis v. Herrera*, 1 N. Mex. 362.

5. Judgment for Property or Its Value.

— Where property is in the hands of an attachment plaintiff and an intervener, if the claim of another intervener is established he is entitled to an alternative judgment for the possession of the property, and against the plaintiff for its value, under the prayer for general relief. *Burlacher v. Watson*, 38 Tex. 62.

A decree in the alternative for the delivery of specific property or the payment of a certain sum of money is erroneous where there was no evidence as to the value of the property. *Reilly v. Freeman*, 1 N. Y. App. Div. 560.

6. Replevin — *Kentucky*. — *Rogers v. Bradford*, 8 Bush (Ky.) 165.

Missouri. — *Smith v. Kander*, 58 Mo. App. 61; *White v. Graves*, 68 Mo. 218; *Wooldridge v. Quinn*, 70 Mo. 370; 2 Stark's Mo. Dig. 372.

New York. — *Young v. Willet*, 8 Bosw. (N. Y.) 486; *Dwight v. Enos*, 9 N. Y. 470; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Rockwell v. Saunders*, 19 Barb. (N. Y.) 473; *Ingersoll v. Bostwick*, 22 N. Y. 425; *Seaman v. Luce*, 23 Barb. (N. Y.) 240; *Wood v. Orser*, 25 N. Y. 348; *Gallarati v. Orser*, 27 N. Y. 324, reversing 4 Bosw. (N. Y.) 94; *Walsh v.*

15. Conditional Judgments. — It is a general rule that judgments must not be conditioned upon any contingency,¹ and it has been held that an alternative or conditional judgment is wholly void.² These rules apply to judgments in criminal cases as well as to those in civil cases.³ Terms, however, may be imposed,⁴ and it has been held that failure to object to a conditional judgment waives the error.⁵

16. Objections, Exceptions, and Motions to Modify. — See, for full treatment of this subject, article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 287 *et seq.*

V. INTERLOCUTORY AND FINAL JUDGMENTS. — A Final Judgment is one which determines the rights of the parties in the suit, or a

Kelly, 42 Barb. (N. Y.) 98, 27 How. Pr. (N. Y.) 359; Wheeler v. Allen, 49 Barb. (N. Y.) 460.

South Carolina. — Robbins v. Slatery, 30 S. Car. 328; Joplin v. Carrier, 11 S. Car. 329.

United States. — Boley v. Griswold, 20 Wall. (U. S.) 486.

See also article REPLEVIN.

Detinue. — Brown v. Brown, 5 Ala. 508; Miller v. Jones, 29 Ala. 174; Wittick v. Keiffer, 31 Ala. 199; Rambo v. Wyatt, 32 Ala. 363; Lucas v. Daniels, 34 Ala. 188; Rose v. Pearson, 41 Ala. 687. See also article DETINUE, vol. 6, p. 662.

1. Indiana. — Morris v. State, 1 Blackf. (Ind.) 37.

Iowa. — Battell v. Lowery, 46 Iowa 49.

Kentucky. — Harlan v. Murrell, 3 Dana (Ky.) 180; Farmer v. Samuel, 4 Litt. (Ky.) 189; Terril v. Arnold, 4 Litt. (Ky.) 302.

Missouri. — Coh v. Bright, 2 Mo. App. Rep. 1191.

North Carolina. — Strickland v. Cox, 102 N. Car. 411.

Wisconsin. — Schultz v. Chicago, etc., R. Co., 48 Wis. 375.

Conditional Judgments Have Been Permitted, however, in a few cases. See Huston v. Ditto, 20 Md. 305; Com. v. Pejepsut Proprietors, 7 Mass. 399; Carlton v. Carey, 61 Minn. 318; Bank of Old Dominion v. McVeigh, 32 Gratt. (Va.) 530.

In Hadley v. Hadley, 80 Me. 459, it was said that a party desiring a conditional judgment must make a motion for it, and the motion must be addressed to the court and not to the jury.

In Myers v. Williams, 85 Va. 621, a judgment allowing a conditional credit was sustained.

In Morrison v. Wimberly, 14 La.

Ann. 724; Dyke v. Dyer, 14 La. Ann. 713, it was held that a judgment may order the defendant to deposit a certain sum with the clerk within a certain time, and that if he fails to do so the plaintiff shall have judgment as prayed for.

What Does Not Amount to a Conditional Judgment. — A judgment awarding an execution against a party for costs if not paid within the time limited, is not a conditional judgment, but final and absolute. Sprott v. Reid, 3 Greene (Iowa) 489.

An agreement to take secured notes for the face of the judgment as payment, and to mark the judgment satisfied provided the notes were filed within a specified time, does not render the judgment a conditional one. Nimocks v. Pope, 117 N. Car. 315, *distinguishing* Strickland v. Cox, 102 N. Car. 411.

2. Strickland v. Cox, 102 N. Car. 411 [*citing* State v. Bennett, 4 Dev. & B. L. (N. Car.) 43; State v. Perkins, 82 N. Car. 681].

3. Morris v. State, 1 Blackf. (Ind.) 37; State v. Perkins, 82 N. Car. 681; Strickland v. Cox, 102 N. Car. 411.

In State v. Bennett, 4 Dev. & B. L. (N. Car.) 43, it was said that, upon a conviction for a criminal offense, it is irregular to annex to the sentence any condition for its subsequent remission. A judgment, though pronounced by the judge, is not his sentence, but the sentence of the law. It is the certain and final conclusion of the law following upon ascertained premises, and must therefore be unconditional. See also *supra*, II. 2. d. *Definitiveness*.

4. Bergen v. Stewart, 28 How. Pr. (N. Y. Supreme Ct.) 6.

5. Walters v. Munroe, 17 Md. 501.

distinct and definite branch of it, and reserves no further question or direction for future determination¹ except such as may be necessary to carry it into effect.² But a judgment may be final, though it does not determine the rights of the parties, if it ends the particular suit.

An **Interlocutory Judgment** is one which does not dispose of the suit, but reserves some further question or direction for future determination.³ As a general rule a judgment is not considered final which settles part only of several issues of law or fact.⁴ A judg-

1. *California*. — Leese v. Sherwood, 21 Cal. 151; Dowling v. Polack, 18 Cal. 625.

Illinois. — Chicago L. Ins. Co. v. Auditor, 100 Ill. 478; Myers v. Manny, 63 Ill. 211; Hayes v. Caldwell, 10 Ill. 33.

Kentucky. — Maysville, etc., R. Co. v. Punnett, 15 B. Mon. (Ky.) 47.

Maryland. — Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762.

Mississippi. — Stebbins v. Niles, 13 Smed. & M. (Miss.) 307.

Nebraska. — Smith v. Sahler, 1 Neb. 310.

Nevada. — Perkins v. Sierra Nevada Silver Min. Co., 10 Nev. 405; State v. Logan, 1 Nev. 509.

New York. — Morris v. Morange, 38 N. Y. 172.

Ohio. — Feaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634.

Tennessee. — Delap v. Hunter, 1 Sneed (Tenn.) 101.

Texas. — Linn v. Arambould, 55 Tex. 611.

2. Belt v. Davis, 1 Cal. 134; Klink v. Steamer Cusseta, 30 Ga. 504; Helm v. Short, 7 Bush (Ky.) 623; Ludlow v. Kidd, 3 Ohio 541.

3. *Alabama*. — Bond v. Marx, 53 Ala. 177.

Arkansas. — State Bank v. Roddy, 15 Ark. 401.

California. — Gray v. Palmer, 9 Cal. 616.

Colorado. — Dusing v. Nelson, 7 Colo. 184.

Illinois. — Hunter v. Hunter, 100 Ill. 519.

Kentucky. — Tinsly v. Martin, 80 Ky. 463; Lewis v. Outton, 3 B. Mon. (Ky.) 453.

Maryland. — Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762; Hazlehurst v. Morris, 28 Md. 67; Boteler v. State, 7 Gill & J. (Md.) 109.

Mississippi. — Cook v. Bay, 4 How. (Miss.) 485.

Nebraska. — Smith v. Sahler, 1 Neb. 310.

Nevada. — Lake v. King, 16 Nev. 215.

New York. — Johnson v. Everett, 9 Paige (N. Y.) 636; Tompkins v. Hyatt, 19 N. Y. 534; Harris v. Clark, 4 How. Pr. (N. Y. Ct. App.) 78; Cruger v. Douglass, 2 N. Y. 571, 4 How. Pr. (N. Y.) 215; Chittenden v. Missionary Soc., 8 How. Pr. (N. Y. Ct. App.) 327.

North Carolina. — Goodbread v. Wells, 4 Dev. & B. L. (N. Car.) 271.

Ohio. — Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634.

4. *Alabama*. — Bond v. Marx, 53 Ala. 177.

New York. — King v. Stafford, 5 How. Pr. (N. Y. Supreme Ct.) 30; Bentley v. Jones, 4 How. Pr. (N. Y. Supreme Ct.) 335.

North Carolina. — State University v. State Nat. Bank, 92 N. Car. 651; Hicks v. Gooch, 93 N. Car. 112; Welch v. Kinsland, 93 N. Car. 281.

West Virginia. — Shirey v. Musgrave, 29 W. Va. 131; Hill v. Als, 27 W. Va. 215.

Exceptions. — "But owing to particular circumstances and hardships, the courts have refused to dismiss appeals from some judgments which did not completely dispose of the cases in which they were entered. These judgments determined particular matters in controversy, and were of such a nature that they could be immediately enforced and by their enforcement could deprive the party against whom they were rendered of all benefits which he might obtain from an appeal at any subsequent stage of the proceedings."

1 Freeman on Judgments (4th ed.), § 35. See also Merrill v. Merrill, 92 N. Car. 657; Merle v. Andrews, 4 Tex. 200; Stovall v. Banks, 10 Wall. (U. S.) 583; Forgay v. Conrad, 6 How. (U. S.) 201; Barnard v. Gibson, 7 How. (U. S.) 650. Compare Martin v. Crow, 28

ment in a criminal case is generally not final unless it fixes the amount, duration, and place of punishment.¹

VI. JUDGMENTS IN REM. — Legal actions and judgments are divided into three classes: *in rem*, *in personam*, and *in utramque*.²

Tex. 614. See also *Cannon v. Hemphill*, 7 Tex. 184.

Appealability the Criterion. — Under statutes limiting the right of appeal to final judgments only, a vast number of cases have been decided in which the distinction between interlocutory and final judgments has been discussed. These cases are usually cited as furnishing the criteria of finality, where the question is to be decided for other purposes than to determine appealability. These cases have been collected in the article on APPEALS, vol. 2, p. 52 *et seq.*, to which reference should be made.

1. *Anschincks v. State*, 43 Tex. 587; *Mayfield v. State*, 40 Tex. 289; *Fulcher v. State*, 38 Tex. 505.

An order overruling a demurrer to an indictment is not final. *People v. Hall*, 45 Cal. 253. Nor is an order sustaining a demurrer to defendant's plea of *autrefois acquit*. *State v. Horne-man*, 16 Kan. 452.

An order sustaining a demurrer to an indictment has been held to be interlocutory where no formal judgment was entered. *State v. Mullix*, 53 Mo. 355; *State v. Love*, 52 Mo. 106; *State v. Gregory*, 38 Mo. 501; *State v. Martindale*, 52 Mo. 31. Compare *People v. Ah Own*, 39 Cal. 604; *Com. v. Campbell*, 5 Bush (Ky.) 311.

An order sustaining exceptions to an indictment, but not disposing of the case, is interlocutory. *State v. Thornton*, 32 Tex. 104.

An order sustaining a demurrer to an indictment as not charging a felony, but leaving the case for trial upon the indictment as charging an assault, is not final. *People v. Martin*, 47 Cal. 112.

A judgment or order after verdict to the effect that "therefore it is considered by the court that the defendant, James T. Trimble, is guilty as found by the jury," which commits him to jail to await sentence, is interlocutory. *Trimble v. State*, 2 Tex. App. 303.

A judgment of an appellate court remanding the case for trial on the merits is not final. *Rankin v. Tennessee*, 11 Wall. (U. S.) 380.

An order quashing an indictment,

discharging the defendant, etc., is final. *State v. Morgan*, 33 Md. 44.

2. Three Classes of Judgments. — "Writers on this subject divide legal actions and judgments into three classes, namely, *in rem*, *in personam*, and *in rem et personam*, or *in utramque* as the last is generally denominated; and they are thus respectively defined, *in rem* whenever the thing claimed by any one is declared by the judgment to be his, either by his right as creditor, or the possession of it is given him in any other manner; *in personam* when he is condemned to give or suffer, to do or not to do anything, or if the status of his person may be affected by it; and *in utramque* where it is of a mixed nature, and both *in rem et in personam*, and that is when both the thing and the person may come at the same time into condemnation. Story, *Conf. of Laws*, § 584, n. 1; *Burgundus*, Tract. 3, n. 1, 2, pp. 84, 85. One thing, however, will be found as an invariable and inseparable quality or incident of a judicial proceeding *in rem* purely, and that is a seizure of the thing to be condemned in some form or other by the process of the court regularly preceding the consideration and adjudication of the right or claim asserted to it before the tribunal. Perhaps the nearest approach we have in our practice under the common law and our statutes to a pure proceeding and adjudication *in rem* is under our statutory process in cases of domestic and foreign attachment, in which, however, the writs always issue *in personam*, or against the defendant by name, but with a mandate to attach or seize his goods and chattels, rights and credits, lands and tenements, which is invariably done, as they can only be sued out upon an affidavit in the one case that the defendant has left the state to avoid the payment of his debts, or in the other that he resides out of it. But although such proceedings are not strictly, they are nevertheless considered in the nature of, proceedings *in rem*. In all such cases, however, the principle of law is well settled that the judgment *in rem*, or against the thing, is conclusive as to

A Judgment in Rem is an adjudication upon the status of some particular matter by a tribunal of competent jurisdiction.¹

the title and transfer and disposition of the property in question under it; but it is only conclusive and binding on the party *in personam* so far as the *res* or property itself is concerned. Story, Conf. of Laws, §§ 592, 593." Capelle v. Baker, 3 Houst. (Del.) 344.

1. Syester v. Brewer, 27 Md. 288.

"A judgment *in rem* I conceive to be an adjudication pronounced (as its name indeed denotes) upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication, being a most solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication." Childs v. Hayman, 72 Ga. 791.

Judgment in Rem and in Personam Distinguished. — "A judgment *in rem* I understand to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is, in form as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself. It is binding only upon the parties appearing to be such by the record, and those claiming by them. A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject-matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it *ipso facto* renders it what it declares it to be." Woodruff v. Taylor, 20 Vt. 65.

"It is urged that when the company asked that an interpleader be awarded, and brought the money owing by it into court, the court then obtained jurisdiction of the fund, and from that time forward the proceeding was one essentially *in rem*, and the court having thus obtained jurisdiction of the *res*, and having given notice according to the laws of Pennsylvania, had ample power to hear and determine, and

having so heard and determined, the parties are bound by the judgment. That such proceeding could be *in rem* seems a novel doctrine. *In rem* is understood to be a technical term taken from the Roman law, and there used to distinguish an action against the thing from one against the person, the terms *in rem* and *in personam* always being the opposite one of the other; an act *in personam* being one done or directed against a specific person, while an act *in rem* was one done with reference to no specific person, but against or with reference to a specific thing, and so against whom it might concern, or 'all the world.' A proceeding brought to determine the status of the thing itself, the particular thing, and which is confined to the subject-matter *in specie*, is *in rem*, the judgment being intended to determine the state or condition, and, *ipso facto*, to render the thing what the judgment declares it to be, while a proceeding which seeks the recovery of a personal judgment is *in personam*. In the former, process may be served on the thing itself, and by such service and making proclamation the court is authorized to decide upon it without other notice to persons, all the world being parties; while in the latter, in order to give the court power to adjudge, there must be service upon those whose rights are sought to be affected. As regards rights, the terms signify the antithesis of 'available against a particular person' and 'available against the world at large.' Thus, '*jura in personam* are rights primarily available against specific persons; *jura in rem*, rights only available against the world at large.' Beyond this, a judgment or decree is *in rem*, or in the nature of a judgment *in rem*, when it binds third persons, such as the sentence of a court of admiralty on a question of prize, or a decree of other courts upon the personal status or relation of the party, such as dissolution of marriage contract, bastardy, etc.; a decree in probate court admitting a will to probate and record, granting administration, etc.; or a decree of a court of a foreign country as to the status of a person domiciled there." Cross v. Armstrong, 44 Ohio St. 613.

Judgments in *Utramque*, or *in rem et in personam*, are judgments which fix the status of a matter, not as against the whole world, but only as between the parties to the suit.¹

Illustrations.—An adjudication in insolvency,² a decree in divorce,³ the probate of a will,⁴ a decree setting aside a homestead⁵ or establishing a disputed boundary line,⁶ are illustrations of judgments *in rem*. Judgments in attachment suits are in the nature of judgments *in rem*.⁷ But a decree in partition is not a decree *in rem*.⁸ The mere fact that money is brought into court

1. "There is another class of cases [besides proceedings purely *in rem*] which may perhaps be considered to some extent proceedings *in rem*, though in form they are proceedings *inter partes*. * * * The object and purpose of a proceeding purely *in rem* is to ascertain the right of every possible claimant, and it is instituted on an allegation that the title of the former owner, whoever he may be, has become divested; and notice of the proceeding is given to the whole world to appear and make claim to it. * * * The limited proceedings *in rem*, before mentioned, are not based on any allegation that the right of property is to be determined between any other persons than the parties to the suit; no notice is sought to be given to any other persons; and the judgment being only as to the status of the property as between the parties of record, it is, as to all other persons, a mere nullity." Woodruff v. Taylor, 20 Vt. 65.

2. Brown v. Smart, 69 Md. 320.

3. Gould v. Crow, 57 Mo. 200. See also article DIVORCE, vol. 7, p. 52.

4. Gale v. Nickerson, 144 Mass. 415.

"The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this state. The proceeding is, in form and substance, upon the will itself. No process is issued against any one; but all persons interested in determining the state or condition of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money or do any particular act, but that the instrument is or is not the will of the testator. It determines the status of the subject-matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to

all the world (at least so far as the property of the testator within this state is concerned), just what the judgment declares it to be." Woodruff v. Taylor, 20 Vt. 65. See article PROBATE AND ADMINISTRATION.

5. Hanley v. Hanley, 114 Cal. 690.

6. Pitman v. Albany, 34 N. H. 577. Compare Lawrence v. Haynes, 5 N. H. 33.

7. Griffith v. Milwaukee Harvester Co., 92 Iowa 634.

A judgment rendered in an attachment suit against an absentee represented by a curator *ad hoc* is one *in rem*, and not *in personam*, and affects only the property attached. Herber v. Abbott, 39 La. Ann. 1112.

"An attachment of property, in this state, where the court has jurisdiction of the property but not of the person of the defendant, and a sale of it (or a levy upon it, if it be real estate) on execution, is in the nature of a proceeding *in rem*. The judgment, if the defendant have no notice, would be treated as a nullity out of our jurisdiction, so far as the person of the defendant was concerned, though it would be held binding, as between the parties, so far as regarded the property, as a proceeding *in rem*." Per Hall, J., in Woodruff v. Taylor, 20 Vt. 65.

The addition of the usual formula, "with privilege upon the property attached," does not impair the personality of a judgment, personal in its terms, against a defendant in attachment. Rathbone v. Ship London, 6 La. Ann. 439.

8. "A suit for partition is not a proceeding *in rem*; the process is not served upon the land, nor is the land a party defendant, nor is the final judgment binding on any of the cotenants who are not brought within the jurisdiction of the court by some service of process, actual or constructive." Childs v. Hayman, 72 Ga. 791 [citing

in an interpleader suit does not render the proceeding one *in rem*.¹

Rendition and Entry. — A judgment *in rem* may be entered in a suit without also rendering a judgment *in personam*,² and conversely a judgment may be rendered *in personam* without also rendering a judgment *in rem*, although the proceeding was one in which a judgment *in rem* might have also been rendered.³ A decree both *in rem* and *in personam* may be rendered at the same time, where there is no inconsistency between such decrees.⁴

Jurisdiction is as essential to the validity of a judgment *in rem* as in the case of any other judgment, but jurisdiction over the *res*, or matter in question, is sufficient, and it is immaterial whether or not jurisdiction of the person of the owner has been acquired.⁵

Freeman's Cotenancy, § 463; Cuyler v. Wayne, 64 Ga. 78; Ragan v. Ragan, 33 Ga. Supp. 107].

1. Cross v. Armstrong, 44 Ohio St. 613. See quotation from this case *supra*, p. 967, note 1.

2. Ellison v. Iler, 22 La. Ann. 470.

In an action to foreclose a lien, where there is already a judgment at law, there need be no decree *in personam*. Martin v. Wade, 5 T. B. Mon. (Ky.) 79; Chaney v. Cooke, 5 T. B. Mon. (Ky.) 249.

It is no error to render a judgment *in rem* against a defendant who has pleaded and proved his discharge in bankruptcy. Truitt v. Truitt, 38 Ind. 16.

Judgment *in rem*, and decree for the foreclosure of a mortgage or the enforcement of a mechanic's lien, without a personal judgment on the debt, secured by such lien, over against the person liable, may be taken. The defendant is not injured, as his liability ends with the sale of the land. Truitt v. Truitt, 38 Ind. 16.

A judgment in a suit commenced by a writ of sequestration should be *in rem* alone, reserving to the plaintiffs their right to an action *in personam*. Peterson v. Willard, 17 La. Ann. 93.

3. Ellison v. Iler, 22 La. Ann. 470.

Where property, seized under an original attachment, has been replevied, and the plaintiff has also proceeded against the person of the defendant, praying that he may be cited to answer, the judgment must be *in personam*, and not *in rem*, against the specific property attached; the execution must run against the goods and

chattels, generally, of the defendant; and the defendant has the right to point out, and have levied upon and sold, property other than that which may have been seized under the attachment. Cloud v. Smith, 1 Tex. 611.

4. In an action to enforce a lien a judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally. Chambers v. Keene, 1 Metc. (Ky.) 294.

Where a guardian purchases land with his ward's money, the ward may elect to take the land or consider it as security for the money, but a decree against the guardian and his surety, and his surety *in personam* and *in rem*, to sell the land is erroneous. Edmonds v. Morrison, 5 Dana (Ky.) 224.

5. See generally article JURISDICTION.

The "thing" must be subject to the cognizance of the court and amenable to its decree. Brown v. Levee Com'rs, 50 Miss. 468.

Where the proceeding was *in rem* against property, and the averments in the complaint were sufficient on general demurrer to show a lien on the property, the mere fact that a void judgment *in personam* against the heirs was also rendered would not make void the judgment subjecting the property to the debt. Heidenheimer v. Loring, 6 Tex. Civ. App. 560.

To entitle one to a judgment in a proceeding *in rem* authorized by a statute, but in which the defendant was not served with process and did not appear, the *res* must have been attached or seized, or at least have been within

As to the Operation, Effect, and Conclusiveness of judgments *in rem*, see article *Judgments*, Am. and Eng. Encyc. of Law (2d edition).

VII. INTEREST — 1. In General. — Interest, when recoverable, rests upon one of two grounds. It is recoverable either as a debt or as damages.¹ Where there is a contract to pay interest, it is a debt and recoverable as such. Where interest is given as damages, it is given because the law has adopted the legal rate of interest as the measure of damages for delay in the payment of money due either by contract or by reason of a tort. In either case its allowance is a matter of substantive law, and as such is beyond the scope of this article.² Where a party is entitled to interest, that right must of course be expressed in the judgment, and the form of the provision therefor in the judgment will be presently considered.³ To be entitled to interest, the party must, of course, make such a case by his pleadings as calls for its allowance,⁴ and the case so made must be established by the verdict or findings.⁵ This is upon the principle already consid-

the jurisdiction of the court rendering the judgment. *Ward v. Boyce*, 152 N. Y. 191.

1. See Hale on Damages, c. 5.

2. See Hale on Damages, c. 5; Am. and Eng. Encyc. of Law, titles *Damages*; *Interest*; *Judgments*.

3. See the next section.

4. **Right to Interest as Affected by Pleadings** — *Arkansas*. — *Fulcher v. Lyon*, 4 Ark. 445.

California. — *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 628; *Lane v. Gluckauf*, 28 Cal. 288; *Corcoran v. Doll*, 32 Cal. 82; *Knowles v. Sandercock*, 107 Cal. 629; *Lamping v. Hyatt*, 27 Cal. 102.

Illinois. — *Plato v. Turrill*, 18 Ill. 273; *Carter v. Lewis*, 29 Ill. 500.

Indiana. — *Carpenter v. Sheldon*, 22 Ind. 259.

Iowa. — *Fleming v. Stearns*, 79 Iowa 256; *Krause v. Hampton*, 11 Iowa 457.

Kansas. — *Phoenix Ins. Co. v. Weeks*, 45 Kan. 751, 20 Ins. L. J. 541.

Kentucky. — *Hull v. Caldwell*, 6 J. J. Marsh. (Ky.) 208.

Louisiana. — *Bass v. Chambliss*, 9 La. Ann. 376.

Michigan. — *Bell v. Ardis*, 38 Mich. 609.

Missouri. — *Shockley v. Fischer*, 21 Mo. App. 551.

Montana. — *Schuttler v. King*, 12 Mont. 149.

New Jersey. — *Smock v. Warford*, 4 N. J. L. 348.

New York. — *Shreve, etc., Co. v. Holbrook*, (Supreme Ct.) 34 N. Y. Supp. 317, 68 N. Y. St. Rep. 468.

Pennsylvania. — *Biggs v. Funk*, 5 Watts (Pa.) 478.

Texas. — *Goggan v. Evans*, 12 Tex. Civ. App. 256; *Porter v. Russek*, (Tex. Civ. App. 1895) 29 S. W. Rep. 72; *Ulmer v. Frankland*, (Tex. Civ. App. 1894) 27 S. W. Rep. 766.

Virginia. — *Hubbard v. Blow*, 4 Call (Va.) 224.

West Virginia. — *Hawker v. Baltimore, etc., R. Co.*, 15 W. Va. 628.

See also article INTEREST, *ante*, p. 435.

5. **Right to Interest as Affected by Verdict** — *Alabama*. — *Jean v. Sandiford*, 39 Ala. 317.

Arkansas. — *Hallum v. Dickinson*, 47 Ark. 120.

California. — *Atherton v. Fowler*, 46 Cal. 323; *Golden Gate Mill, etc., Co. v. Joshua Hendy Mach. Works*, 82 Cal. 184.

Georgia. — *Governor v. Daniel*, R. M. Charl. (Ga.) 449.

Illinois. — *Hallberg v. Brosseau*, 64 Ill. App. 520.

Kansas. — *Carter v. Christie*, 1 Kan. App. 604; *Southern Kansas R. Co. v. Showalter*, 57 Kan. 686; *Citizens' Bank v. Bowen*, 25 Kan. 117; *Simmons v. Garrett*, McCahon (Kan.) 82.

Kentucky. — *Martin v. Com.*, 6 J. J. Marsh. (Ky.) 549.

Louisiana. — *Ward v. Brandt*, 10 Martin (La.) 478; *Bedford v. Jacobs*, 5 Martin N. S. (La.) 448; *Dale v. Downs*, 7 Martin N. S. (La.) 225; *Cochrane v. Murphy*, 4 La. Ann. 6; *Bulloc v. Parthet*, 8 Martin N. S. (La.) 123.

ered that the judgment must conform to and be supported by the pleadings and verdict.¹

2. Provisions in Judgment for Interest — Interest on Demand. — Ordinarily, interest due on the demand on which the action is brought should be calculated and the judgment rendered for the aggregate amount of the demand and interest,² though sometimes it is required that the amounts of the debt, interest, and damages shall be kept separate and not given in a lump sum.³

Michigan. — *Wright v. Seeley*, 96 Mich. 491; *Bell v. Ardis*, 38 Mich. 609; *Parker v. Lake Shore, etc.*, R. Co., 93 Mich. 607.

Montana. — *Palmer v. Murray*, 8 Mont. 312.

Nebraska. — *Wiseman v. Ziegler*, 41 Neb. 886.

New Jersey. — *Metler v. Easton, etc.*, R. Co., 37 N. J. L. 222.

North Carolina. — *Houston v. Potts*, 65 N. Car. 41.

Texas. — *Akin v. Jefferson*, 65 Tex. 137; *Smith v. Smith*, 10 Tex. Civ. App. 485; *Freiberg v. Brunswick-Balke-Collender Co.*, (Tex. App. 1890) 16 S. W. Rep. 784; *Irvin v. Garner*, 50 Tex. 48.

Virginia. — *Lake v. Tyree*, 90 Va. 719.

United States. — *American Nat. Bank v. National Wall-Paper Co.*, 77 Fed. Rep. 85.

1. See *supra*, III. 9. *Conformity to Pleadings and Proof*, and III. 10. *Conformity to Verdict or Findings*.

2. *Alabama.* — *Tankersley v. Silburn*, Minor (Ala.) 185.

California. — *Bibend v. Liverpool, etc.*, F., etc., Ins. Co., 30 Cal. 78; *Mount v. Chapman*, 9 Cal. 294; *Emeric v. Tams*, 6 Cal. 155.

Illinois. — *Washington Park Club v. Baldwin*, 59 Ill. App. 61.

New York. — *DeWitt v. Swift*, 3 How. Pr. (N. Y. Supreme Ct.) 280.

Texas. — *Fisk v. Holden*, 17 Tex. 408; *Hagood v. Aikin*, 57 Tex. 511; *Frazier v. Campbell*, 5 Tex. 275.

West Virginia. — *Tiernan v. Minghini*, 28 W. Va. 314.

United States. — *American Nat. Bank v. National Wall-Paper Co.*, 77 Fed. Rep. 85.

Illustrations. — In entering a judgment the correct rule is to add to the principal the interest due on the notes up to the time of the judgment, and enter the judgment for the gross amount, and such judgment is then to bear the same interest as the notes

until paid. *Guy v. Franklin*, 5 Cal. 416. The fact that this results in allowing compound interest is no objection. *Stanton v. Woodcock*, 19 Ind. 273.

Where the suit was on a note for \$100, and the jury returned a verdict "for the plaintiff the amount of the note, \$100," and a judgment was rendered for \$105.66, "principal debt and interest," the court, holding that interest followed the principal sum as an incident, affirmed the judgment. *Fisk v. Holden*, 17 Tex. 408.

In *Tiernan v. Minghini*, 28 W. Va. 314, a decree was entered in a cause ascertaining and fixing the aggregate amount of the plaintiff's debt and giving interest on such aggregate from the date of the decree, as prescribed by statute. In a decree entered in the same cause several years thereafter, the debt was reaggreated by calculating interest on the first aggregate sum to the date of the latter decree, then adding this interest to the sum of the first decree, and interest was allowed on the second aggregate from the date of the last decree. This was held erroneous.

Interest Between Verdict and Judgment.

— Where the judgment is not entered until some time after the verdict, the judgment should be entered for the amount of the verdict with interest thereon from the date of the verdict, and it is error to compute interest from the time of the verdict to the time of entry of judgment, so as to make that gross amount bear interest. *Alpers v. Schammel*, 75 Cal. 590.

3. See *Wooster v. Clarke*, 2 Ark. 101; *Brookbank v. Jeffersonville*, 41 Ind. 406.

In an Action of Debt the judgment should not be entered for an aggregate sum, including the debt, interest, and damages, without distinguishing the amount of either. *Wilmans v. State Bank*, 6 Ill. 667. The judgment should be entered for the principal as debt and for the interest as damages, and it is

Interest on Judgment. — By statute, judgments now bear interest without any provision therefor being inserted therein.¹ It is, therefore, ordinarily unnecessary to state the rate of interest which the judgment is to bear, as this is fixed by statute.² But where the judgment is to bear the same rate of interest as the debt upon which it is founded, the statute usually requires the rate to be expressed in the judgment.³

error to enter judgment for the aggregate. *March v. Wright*, 14 Ill. 248; *Mager v. Hutchinson*, 7 Ill. 266.

In an action of debt on a note, the interest ascertained to be due at time of judgment ought to be entered as so much damages; and the judgment is that the plaintiff recover against the defendant the sum of — dollars in debt and the sum of — dollars in damages, making in all the sum of — dollars, together with his costs and charges. *Stevens v. Dunbar*, 1 Blackf (Ind.) 56.

Judgment on Note. — In *Johnson v. McLain, Hempst.* (U. S.) 59, it was held erroneous to allow interest on the debt from the maturity of the note only to the date of the judgment. The judgment should have been for the amount of the debt with interest until paid.

In *Ray v. Justices*, 6 Ga. 303, it was held that a statute requiring the amount of principal and interest to be stated separately in judgments applied to suits on promissory notes and other special contracts bearing interest, and not to cases where the recovery was in damages.

Alternative Forms of Judgment. — "The judgment is for eight hundred dollars, to bear ten per cent. interest from the 17th day of November, 1831. It is contended that the interest should have been ascertained by the court, and a judgment rendered for it in damages. It is admitted that this is a very common way of giving judgment; but, on the other hand, the mode adopted by the Circuit Court is sanctioned by the practice of several of the states, especially by the practice in Kentucky, and we cannot conceive that one mode has any particular advantage over the other, each being equally calculated to promote the ends of justice." *Archer v. Morehouse, Hempst.* (U. S.) 186. Compare *Prince v. Lamb*, 1 Ill. 378, holding that the amount of interest should be calculated and given as damages. See also *Wilbur v. Abbot*, 58 N. H. 272.

1. *Pearsons v. Hamilton*, 2 Ill. 415; *Simmons v. Garrett, McCahon* (Kan.) 82; *State v. Vogel*, 14 Mo. App. 187; *Amis v. Smith*, 16 Pet. (U. S.) 303.

In *Simmons v. Garrett, McCahon* (Kan.) 82, the court said: "In rendering a judgment for money, the court should fix the amount then due and render a judgment therefor, saying nothing about subsequent interest, which must be collected by the sheriff or other officer from the date and amount of judgment."

Provision for Interest Inserted by Clerk. — A memorandum made by the clerk, at the foot of the judgment, that it should bear ten per cent. interest, is no part of the judgment. *Fugate v. Glasscock*, 7 Mo. 577.

In *San Joaquin Land, etc., Co. v. West*, 99 Cal. 345, it was held that the insertion by the clerk of the court in a money judgment entered by him, of the words, "with interest thereon at the rate of seven per cent per annum from the date hereof until paid," is a proper ministerial act, authorized by law, although no authority therefor is found in the decision of the court, which should not contain any such adjudication, where there is no issue in the case as to the right of the plaintiff to have interest upon the judgment awarded.

2. **Specifying Rate.** — *Catron v. Lafayette County*, 125 Mo. 67; *State v. Vogel*, 14 Mo. App. 187. But see *Troxwell v. Fugate, Hard.* (Ky.) 2, holding a judgment for interest to be erroneous where it does not state the rate of interest recovered. *Smith v. Tatman*, 71 Ind. 171.

3. *Wooster v. Clarke*, 2 Ark. 101; *Mount v. Chapman*, 9 Cal. 294; *McCutchen v. Dougherty*, 44 Miss. 419; *Ramsey v. Jones*, 5 Lea (Tenn.) 500.

In *Missouri*, under Rev. Stat. 1889, § 5974 (Rev. Stat. 1879, § 2725), every judgment in a civil action bears interest, though it be not therein expressed, at the rate which the cause of action bore. The judgment need not

Certainty. — A provision in a judgment for interest should give data from which the amount may be calculated with certainty.¹

Harmless Error. — Error as to the day on which interest commences may or may not be harmless.² A mistake of a few cents in calculating interest is immaterial.³

On Default, the record need not show that the interest was computed by the clerk.⁴

VIII. RENDITION, ENTRY, AND RECORD OF JUDGMENTS. — See article RENDITION AND ENTRY OF JUDGMENTS.

IX. JUDGMENTS BY CONFESSION. (See also article COGNOVIT, vol. 4, p. 560.) — **1. Classification and Definition.** — Judgments by confession are of two kinds: first, judgment by confession after action brought; second, judgment by confession without action. A judgment by confession after action brought is one entered by the defendant after the action against him has been commenced by the service of process.⁵ A judgment by confession without action is, as its name implies, one entered by the defendant, or by his attorney, without the institution of any action against him.⁶

2. By Confession After Action Brought — *a. KINDS* — **By Cognovit Actionem.** — Judgments by confession after action brought are also divided into two classes, the one a judgment by *cognovit actionem*, and the other a judgment by confession *relicta verificatione*.⁷ In the case of a judgment by *cognovit actionem*, the defendant after service does not enter a plea, but acknowledges and confesses that the plaintiff's cause of action is just and rightful.⁸

state the rate of interest, as the record may be consulted to ascertain the rate. *State v. Vogel*, 14 Mo. App. 187; *Catron v. Lafayette County*, 125 Mo. 67.

1. *Wooster v. Clarke*, 2 Ark. 101.

Judgment for interest from a day not specified and uncertain is bad. *Brittenham v. Cummins*, 1 Bibb (Ky.) 488.

In *Tankersley v. Silburn*, Minor (Ala.) 185, a judgment for a sum certain with interest from a particular date, but to a day which could only be ascertained by reference to the entire record, was held erroneous, but as the record furnished sufficient data it was corrected and rendered on appeal.

A judgment cannot be rendered to draw interest from a day prior to its rendition, nor can it fix a higher rate of interest than is allowed by law. *Simmons v. Garrett*, *McCahon* (Kan.) 82.

A judgment for interest from a given date is sufficiently certain without fixing the amount. *Dinsmore v. Austill*, Minor (Ala.) 89; *DeWitt v. Swift*, 3 How. Pr. (N. Y. Supreme Ct.) 280.

2. "We think the recitation in the judgment that the purchase money,

with interest from an erroneous date, amounts to a stated sum, is immaterial, when it clearly appears that the amount for which judgment is rendered does not exceed the amount for which the party complaining is legally liable." *Dean v. Blount*, 71 Tex. 270.

In *Buford v. Burdett*, 3 T. B. Mon. (Ky.) 227, it was held that an error in allowing interest from too early a date was prejudicial to the defendant and could not be cured by a release of the excess by the plaintiff, although made by leave of court.

3. *Ziel v. Dukes*, 12 Cal. 479.

A Clerical Error in calculating interest from too early a date will not be considered ground of reversal unless a motion to correct the error has been made in the court below. *Wilson v. Barnes*, 13 B. Mon. (Ky.) 330.

4. *Radcliff v. Erwin*, Minor (Ala.) 88

5. See *Crouse v. Derbyshire*, 10 Mich. 479.

6. *Flanagan v. Bruner*, 10 Tex. 257.

7. *Burr v. Mathers*, 51 Mo. App. 470.

8. *Hirschfield v. Franklin*, 6 Cal. 607; *Burr v. Mathers*, 51 Mo. App. 470;

By Confession Relicta Verifications. — In the case of confession *relicta verificatione*, the defendant, after pleading and before trial, both confesses the plaintiff's cause of action and withdraws or abandons his plea or other allegation, whereupon judgment is entered against him without proceeding to trial.¹

b. NECESSITY OF PROCESS. — This class of judgments originated under the common law and can be entered only after the action has been properly commenced by service of process upon a defendant.²

A Waiver or Acceptance of Service is, however, as effectual in law as actual service.³

Stewart v. Walters, 38 N. J. L. 274; *Hower v. Jones*, 1 Cleve. (Ohio) 257; *Philadelphia v. Toll*, 2 W. N. C. (Pa.) 226.

Signature of Cognovit. — A *cognovit* must be signed by the attorney. *Philadelphia v. Toll*, 2 W. N. C. (Pa.) 226.

Effect as Admission. — A *cognovit* is good as an admission *in pais* after answer is filed. *Hirschfield v. Franklin*, 6 Cal. 607.

Sufficiency of Cognovit. — Where the *cognovit* states that the defendant "cannot deny" the action, etc., it is sufficient to warrant an entry of judgment upon confession. *Lewis v. Barber*, 21 Ill. App. 638; *Keith v. Kellogg*, 97 Ill. 147. See, however, *Elliott v. Daiber*, 42 Ill. 467, in which it was held that where a party sued before a justice of the peace stated that he could not deny the plaintiff's demand, such admission conferred no authority to enter a judgment by confession. The court said: "It does not follow, because a defendant says he cannot deny the plaintiff's demand, that he is the plaintiff's debtor. The defendant may have claims to set off which he may not choose to litigate before the justice, but be willing the justice should find against him, so that he may take an appeal to another court and there litigate. By construing his declaration that he could not deny the plaintiff's demand as a confession of judgment, the right of appeal would be taken away, and the party injured."

Entry of Judgment. — A judgment by *cognovit* after service of process may be entered in vacation, without a judge's or commissioner's order, and without an affidavit. *Stewart v. Walters*, 38 N. J. L. 274.

Hicks v. Ayer, 5 Ga. 298; *Burr v. Mathers*, 51 Mo. App. 470; *Burton v. Lawrence*, 4 Tex. 373; *Bouv. L. Dict.*, title Judgments.

In *Burton v. Lawrence*, 4 Tex. 373, a judgment which recited that "the defendants, by leave of the court, withdrew their pleas, and say that they cannot deny the plaintiff's cause of action against them for debt and interest in plaintiff's petition claimed," etc., was held to be in effect a confession of judgment for a sum certain, to be ascertained simply by reference to the petition.

Retraction of Confession. — In *Smith v. Simms*, 9 Ga. 418, it was held that where the confession of judgment was made by the defendant through a mistake of fact as to the contents of the pleadings, such confession may, upon discovery of the error, be retracted at any time before recording.

2. Rogers v. Bowen, 19 Ga. 596; *Craig v. Glass*, 1 Ind. 89; *Crouse v. Derbyshire*, 10 Mich. 479; *Burr v. Mathers*, 51 Mo. App. 470; *Stewart v. Walters*, 38 N. J. L. 274; *Schroeder v. Fromme*, 31 Tex. 602; *Flanagan v. Bruner*, 10 Tex. 257; *Gerald v. Burthee*, 29 Tex. 202.

In *Flanagan v. Bruner*, 10 Tex. 257, it is held that an appearance cannot be said to be with process where the citation is merely made out, but there is no service by the officer nor waiver or acceptance of such service.

In Missouri, where it is provided by statute that a confession of judgment if made before a justice without service, must be in writing, a judgment orally confessed without service is a nullity. *Burr v. Mathers*, 51 Mo. App. 470.

Sufficient Proof of Service. — Where W. B. acknowledged service of a declaration and process in a suit against J. B. as his agent, and J. B. afterwards confessed judgment, service on J. B. was thereby sufficiently proved. *Rogers v. Bowen*, 19 Ga. 596.

3. Flanagan v. Bruner, 10 Tex. 257;

c. **AFFIDAVIT AND STATEMENT UNNECESSARY.**—Where a defendant confesses judgment after service or waiver thereof, an affidavit or statement of indebtedness is unnecessary.¹

3. By Confession Without Action—*a.* **IN GENERAL.**—In almost all of the states provision is made by statute for the entry of judgment by confession where no action has been instituted against the defendant.² Such statutes are to be strictly construed.³ And since judgments by confession owe their efficacy entirely to the statutes authorizing them, a strict compliance with the statutory requirements in every particular is essential to their validity.⁴ As a corollary to this rule it follows that where

Gerald v. Burthee, 29 Tex. 202; *Byers v. Brannon*, (Tex. 1892) 19 S. W. Rep. 1091.

Waiver by Power of Attorney.—In *Varnum v. Runion*, 1 McLean (U. S.) 413, it was held that a power of attorney by which an attorney was authorized to confess a judgment in a certain suit, naming the parties, then pending in the Circuit Court of the United States, authorized a judgment to be entered, though the process had not been served on the party; the power of attorney constituting a waiver of service in such case.

1. *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96; *Franse v. Owens*, 25 Mo. 329; *Stewart v. Walters*, 38 N. J. L. 274; *Budd v. Marvin*, 4 N. J. L. 281; *Elliot v. Woodhull*, 12 N. J. L. 126; *Ferguson v. Earl*, 14 N. J. L. 124; *Hoguet v. Wallace*, 28 N. J. L. 523; *Miller v. Oregon City Paper Mfg. Co.*, 3 Oregon 24; *Miller v. Bank of British Columbia*, 2 Oregon 291; *Gerald v. Burthee*, 29 Tex. 202; *Flanagan v. Bruner*, 10 Tex. 257; *Chestnutt v. Pollard*, 77 Tex. 86.

2. *Alabama*.—*Gayle v. Foster*, Minor (Ala.) 125; *Hodges v. Ashurst*, 2 Ala. 301; *Johnson v. Kelly*, 2 Stew. (Ala.) 490; *Callier v. Denson*, Minor (Ala.) 19. *Arkansas*.—*Johnston v. Glasgow*, 5 Ark. 311; *Choat v. Bennett*, 11 Ark. 314; *Thompson v. Foster*, 6 Ark. 208; *Pickett v. Thruston*, 7 Ark. 397.

California.—*Chapin v. Thompson*, 20 Cal. 686.

Illinois.—*Russell v. Lillja*, 90 Ill. 327; *Little v. Dyer*, 138 Ill. 272; *Kellogg v. Keith*, 4 Ill. App. 386.

Indiana.—*Hawes v. Pritchard*, 71 Ind. 166.

Iowa.—*Edmonds v. Montgomery*, 1 Iowa 143; *Edgar v. Greer*, 7 Iowa 136.

Louisiana.—*Marbury v. Pace*, 29 La. Ann. 557.

Maryland.—*Huston v. Ditto*, 20 Md. 305.

Massachusetts.—*Henry v. Estes*, 127 Mass. 474.

Michigan.—*Beach v. Botsford*, 1 Dougl. (Mich.) 199.

Mississippi.—*Bass v. Estill*, 50 Miss. 300.

New Jersey.—*Latham v. Lawrence*, 11 N. J. L. 322; *Clapp v. Ely*, 27 N. J. L. 555.

New York.—*Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497.

North Carolina.—*Farley v. Lea*, 4 Dev. & B. L. (N. Car.) 169.

Ohio.—*Matthews v. Thompson*, 3 Ohio 272; *Rosebrough v. Ansley*, 35 Ohio St. 107.

Pennsylvania.—*Rex v. Nelson*, 39 Leg. Int. (Pa.) 190; *Barker v. Beeber*, 112 Pa. St. 216.

Texas.—*Grubbs v. Blum*, 62 Tex. 426.

Utah.—*State Nat. Bank v. Sears*, 13 Utah 172.

Virginia.—*Saunders v. Lipscomb*, 90 Va. 647.

In *New Jersey* it was held that a judgment entered upon a judgment note without process was illegal. *Hinchman v. Glover*, 2 N. J. L. 85. See also *Stretch v. Hancock*, 2 N. J. L. 193.

Statutes Not Applicable After Action Brought.—Such statutes have, however, no reference to the class of judgments by confession previously spoken of where process has been regularly served. *Schroeder v. Fromme*, 31 Tex. 602; *Crouse v. Derbyshire*, 10 Mich. 479; *Elliot v. Woodhull*, 12 N. J. L. 126.

3. *Edgar v. Greer*, 7 Iowa 136; *Chapin v. Thompson*, 20 Cal. 686.

4. *Chapin v. Thompson*, 20 Cal. 686; *Hawes v. Pritchard*, 71 Ind. 166; *Edgar v. Greer*, 7 Iowa 136; *Henry v.*

the statute has been strictly complied with in every regard, nothing further can be necessary in order that the judgment may be valid.¹

b. DECLARATION OR SERVICE OF PROCESS UNNECESSARY. — Under such statutes the filing of a declaration² or the service of process³ is not essential to the validity of the judgment by confession.

c. WHO MAY CONFESS JUDGMENT. — Generally speaking, parties to a judgment by confession are the same as to a judgment rendered after litigation;⁴ that is, such judgment may be in

Estes, 127 Mass. 474; *Beach v. Botsford*, 1 Dougl. (Mich.) 199; *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497; *Rosebrough v. Ansley*, 35 Ohio St. 107; *Barker v. Beeber*, 112 Pa. St. 216; *Grubbs v. Blum*, 62 Tex. 426.

Want of Signature. — Thus a judgment by confession is void for want of conformity to the statute where it does not appear to be signed by the person making the same, and by one or more competent witnesses. *Beach v. Botsford*, 1 Dougl. (Mich.) 199.

Failure of Debtor to Appear in Person. — In those states where the statutes authorizing a judgment without pleadings apply only to a proceeding wherein the debtor appears personally in court and confesses judgment, no valid judgment can be confessed without such personal appearance. *Rosebrough v. Ansley*, 35 Ohio St. 107.

1. *Johnston v. Glasgow*, 5 Ark. 311; *Marbury v. Pace*, 29 La. Ann. 557.

2. *Gayle v. Foster, Minor* (Ala.) 125; *Thompson v. Foster*, 6 Ark. 208; *Choat v. Bennett*, 11 Ark. 313; *Johnston v. Glasgow*, 5 Ark. 311; *Russell v. Lillja*, 90 Ill. 327; *Rex v. Nelson*, 39 Leg. Int. (Pa.) 190; *Montelius v. Montelius, Bright* (Pa.) 79.

Where a Declaration Is Filed in such case and judgment is confessed upon it, it is immaterial whether the declaration will stand the test of strict technical principles or not. *Thompson v. Foster*, 6 Ark. 208; *Choat v. Bennett*, 11 Ark. 313.

3. *Gayle v. Foster, Minor* (Ala.) 125; *Hodges v. Ashurst*, 2 Ala. 301; *Callier v. Denson, Minor* (Ala.) 19; *Thompson v. Foster*, 6 Ark. 208; *Little v. Dyer*, 138 Ill. 272; *Marbury v. Pace*, 29 La. Ann. 557; *Farley v. Lea*, 4 Dev. & B. L. (N. Car.) 169; *Matthews v. Thompson*, 3 Ohio 272.

No Application to Cognovit Actionem. — In *Little v. Dyer*, 138 Ill. 272, it was

held that the confession of judgment contemplated by the statute of Illinois is a confession of judgment in a proceeding instituted "without process," and therefore has no application to a *cognovit actionem*, or confession of judgment by the defendant in an action after suit brought, which was resorted to at common law in many different forms of action.

4. By Officers of Corporations. — *Shute v. Keyser*, (Arizona 1892) 29 Pac. Rep. 386; *U. S. Electric Lighting Co. v. Leiter*, (D. C. 1887) 9 Cent. Rep. 655; *Snyder v. Bailey*, 165 Ill. 447; *Boston Tailoring House v. Fisher*, 59 Ill. App. 400; *McKinley v. Smith*, 25 Ill. App. 168. *Joliet Electric Light, etc., Co. v. Ingalls*, 23 Ill. App. 45; *McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377; *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96; *Sharp v. Danville, etc., R. Co.*, 106 N. Car. 308; *Nimocks v. Cape Fear Shingle Co.*, 110 N. Car. 20; *Miller v. Bank of British Columbia*, 2 Oregon 291; *Jackson v. Cartwright Lumber Co.*, 2 Pa. Dist. Rep. 680; *Atlantic Refining Co. v. Mengel*, 6 Pa. Dist. Rep. 223; *Ford v. Hill*, 92 Wis. 188.

A corporation may authorize an attorney to confess judgment for it. *U. S. Electric Lighting Co. v. Leiter*, (D. C. 1887) 9 Cent. Rep. 655.

The president of a corporation may confess judgment for such corporation. If, however, this is done without the order or knowledge of the directors or company, and without setting forth the cause of the indebtedness, it is void. *McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377; *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96.

Partnerships. — *Columbus Watch Co. v. Hodenpyl*, 61 Hun (N. Y.) 557; *Stevens v. Diehl*, 127 Pa. St. 416; *Breeding v. Boggs*, 20 Pa. St. 33; *Alexander v. Alexander*, 85 Va. 353; *Coker v. Wynne*, 2 Va. L. J. 377.

favor of, or made by, all such persons as may maintain or defend a suit and be bound by the judgment therein.¹

d. FOR WHAT MAY BE CONFESSED — (1) *In General*. — Although it is a requirement of the statutes authorizing a confession of judgment, that the debt for which judgment is confessed must be either justly due or to become due,² and though such debt should be a legal one, yet this does not mean that the demand must be one against which the debtor could set up no

A power of attorney executed by a firm need not be under seal. *Alexander v. Alexander*, 85 Va. 353.

A partner cannot confess a judgment against his firm. *Elliott v. Holbrook*, 33 Ala. 659; *Hopper v. Lucas*, 86 Ind. 43; *Barlow v. Reno*, 1 Blackf. (Ind.) 252; *Christy v. Sherman*, 10 Iowa 535; *North v. Mudge*, 13 Iowa 496; *Soper v. Fry*, 37 Mich. 236; *Morgan v. Richardson*, 16 Mo. 409; *Stoutenburgh v. Vandenberg*, 7 How. Pr. (N. Y. Supreme Ct.) 229; *Von Keller v. Muller*, 3 Abb. Pr. (N. Y.) 375, note; *Hamilton's Appeal*, 103 Pa. St. 368; *Gerard v. Basse*, 1 Dall. (Pa.) 119; *Lehman v. Rood*, 5 Pa. Dist. Rep. 655; *Mair v. Beck*, (Pa. 1886) 1 Cent. Rep. 898; *McCleery v. Thompson*, 130 Pa. St. 443; *Boyd v. Thompson*, 153 Pa. St. 78; *Franklin v. Morris*, 154 Pa. St. 152; *Clark v. Bowen*, 22 How. (U. S.) 270.

Partners have no implied authority to confess judgment for each other. *Soper v. Fry*, 37 Mich. 236.

Such judgment will be valid only against the one confessing. *Hopper v. Lucas*, 86 Ind. 43; *North v. Mudge*, 13 Iowa 496; *Stoutenburgh v. Vandenberg*, 7 How. Pr. (N. Y. Supreme Ct.) 229; *Gerard v. Basse*, 1 Dall. (Pa.) 119; *Clark v. Bowen*, 22 How. (U. S.) 270.

A partner may, however, bind the partnership where the other partner or partners assent to his act. *Elliott v. Holbrook*, 33 Ala. 659; *Edwards v. Pitzer*, 12 Iowa 607; *Hard v. Foster*, 98 Mo. 297; *Miller v. Wagner*, 24 Pittsb. L. J. N. S. 458; *Hamilton's Appeal*, 103 Pa. St. 368.

A Judge may confess judgment against himself. *Thornton v. Lane*, 11 Ga. 459.

A Clerk may enter his own confession of judgment, *Smith v. Mayo*, 83 Va. 910; or a judgment in his own favor, *Moore v. Trimmier*, 32 S. Car. 511.

A Public Officer who is liable to be sued for services rendered for the public at his request, may confess judg-

ment therefor. *Gere v. Cayuga County* 7 How. Pr. (N. Y. Supreme Ct.) 255.

A defaulting tax collector and his securities may validly confess judgment for the amount of the defalcation. *Pearce v. State*, 49 La. Ann. 643.

The officers of a township may confess judgment in a suit brought against them. *Menaval v. Jackson Tp.*, 9 Pa. Co. Ct. Rep. 28.

In *Grand Island, etc.*, R. Co. v. Baker, (Wyoming 1896) 45 Pac. Rep. 494, it was held that the condition of personal appearance in court will not allow a confession of judgment by the board of county commissioners.

Married Women. — A judgment confessed by a married woman is presumably valid. *Abell v. Chaffee*, 154 Pa. St. 254; *Adams v. Grey*, 154 Pa. St. 258; *Stephan v. Hudock*, 4 Pa. Super. Ct. Rep. 474.

In *New York* a married woman may confess judgment only for a debt contracted for the benefit of her separate estate or in the course of business carried on by her on her separate account. *White v. Wood*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 187.

In *Virginia* a married woman may take confession of judgment from her husband. *Alexander v. Alexander*, 85 Va. 353.

A married woman cannot bind herself by simply signing a power of attorney. *Patton v. Stewart*, 19 Ind. 233.

Joint Defendants. — In an action against two or more defendants, judgment cannot be rendered against both on the confession of one. *Wiggins v. Klienmans*, 9 N. J. L. 249; *Ballinger v. Sherron*, 14 N. J. L. 144.

1. See title *Judgments*, Am. and Eng. Encyc. of Law.

2. **Where Debt Is Paid.** — In *Rea v. Forrest*, 88 Ill. 275, it was held that where the payee of a note more than reimburses himself from a note assigned to him by the maker as collateral security, and retains the collateral, he will not be entitled to enforce payment of the prin-

defenses in an action at law brought to recover such demand.¹ Thus, for instance, although part of the debt for which a judgment is confessed is barred by the statute of limitations at the time when the confession is taken, yet if such claim be honest the defendant is not obliged to interpose the statute, but has the right to waive such defense.² Where, however, the power of attorney to confess judgment is not executed until after the debt or claim is barred by the statute of limitations, such warrant of attorney does not extend the period of limitation, and confers no authority to enter judgment.³ Even if a part of the claim upon which the judgment is confessed be founded only upon a moral obligation, such as a verbal assumption of indebtedness, which under the statute of frauds would not be enforceable at law, the judgment is nevertheless good.⁴

(2) *For a Tort.* — Judgment cannot, however, be confessed for a tort.⁵

(3) *Confession Before Maturity of Debt.* — Where, as is the

principal note thus paid; and if he takes a judgment thereon, under a power of attorney attached thereto, without the knowledge or consent of the maker, it will be fraudulent and void.

1. *Confession on Illegal Demand.* — Where a person apparently indebted to the estate of a deceased creditor, upon being called upon for payment, voluntarily confesses a judgment for the debt to the personal representative of the supposed creditor, without apprising him that the demand is illegal (in this case the notes upon which the confession was founded were given upon the sale of tickets in a lottery not authorized by law and contrary to the statute), the defendant in the judgment and those claiming under him subsequent thereto are estopped from denying the validity of such judgment. *Shufelt v. Shufelt*, 9 Paige (N. Y.) 137.

Judgment in Excess of Debt. — In *Nusbaum v. Louchheim*, (Pa. 1885) 1 Atl. Rep. 391, judgment was confessed for such an amount as to leave nothing for the levy of subsequent creditors, and it was held that, a combination between the parties having been proved, fraud would be established.

Confession by Bankrupt Subsequent to Discharge. — In *Dewey v. Moyer*, 72 N. Y. 70, it was held that where a bankrupt, subsequent to his discharge in bankruptcy, confesses judgment upon an old debt, such debt is a good consideration for the judgment, and the latter is not affected by the discharge.

Judgment Based on Gaming Consideration. — In *Illinois* it was held that a judgment by confession based on a gaming consideration is void under the code of that state. *West v. Carter*, 129 Ill. 249.

2. *Keen v. Kleckner*, 42 Pa. St. 529; *Woods v. Irwin*, 141 Pa. St. 278; *Cross v. Moffat*, 11 Colo. 210.

Confession by Executor. — It is not a fraud in law for an executor to confess a judgment for a *bona fide* debt barred by the statute. If sued therefor, he has a right to plead the statute, but is not bound to do so; and other creditors have no right to interfere except for fraud or collusion against them. *Woods v. Irwin*, 141 Pa. St. 278.

3. *Brown v. Parker*, 28 Wis. 21; *Walrod v. Manson*, 23 Wis. 393; *Matzenbaugh v. Doyle*, 156 Ill. 331.

4. *Keen v. Kleckner*, 42 Pa. St. 529.

5. *Burkham v. Van Saun*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 163; *Boutel v. Owens*, 2 Sandf. (N. Y.) 655. See also *Burns v. Nash*, 23 Ill. App. 552; *Willer v. French*, 27 Ill. App. 76.

"The practice of entering judgment by confession upon warrant of attorney, without process, in all actions of tort, did not obtain and there is no precedent for it at common law." *Burns v. Nash*, 23 Ill. App. 552.

On a Demand for Trespass. — In *Boutel v. Owens*, 2 Sandf. (N. Y.) 655, it was held that a confession of judgment without action is not authorized by the code on a demand for trespass upon real and personal property.

case in most states, it is provided by statute that a confession of judgment may be for a debt due or to become due, judgment may be confessed upon a debt which is not yet due. Thus, judgment may be confessed upon a note not yet matured.¹ Although this is the general rule, yet the statutes in a few states

1. *California*. — Pond *v.* Davenport, 45 Cal. 225.

Illinois. — Towle *v.* Gonter, 5 Ill. App. 409; Alldritt *v.* Morrison First Nat. Bank, 22 Ill. App. 24, 192; McDonald *v.* Chisholm, 131 Ill. 273; Elkins *v.* Wolfe, 44 Ill. App. 376; Cohen *v.* Burgess, 44 Ill. App. 206; Blanck *v.* Medley, 63 Ill. App. 211; Farwell *v.* Huston, 151 Ill. 239; Sherman *v.* Baddely, 11 Ill. 622; Adam *v.* Arnold, 86 Ill. 185; Thomas *v.* Mueller, 106 Ill. 36; Cummins *v.* Holmes, 11 Ill. App. 158; Roundy *v.* Hunt, 24 Ill. 598; Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624.

Indiana. — Calloway *v.* Byram, 95 Ind. 423; Gall *v.* Fryberger, 75 Ind. 98; De Haven *v.* Covalt, 83 Ind. 344; Robertson *v.* Huffman, 92 Ind. 247.

Iowa. — McClish *v.* Manning, 3 Greene (Iowa) 223.

Massachusetts. — Richards *v.* Barlow, 140 Mass. 218.

Mississippi. — Black *v.* Pattison, 61 Miss. 599.

Missouri. — Stern *v.* Mayer, 19 Mo. App. 511; Mechanics' Bank *v.* Mayer, 93 Mo. 417.

New York. — Teel *v.* Yost, 128 N. Y. 387; Boutel *v.* Owens, 2 Sandf. (N. Y.) 655; Jaffray *v.* Saussman, 52 Hun (N. Y.) 561.

Pennsylvania. — Volkenand *v.* Drum, 143 Pa. St. 525; Integrity Title Ins., etc., Co. *v.* Rau, 153 Pa. St. 488.

Wisconsin. — Reid *v.* Southworth, 71 Wis. 288.

Under Power of Attorney. — Power thus to confess a judgment before the maturity of the note may be conferred by warrant of attorney. Blanck *v.* Medley, 63 Ill. App. 211; Towle *v.* Gonter, 5 Ill. App. 409; Alldritt *v.* Morrison First Nat. Bank, 22 Ill. App. 24, 192; Elkins *v.* Wolfe, 44 Ill. App. 376; Cohen *v.* Burgess, 44 Ill. App. 206; Sherman *v.* Baddely, 11 Ill. 622; McClish *v.* Manning, 3 Greene (Iowa) 223; Volkenand *v.* Drum, 143 Pa. St. 525; Smith *v.* Pringle, 100 Pa. St. 275; Reid *v.* Southworth, 71 Wis. 288.

Clear and Precise Language Is Required in order to authorize a confession of judgment upon a note not due. Reid

v. Southworth, 71 Wis. 288, where it was held that a warrant of attorney to confess judgment upon a note "for such amount as may appear to be unpaid thereon" authorized judgment to be confessed only for the amount actually due.

Warrant to Confess in a Certain Contingency. — When a warrant of attorney confers authority in a certain contingency to confess judgment on a note before the same is due, the record must show that the specified contingency had happened, otherwise a judgment is unwarranted. Roundy *v.* Hunt, 24 Ill. 598, where the court said: "It is a rule of general application that all powers not coupled with an interest must be strictly pursued in their execution. Here was a power to confess a judgment before the maturity of the debt, upon the happening of a specified contingency. The judgment was confessed before the note fell due, and the record fails to show that the contingency had happened which authorized the entry of the judgment. The declaration on its face shows no cause of action, but sets out a note not then due by its terms, and it contains no averment to show that a judgment was authorized. The warrant of attorney, it is true, contains a provision that in case Hunt should believe that there was danger of losing the sum mentioned in the note, then a judgment might be confessed before the note fell due. But it is nowhere averred, nor does it appear, that Hunt had become apprehensive of such loss, or that he even knew that the judgment was confessed. Before the judgment could be legally confessed, Hunt must have feared the loss, and that should have appeared in the record. There were no other conditions upon which the judgment could be confessed before the maturity of the note. We are, therefore, of the opinion that the judgment was unwarranted, and should have been vacated, and the execution and levy quashed." See also, in this connection, Dilley *v.* Van Wie, 6 Wis. 209; Bode *v.* New England Invest. Co., 1 N. Dak. 121.

provide that a judgment may be confessed for a debt justly due and owing, and where this is the case the debt must be one actually existing at the time.¹

(4) *Confession for Future Advances.* — In those jurisdictions where judgment may be confessed for an obligation not yet due, judgment by confession may be taken to secure future advances² or to secure both existing and future indorsements for the accommodation of the debtor.³

(5) *Confession to Secure Against Contingent Liability.* — So, also, in most of the states a confession of judgment for the purpose of securing the plaintiff against a future contingent liability is proper.⁴ In those states, however, where a confession can

1. Sayre v. Hewes, 32 N. J. Eq. 652; Clapp v. Ely, 10 N. J. Eq. 178, 27 N. J. L. 555; Warwick v. Petty, 44 N. J. L. 542; Blackwell v. Rankin, 7 N. J. Eq. 152; Sterling v. Fleming, 53 N. J. L. 652; Spier v. Corll, 33 Ohio St. 236.

2. Robinson v. Consolidated Real Estate, etc., Co., 55 Md. 105; Cook v. Whipple, 55 N. Y. 150; Truescott v. King, 6 N. Y. 147; Hammond v. Bush, 8 Abb. Pr. (N. Y. Supreme Ct.) 152; Lansing v. Woodworth, 1 Sandf. Ch. (N. Y.) 43; Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 320; Livingston v. McInlay, 16 Johns. (N. Y.) 165; Averill v. Loucks, 6 Barb. (N. Y.) 19; Wilder v. Fonday, 4 Wend. (N. Y.) 100; Shenk's Appeal, 33 Pa. St. 371; Parmentier v. Gillespie, 9 Pa. St. 86; Ter-Hoven v. Kerns, 2 Pa. St. 96; Kunybacher v. Charles, (Pa. 1853) 1 Am. L. Reg. 634.

Purpose Must Be Stated in Original Agreement. — Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 320. See also Robinson v. Consolidated Real Estate, etc., Co., 55 Md. 105.

In Averill v. Loucks, 6 Barb. (N. Y.) 19, where it was held that a judgment may be taken and held for future responsibilities and advances to the extent of the amount of the judgment, it was also held that to enable a creditor thus to hold the judgment it must be a part of the original agreement that the judgment shall be a security for such responsibilities and advances, and that it cannot, as against third persons, be held to meet and cover new and distinct engagements subsequently entered into by the parties.

Effect of Subsequent Intermediate Judgments. — According to several of the decisions it seems that when a subsequent judgment intervenes before all the advances agreed for have been made, future advances after that period

are not covered. Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 320. See also, to the same effect, Averill v. Loucks, 6 Barb. (N. Y.) 19; Lansing v. Woodworth, 1 Sandf. Ch. (N. Y.) 43.

3. Lansing v. Woodworth, 1 Sandf. Ch. (N. Y.) 43, where the court said: "The confession of judgments to secure indorsements and future advances is not uncommon, and so far as I know is of unquestioned propriety. This court has sustained mortgages given for the same purpose, holding as to mortgages, as it probably would in respect of judgments, that advances made or liabilities incurred after the attaching of a subsequent lien would be subject to the priority of the latter."

Such a judgment is not an "estate or interest in lands," and is not within the provisions of the *New York Revised Statutes*, relative to uses and trusts. Lansing v. Woodworth, 1 Sandf. Ch. (N. Y.) 43.

4. Farmers', etc., Bank v. Spear, 49 Ill. App. 509; Cook v. Cressy, (N. Y. 1872) 7 Alb. L. J. 140; Marks v. Reynolds, 12 Abb. Pr. (N. Y. Supreme Ct.) 403; Allen v. Norton, 6 Oregon 344; Miller v. Howry, 3 P. & W. (Pa.) 374; Stewart v. Stocker, 1 Watts (Pa.) 135; McClure v. Roman, 52 Pa. St. 458; Pennock v. Copeland, 1 Phila. (Pa.) 29; Ford v. Elkin, 2 Spears L. (S. Car.) 146.

Enforced by Execution. — A judgment by confession on a contingent liability can be enforced by execution. Allen v. Norton, 6 Oregon 344.

In Miller v. Howry, 3 P. & W. (Pa.) 374, it was held that a judgment may be confessed to secure the plaintiff against a future contingent liability, and execution may issue thereon as soon as such liability becomes absolute, without actual payment by the

only be for an existing debt, judgment cannot, of course, be confessed to secure against contingent liabilities.¹

(6) *For a Sum Certain.* — A confession of judgment ought to be for a certain and specified sum,² and a power of attorney to confess judgment for an indefinite sum is invalid.³ Where, however, the provisions of a power of attorney are severable, and judgment only for an ascertained amount is confessed, such judgment will not be set aside for the reason that the power of attorney provides also for the confession of judgment for an unliquidated amount.⁴

2. CONSENT OF CREDITOR — **As a General Requisite.** — The consent of the creditor is essential to a valid judgment by confession,⁵

plaintiff. See also, to the same effect, *Stewart v. Stocker*, 1 Watts (Pa.) 135.

1. *Sayre v. Hewes*, 32 N. J. Eq. 652; *Sterling v. Fleming*, 53 N. J. L. 652.

2. *Curtice v. Scovel*, 1 Root (Conn.) 328, 421; *Curtice v. Bulkley*, 1 Root (Conn.) 329; *Little v. Dyer*, 138 Ill. 272; *Fortune v. Bartolomei*, 164 Ill. 51; *Patterson v. Indiana*, 2 Greene (Iowa) 492; *Vanderveer v. Ingleton*, 7 N. J. L. 140; *Nichols v. Hewit*, 4 Johns. (N. Y.) 423; *Eavenson v. Zoellers*, 6 Pa. Co. Ct. Rep. 138; *Bennett v. Haley*, 142 Pa. St. 253.

Confession on Future Award. — The judgment entered by a justice on a confession by the party for such sum as A and B should award, before the award, is bad. *Nichols v. Hewit*, 4 Johns. (N. Y.) 423.

A Judgment Entered by Confession on an Arbitration Note conditioned for the performance of an award is void. *Curtice v. Scovel*, 1 Root (Conn.) 327; *Curtice v. Bulkley*, 1 Root (Conn.) 329; *Talcott v. Pulsifer*, 2 Root (Conn.) 443, where the court said: "The note is such that a justice has no right by law to take a confession upon; it being an escrow, and not a note for a debt due and owing; and it is altogether against the policy of the law to place an award which is to be made in such manner that the party can have no remedy or day in court to except against it, let it be ever so corrupt or mistaken."

3. *Fortune v. Bartolomei*, 164 Ill. 51; *Little v. Dyer*, 138 Ill. 272; *Scott v. Mantonya*, 164 Ill. 473; *Bennett v. Haley*, 142 Pa. St. 253.

A power of attorney in a lease authorizing a confession of judgment for unpaid water rent, gas bill, and bills for keeping the building in a sanitary condition, as additional rent, is invalid as authorizing the confession of judg-

ment for an uncertain and indefinite sum. *Fortune v. Bartolomei*, 164 Ill. 51.

Cases Not Within the Rule. — Where a power of attorney authorizes a judgment to be confessed for "such sum as shall appear at the time of confessing judgment to be due" on the note therein described, and is in sufficient form in all other particulars to give the court jurisdiction, it is sufficient. *Patterson v. Indiana*, 2 Greene (Iowa) 492.

A power of attorney in a lease authorizing the confession of judgment "from time to time, for any rent which may then be due by the terms of this lease," is not invalid as being for an indefinite sum, where the monthly rental is fixed by the lease, and the amount which is due for the unpaid period is ascertainable by inspection thereof. *Fortune v. Bartolomei*, 164 Ill. 51.

In *Holden v. Bull*, 1 P. & W. (Pa.) 460, it was held that a judgment entered upon a bond in the penalty of one hundred dollars, with a warrant to confess a judgment, having a condition thereunder written that the obligor will pay a fine and bill of costs, then uncertain as to amount, is valid.

4. *Fortune v. Bartolomei*, 164 Ill. 51.

5. *Ryan v. Daly*, 6 Cal. 238; *Wilcoxson v. Burton*, 27 Cal. 228; *Chapin v. McLaren*, 105 Ind. 563; *Haggerty v. Juday*, 58 Ind. 154; *Farmers', etc., Bank v. Mather*, 30 Iowa 283; *Flanagan v. Continental Ins. Co.*, 22 Neb. 235; *Howell v. Gilt Edge Mfg. Co.*, 32 Neb. 627; *Ingersoll v. Dyott*, 1 Miles (Pa.) 245.

"To bind the creditor, his assent, either express or implied, must be obtained, as otherwise the judgment confessed might be greatly below the

and a judgment entered without his consent or knowledge may be vacated on motion of the creditor.¹

Ratification. — The creditor may, however, subsequently ratify a judgment confessed without his knowledge or consent, and such judgment will be valid from the time when ratified.² Such ratification will not, however, affect rights acquired by other parties previous to the ratification.³

f. JURISDICTION, PRESUMPTION THEREOF, AND WAIVER OF OBJECTION — **Jurisdiction of Court Essential.** — Judgments by confession have all the qualities, incidents, and attributes of other judgments,⁴ and must, therefore, be entered in a court having

actual amount of the debt." *Flanagan v. Continental Ins. Co.*, 22 Neb. 235.

1. *Farmers', etc., Bank v. Mather*, 30 Iowa 283; *Chapin v. McLaren*, 105 Ind. 563.

Presumption of Assent. — Consent may, where the contrary does not appear, be presumed from the record. *Kennard v. Carter*, 64 Ind. 31.

The assent of the plaintiff is presumed where judgment is for his benefit. *McCalmont v. Peters*, 13 S. & R. (Pa.) 196; *Flanagan v. Continental Ins. Co.*, 22 Neb. 235.

Where judgment is rendered on the personal confession of the defendant made orally in open court, it is held that the plaintiff's assent, although not affirmatively shown by the transcript, will be presumed from the fact that he procured a satisfaction of the judgment by an execution, levy, and sale of the defendant's property. *Mercer v. James*, 6 Neb. 406.

Consent of Creditor's Attorney. — In *Chapin v. McLaren*, 105 Ind. 563, it was held that knowledge of the confession of judgment and consent thereto on the part of the creditor's attorney is sufficient.

2. *Lowenstein v. Caruth*, 59 Ark. 588; *Wilcoxson v. Burton*, 27 Cal. 228; *Chapin v. McLaren*, 105 Ind. 563; *Haggerty v. Juday*, 58 Ind. 154.

The Mere Silence of the Creditor, or his failure to object when informed of the judgment entered without his consent or knowledge, is not a ratification thereof, though admissible as evidence in some degree tending to prove the same. *Haggerty v. Juday*, 58 Ind. 154.

3. *Wilcoxson v. Burton*, 27 Cal. 228, where the court said: "It may be admitted, where a debtor confesses judgment without the request or knowledge of his creditor, and the creditor thereafter ratifies it by claiming under

it and attempting to enforce it, that the record will become binding as between the parties to it, by force of the ratification; and that by relation the judgment, as to them, would be considered as good from the date of its entry. But such ratification can neither override nor in any manner affect rights acquired prior to the ratification, and while the judgment was one only in name. To hold otherwise would be to go counter to all analogy, and would be subversive of authority which it is now too late to question." See also *Lowenstein v. Caruth*, 59 Ark. 588, holding that "an insolvent debtor may prefer one creditor to others, and may secure him by confession of judgment. But he cannot do so without first obtaining the assent of the creditor. Parties are as indispensable to judgments as they are to actions. Neither is of any validity without them. A judgment by confession in favor of a person without his knowledge or consent cannot operate 'as a final determination of the right of the parties in the proceedings.' It estops neither party from denying anything set forth in it."

4. *Caley v. Morgan*, 114 Ind. 350; *Lanning v. Carpenter*, 23 Barb. (N. Y.) 402; *Ex p. Ware Furniture Co.*, 49 S. Car. 20.

In *Lanning v. Carpenter*, 23 Barb. (N. Y.) 402, the court, in holding that the entry of a judgment by confession requires the exercise of the jurisdiction of the court, and that when entered such judgment is a judicial act of the court, said: "No adjudication in fact by the court, nor the agency of any judge of the court, is required to warrant or in entering the judgment. The legislature have prescribed the judgment and directed the clerk to enter it. But the judgment is, by the express

jurisdiction of the cause.¹

When Record Must Show Jurisdiction. — Where a judgment is confessed in a court of limited jurisdiction, the record of such court must show that it had jurisdiction of the cause.²

terms of section 384, a judgment of this court. It has manifestly all the qualities, incidents, and attributes of other judgments, and is to be proceeded with, and upon, in like manner. It does not differ from any other judgment except in the mode of obtaining it. The court has full control over it as to amendments, and in all other respects, as in the case of its other judgments. I do not perceive why such a judgment does not occupy the same footing, and is not in like manner, in legal contemplation and effect, a judicial final determination of the court in the exercise of its jurisdiction, as judgments on failure to answer under subdivision 1 of section 246 of the code. Judgments, under that subdivision, are entered by the agency of the plaintiff and the clerk of the court, without any act otherwise of the court; and yet no one can doubt that such judgments are, in a legal view, the judicial action of the court in the performance of its functions."

1. *Rapley v. Price*, 9 Ark. 428; *Caley v. Morgan*, 114 Ind. 350; *Marsh v. Sherman*, 12 Ind. 358; *Spear v. Carter*, 1 Mich. 19; *Lanning v. Carpenter*, 23 Barb. (N. Y.) 402; *Tenny v. Filer*, 8 Wend. (N. Y.) 569; *Adams v. Tator*, 57 Hun (N. Y.) 302, 19 Civ. Pro. Rep. (N. Y.) 114; *Slocumb v. Cape Fear Shingle Co.*, 110 N. Car. 24; *Camp v. Wood*, 10 Watts (Pa.) 118; *Coates v. Cork*, 1 Miles (Pa.) 270; *Ex p. Ware Furniture Co.*, 49 S. Car. 20.

Jurisdictional Amount. — In *Marsh v. Sherman*, 12 Ind. 358, it was held that the Circuit Court having original exclusive jurisdiction in all cases of "one thousand dollars or upwards," a judgment by confession for such amount entered in the Court of Common Pleas was void. See also *Thomas v. Feaster*, 22 Ind. 356; *Shaw v. Gallagher*, 8 Ind. 252; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 210.

A judgment cannot be confessed in the Superior Court for an amount an action to recover which would be within the exclusive jurisdiction of a justice of the peace. *Slocumb v. Cape Fear Shingle Co.*, 110 N. Car. 24.

The District Court of Philadelphia

could not enter judgment on a bond and warrant where the debt did not exceed one hundred dollars, even though the penalty was in a larger sum. *Coates v. Cork*, 1 Miles (Pa.) 270.

Justice of the Peace—New York. — Where the jurisdiction of a justice of the peace to enter confessions of judgment does not extend to the confession of judgment for a contingent liability, the confession of such a judgment before him is void. *Adams v. Tator*, 57 Hun (N. Y.) 302, 19 Civ. Pro. Rep. (N. Y.) 114.

Jurisdiction Dependent on Residence. — Where a statute requires actions to be tried in the county where the defendant resides, a confession of judgment against the defendant can only be entered in such county. *Ex p. Ware Furniture Co.*, 49 S. Car. 20.

Erroneous Exercise of Jurisdiction. — In *Bush v. Hanson*, 70 Ill. 480, it was held that where a declaration, the warrant of attorney and affidavit of its execution, the note, and *cognovit* by the attorney authorized are filed, the defendant is before the court, and there is enough to set the court in motion to hear and determine; and if, in such case, the court proceeds, and, in rendering judgment, acts without sufficient authority, without the oral testimony required by the statute having been produced, a case will be presented, not of want of jurisdiction, but only of error in the exercise of jurisdiction.

Courts of Concurrent Jurisdiction. — Although the authority of a warrant to confess judgment should be strictly pursued, and judgment should be entered in the court therein specified, yet a judgment in another court will be valid where the courts are of concurrent jurisdiction. *Hauer's Appeal*, 5 W. & S. (Pa.) 473.

2. *Smith v. Finley*, 52 Ark. 373; *Dragoo v. Graham*, 17 Ind. 427; *Spear v. Carter*, 1 Mich. 19; *Howell v. Gilt Edge Mfg. Co.*, 32 Neb. 627; *Tenny v. Filer*, 8 Wend. (N. Y.) 569; *Camp v. Wood*, 10 Watts (Pa.) 118.

In *Howell v. Gilt Edge Mfg. Co.*, 32 Neb. 627, the court said: "The judgments in this instance are those of an inferior court without the legal pre-

Entry upon Warrant in Another Jurisdiction. — Although it is possible that a warrant of attorney may be given which will authorize confession of judgment in another jurisdiction, yet if, by a fair consideration of its terms, such warrant seems to contemplate judgment in a court of a state in which it was executed, it will not uphold a judgment in another state.¹

Presumptions as to Jurisdiction. — When collaterally attacked, however, judgments by confession are supported by the same presumptions that sustain other judgments.²

Waiver of Objection to Jurisdiction. — Although the consent of parties

sumptions in its favor, and every fact essential to jurisdiction ought to appear affirmatively of record."

Where by statute the jurisdiction of a justice of the peace was restricted to certain actions, and judgment by confession might be entered for any sum not exceeding \$150, provided that such a confession should be in writing, signed by the person making the same, in presence of a justice or one or more competent witnesses, a judgment rendered by the justice in these words: "Judgment by written confession of the above-named defendants in favor of the above-named plaintiff, for \$88.18 damages, and costs of suit," was held not to show, and not to be *prima facie* evidence, that the justice had jurisdiction of either the persons of the defendants or the subject-matter of the suit, and that it was therefore void. *Spear v. Carter*, 1 Mich. 19.

Where the entry of a judgment by confession in the docket of a justice's court did not show, except by inference, that the defendant personally appeared in court, as required by a statute governing a confession of judgment, and it was shown by parol testimony that he did not in fact appear, such judgment was held to be void. *Smith v. Finley*, 52 Ark. 373. So, also, as holding that the record should show the personal appearance of the parties, see *Camp v. Wood*, 10 Watts (Pa.) 118.

Record Sufficiently Showing Jurisdiction. — The record of a justice's court was as follows: "April 10, 1840. Comes S. Robins, with a power of attorney to confess judgment. Whereupon the defendant, by his attorney, waived the issuing and service of process, and confessed judgment," etc. Such record, though informal and irregular, was held sufficient as the basis of an action and sufficiently showed,

that the justice had jurisdiction over the person of the defendant. *Dragoo v. Graham*, 17 Ind. 427.

1. *Manufacturers', etc., Bank v. Boyd*, 3 Den. (N. Y.) 257; *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497. See also *Davis v. Packer*, 8 Ohio Cir. Ct. Rep. 107; *Carlin v. Taylor*, 7 Lea (Tenn.) 666.

In *Grover, etc., Sewing Mach. Co. v. Radcliffe*, 66 Md. 511, a resident of Maryland executed a bond for a penal sum with a collateral condition. The bond authorized any attorney of any court of record of another state to confess judgment. The judgment was entered by the prothonotary of a Pennsylvania court, and attachment upon it was levied on the defendant's land in Maryland. It was held that the defendant had not authorized the prothonotary or clerk of a court under a special law to enter judgment, and that such judgment could not be enforced against him in Maryland.

Where a Confession upon Warrant Is Forbidden. — A confession by warrant of attorney is inoperative in a state in which it is forbidden by law, although valid in the state where executed. *Hamilton v. Schoenberger*, 47 Iowa 385.

A warrant purporting to give authority to confess a judgment beyond the state is valid as to judgment confessed within the state where executed. *Teel v. Yost*, 128 N. Y. 387. See also *Athens First Nat. Bank v. Garland*, (Mich. 1896) 67 N. W. Rep. 559.

2. *Caley v. Morgan*, 114 Ind. 350, holding that when a party submits himself to the jurisdiction of a competent court and confesses judgment, and the court enters judgment for the amount admitted to be due, it will be presumed that all the preliminary steps necessary to confer jurisdiction were taken.

cannot confer jurisdiction over the subject-matter,¹ yet, where the subject-matter is within the jurisdiction of the court, a judgment entered upon confession without excepting to the jurisdiction of the person is valid.²

g. MANNER OF CONFESSION — (1) *Upon Warrant of Attorney* — (a) *Generally*. — A debtor may authorize the confession of judgment against him by a warrant of attorney.³

1. Feillett v. Engler, 8 Cal. 77; Slocomb v. Cape Fear Shingle Co., 110 N. Car. 24.

2. Kelly v. Lyons, 40 La. Ann. 498, holding that when a party about to be sued is presented by his adversary with a petition addressed to a particular court, and indorses thereon his acceptance of service, waiver of citation, and confession of judgment, and when, two days afterwards, said petition and confession are filed in court, and judgment rendered thereon, the defendant cannot claim that such judgment is a nullity because violating Code Pro., art. 162, which prohibits the election by a party of a domicile other than his own for the purpose of being sued. A confession of judgment was a pleading to the merits, and having thus pleaded to the merits without exception to the jurisdiction, the judgment rendered is valid.

The requisite that the debtor must have been a resident of a district where the judgment was confessed merely gives such privilege to the debtor, which he may yield up at his pleasure; and a confession of judgment before the clerk of the court of a district other than that where the defendant resides is valid. Martin v. Bowie, 3 Hill L. (S. Car.) 225.

3. *Alabama*. — Hill v. Lambert, Minor (Ala.) 91; Hodges v. Ashurst, 2 Ala. 301.

Colorado. — Cross v. Moffat, 11 Colo. 210.

District of Columbia. — Harper v. Cunningham, (D. C.) 23 Wash. L. Rep. 100.

Illinois. — Little v. Dyer, 138 Ill. 272; Burwell v. Orr, 84 Ill. 465; Gross v. Weary, 90 Ill. 256; Borchsenius v. Canutson, 7 Ill. App. 365; Holmes v. Parker, 125 Ill. 478; Roundy v. Hunt, 24 Ill. 598; Chase v. Dana, 44 Ill. 262; Tucker v. Gill, 61 Ill. 236; Frye v. Jones, 78 Ill. 627; Keith v. Kellogg, 97 Ill. 147; Campbell v. Goddard, 117 Ill. 251; Follansbee v. Scottish American Mortg. Co., 5 Ill. App. 17, 25; Baldwin

v. Freyendall, 10 Ill. App. 106; Truett v. Wainwright, 9 Ill. App. 411; Whitton v. Whitton, 64 Ill. App. 53; McDonald v. Chisholm, 131 Ill. 273; Alldritt v. Morrison First Nat. Bank, 22 Ill. App. 24, 192; Thomas v. Mueller, 106 Ill. 36; Cummins v. Holmes, 11 Ill. App. 158; Towle v. Gonter, 5 Ill. App. 409; Graves v. Whitney, 49 Ill. App. 435; Johnson v. Crane, 22 Ill. App. 366.

Indiana. — Agard v. Hawks, 24 Ind. 276; McPheeters v. Campbell, 5 Ind. 107; Allen v. Parker, 11 Ind. 504.

Louisiana. — Gasquet v. Johnston, 8 Martin N. S. (La.) 547; Toledano v. Relf, 7 La. Ann. 60.

Maryland. — Montgomery v. Murphy, 19 Md. 576.

Michigan. — Athens First Nat. Bank v. Garland, (Mich. 1896) 67 N. W. Rep. 559.

Missouri. — Benjamin v. Bartlett, 3 Mo. 86.

Nebraska. — Howell v. Gilt Edge Mfg. Co., 32 Neb. 627.

New Jersey. — Young v. Stout, 10 N. J. L. 302; English v. Sharpe, 15 N. J. L. 457; Harwood v. Hildreth, 24 N. J. L. 51; Burroughs v. Condit, 6 N. J. L. 300.

New York. — M'Farland v. Irwin, 8 Johns. (N. Y.) 77.

Ohio. — Drake v. Simpson, 30 Ohio L. J. 236; Staner v. Stom, 7 West. L. J. (Ohio) 407; Cushman v. Welsh, 19 Ohio St. 536; Marsden v. Soper, 11 Ohio St. 503; Clements v. Hull, 35 Ohio St. 141; Spence v. Emerine, 46 Ohio St. 433.

Pennsylvania. — Bauer v. Rihs, 4 Pa. Dist. Rep. 583; Blythe Tp. v. Morris, (Pa. 1888) 11 Cent. Rep. 660; Limbert v. Jones, 118 Pa. St. 589; Swartz's Appeal, 119 Pa. St. 208; Weikel v. Long, 55 Pa. St. 238.

Virginia. — Caldwell v. Shields, 2 Rob. (Va.) 305.

Wisconsin. — Richards v. Globe Bank, 12 Wis. 693; Vliet v. Camp, 13 Wis. 198.

United States. — Fairchild v. Camac, 3 Wash. (U. S.) 558.

Second Confession under Same Power. — Where a judgment rendered upon a power of attorney is reversed for error, the attorney may, under the same power, confess a correct judgment, his power not being exhausted by the first act.¹

Entry of One Judgment on Several Powers of Attorney. — Where several powers of attorney are given to confess judgment on several debts in favor of and against the same parties, it is both competent and proper for the court to consolidate them and enter a single judgment.²

(b) **Nature of Judgment.** — Confession by warrant of attorney is analogous to a judgment by *cognovit*, but differs therefrom in that an action must be commenced before a *cognovit* can be given.³

(c) **Negotiability of Warrant.** — As to whether a warrant of attorney attached to a note authorizing confession of judgment in favor of the holder will authorize confession of judgment in favor of one to whom the note has been transferred, the authorities differ. In some cases it is held that such warrant of attorney is a security, and that when the note is negotiated the transfer carries with it the security.⁴ In other cases it is held that such power of

In Kentucky it has been held that a warrant of attorney to confess judgment before suit is brought is void. *O'Hara v. Lannier*, 1 B. Mon. (Ky.) 100; *Rankin v. Lawrence*, 4 Rich. L. (S. Car.) 267.

1. *Huner v. Doolittle*, 3 Greene (Iowa) 76, where the court said: "A decree had been confessed in the same case at a previous term of the court. It is therefore contended that the first act of confession exhausted the authority of the attorney to confess under that power. This would be true if the first decree had been valid or remained unreversed. But it appears that it was taken to the Supreme Court and reversed. This placed the case and the rights of the parties the same as if the first decree had not been rendered. The intention of the power had not been carried out, consequently the object was not accomplished, and the authority was not exhausted by the first act." See also *Fairchild v. Camac*, 3 Wash. (U. S.) 558.

2. *Genestelle v. Waugh*, 11 Mo. 367, where it was objected that there were three several warrants of attorney to confess judgments upon three several notes, and a single judgment was entered for the whole amount of the notes, but the court said: "The single judgment resulted from the duty and powers of the court, and not from

the form of the warrants of attorney. Had separate suits been brought the court would have ordered them to be consolidated. The judgment in this case was authorized by the warrants of attorney, although it did not conform to the letter of any one of them."

In *Iglehart v. Chicago M. & F. Ins. Co.*, 35 Ill. 514, it was held that since a court of general jurisdiction has power to consolidate different actions of the same nature between the same parties, it is not error, where several promissory notes accompanied by warrants of attorney are declared upon in one action, to enter one judgment by confession in open court on all of the notes, nor is it material that any order should be made authorizing such an entry of judgment. See also *Odell v. Reynolds*, 37 U. S. App. 447.

3. *Bouv. L. Dict.*, title Judgments. See also *Little v. Dyer*, 138 Ill. 272.

4. *Cross v. Moffat*, 11 Colo. 210.

Warrant in Favor of Any Holder. — In *Watson v. Paine*, 25 Ohio St. 340, the court said: "Upon this point [whether a warrant of attorney attached to a negotiable note authorizing an appearance, waiver of process, and confession of judgment in favor of the holder of the note can be exercised in favor of an indorsee], the members of the court are not fully agreed. For my own part, while admitting that a power ad-

attorney is not negotiable, and when the note is transferred becomes invalid and inoperative.¹

(d) **Construction of Warrant.** — A power of attorney to confess judgment will be strictly construed,² but not with such strictness as to make it inoperative³ or defeat the manifest intention of the parties to the instrument.⁴

addressed to an individual attorney cannot be exercised by another, and that an authority to confess judgment in favor of the payee alone cannot be used in favor of an indorsee, I am still wholly unable to find a reason why a power to confess judgment in favor of any holder of the note may not as well be used in favor of an indorsee as in favor of the payee. That such warrant may be used in favor of the payee is not doubted. It is also clear that the negotiability of commercial paper is not affected by attaching thereto, as part of the instrument, a power of attorney to confess judgment thereon. The law regards a *cognovit* attached to commercial paper as a valuable security in the hands of the payee; and to hold that such security cannot, in any case, follow the note into the hands of an indorsee would materially depreciate the value of such paper. It appears to me unreasonable that the law should permit the payee of a note intended for circulation to take such security, and then restrain the negotiation of the paper by declaring a forfeiture of the security if the paper be put in circulation. Commercial policy does not, in my opinion, require such restriction upon the power to contract."

1. *Osborn v. Hawley*, 19 Ohio 130; *Spence v. Emerine*, 46 Ohio St. 433. See also *Marsden v. Soper*, 11 Ohio St. 503; *Drake v. Simpson*, 30 Ohio L. J. 236.

Negotiability of Note Not Affected. — A power of attorney to confess judgment, attached to a note, and forming a part of the same instrument, does not destroy the negotiability of the note. *Osborn v. Hawley*, 19 Ohio 130. But see *Richards v. Barlow*, 140 Mass. 218.

Available to Payee's Administrator. — A warrant of attorney to confess judgment, available to the payee of the note, of which it forms a part, is available to the payee's administrator, although it would not be available to a transferee of the note. *Drake v. Simpson*, 30 Ohio L. J. 236.

Where Both the Payee and His Assigns

Are Named, in a power to confess judgment upon a note, thus showing that its benefit was intended for the assignee as much as for the payee, and such being the case, it is a matter of no consequence whether the holder derived his title mediately or immediately from the payee. *Holmes v. Bemis*, 124 Ill. 453.

2. *Illinois*. — *Campbell v. Goddard*, 117 Ill. 251; *Roundy v. Hunt*, 24 Ill. 598; *Chase v. Dana*, 44 Ill. 262; *Tucker v. Gill*, 61 Ill. 236; *Frye v. Jones*, 78 Ill. 627; *Keith v. Kellogg*, 97 Ill. 147; *Follansbee v. Scottish American Mortg. Co.*, 5 Ill. App. 17, 25; *Baldwin v. Freyendall*, 10 Ill. App. 106; *Holmes v. Parker*, 25 Ill. App. 225; *Graves v. Whitney*, 49 Ill. App. 435; *Little v. Dyer*, 138 Ill. 272.

New York. — *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497.

Ohio. — *Cushman v. Welsh*, 19 Ohio St. 536; *Spence v. Emerine*, 46 Ohio St. 433; *Fitzgerald v. Wiggins*, 11 Ohio L. Bul. 51.

Texas. — *Williams v. Merchants' Nat. Bank*, 67 Tex. 606.

In *Spence v. Emerine*, 46 Ohio St. 433, the court said: "It is an established principle that an authority given by warrant of attorney to confess a judgment against the maker of the note must be clear and explicit, and strictly pursued, and we cannot supply any supposed omissions of the parties."

3. *Holmes v. Parker*, 25 Ill. App. 225.

4. *Keith v. Kellogg*, 97 Ill. 147.

Usual Rules of Construction Applied. — In *Holmes v. Parker*, 25 Ill. App. 225, it was held that a warrant of attorney to confess judgment, although the power must be strictly pursued, is to be construed according to the rules that apply to other written contracts.

Construed as a Whole. — Where the meaning can be ascertained from a consideration of the entire writing, the omission of words plainly meant to be inserted, or the insertion of words evidently not intended, will not be permitted to defeat the intention of the parties. *Holmes v. Parker*, 25 Ill. App. 225.

Authority Conferred to Be Strictly Pursued. — In view of the rule of strict construction of a warrant of attorney to confess judgment, the authority thereby conferred must be strictly pursued, and cannot be exercised beyond the limits expressed in the instrument.¹

(e) **Essentials of Warrant — Authority Must Be Expressly Granted.** — A warrant to confess judgment should contain a grant of the authority, expressed clearly and intelligibly.²

In accordance with this principle, blanks left unfilled in warrants of attorney have been read as filled up with the proper date, and also with the name of the person against whom the judgment was to be confessed. *Sweesey v. Kitchen*, 80 Pa. St. 160; *Links v. Mayer*, 22 Ill. App. 489; *Vliet v. Camp*, 13 Wis. 198.

Where Written and Printed Portions Conflict. — Where a printed blank is used, the written portions will have greater weight in interpreting the instrument than the printed, if the two portions are inharmonious. *Holmes v. Parker*, 25 Ill. App. 225; *American Express Co. v. Pinckney*, 29 Ill. 392; *Clark v. Woodruff*, 83 N. Y. 523.

1. *Alabama.* — *Stevens v. Dubarry*, Minor (Ala.) 379.

Delaware. — *Vincent v. Herbert*, 2 Houst. (Del.) 425.

Illinois. — *Graves v. Whitney*, 49 Ill. App. 435; *Chase v. Dana*, 44 Ill. 262; *Roundy v. Hunt*, 24 Ill. 598; *Tucker v. Gill*, 61 Ill. 236; *Frye v. Jones*, 78 Ill. 627; *Keith v. Kellogg*, 97 Ill. 147; *Campbell v. Goddard*, 117 Ill. 251; *Follansbee v. Scottish American Mortg. Co.*, 5 Ill. App. 17, 25; *Baldwin v. Freyendall*, 10 Ill. App. 106; *Askew v. Goddard*, 17 Ill. App. 377; *Whitney v. Bohlen*, 157 Ill. 571; *Holmes v. Bemis*, 25 Ill. App. 232; *Hansen v. Schlesinger*, 125 Ill. 230.

New Jersey. — *Hunt v. Chamberlin*, 8 N. J. L. 336; *Sweeney v. Stroud*, 55 N. J. L. 97.

New York. — *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497.

Ohio. — *Cushman v. Welsh*, 19 Ohio St. 536; *Rigby v. Taylor*, 9 West. L. J. (Ohio) 43.

Pennsylvania. — *Claghorn's Estate*, 181 Pa. St. 600; *Patterson v. Pyle*, (Pa. 1889) 17 Atl. Rep. 6.

Tennessee. — *Rankin v. Eakin*, 3 Head (Tenn.) 229.

Utah. — *State Nat. Bank v. Sears*, 13 Utah 172.

Washington. — *Reid v. Southworth*, 71 Wis. 288.

An attorney confessing a judgment under a warrant is an attorney in fact, under a special and limited authority which must be strictly pursued. *Baldwin v. Freyendall*, 10 Ill. App. 106.

Illustrations. — Where the warrant is for a confession for a specified sum, there can be no confession for a greater sum, no matter how small the excess. *Askew v. Goddard*, 17 Ill. App. 377.

Where the power conferred is to confess judgment on a note of a specified date, judgment cannot, in general, be confessed on a note bearing a different date. *Chase v. Dana*, 44 Ill. 262.

The power of attorney to confess judgment at the March term of a court does not confer authority to confess judgment at a subsequent term, even though such subsequent term is of the same year. *Rankin v. Eakin*, 3 Head (Tenn.) 229.

A judgment entered on a note by confession before anything was due, under a warrant of attorney which did not clearly confer authority for that purpose, will be set aside. *Reid v. Southworth*, 71 Wis. 288.

A warrant of attorney given by two persons authorizing an attorney to appear to an action brought "against us" and confess judgment "against us" will not authorize an entry of a judgment against one of them, although the other be dead at the time judgment is entered. *Hunt v. Chamberlin*, 8 N. J. L. 336.

Statute in Force at Time of Execution

Controls. — A warrant of attorney must be executed according to the requirements of the statute in force when the judgment is taken, and not when the power was given. *McPheeters v. Campbell*, 5 Ind. 107.

2. *Campbell v. Goddard*, 117 Ill. 251; *Keith v. Kellogg*, 97 Ill. 147; *Graves v. Whitney*, 49 Ill. App. 435; *Frye v. Jones*, 78 Ill. 632; *Oakley v. McCotter*, 12 N. Y. Leg. Int. 91; *Rabe v. Heslip*, 4 Pa. St. 139; *Grubbs v. Blum*, 62 Tex. 426.

Designation of Person to Exercise Power. — The warrant should also contain a designation of the person who is intended to exercise such power.¹ Such designation need not, however, be by a name, but may describe him personally, or as one of a specified class,² as, for example, "any attorney."³

No Particular Form Necessary. — While the warrant of attorney to confess judgment should set forth its purpose, yet no particular form of words is necessary if the intention of the parties is clearly apparent.⁴

In *Rabe v. Heslip*, 4 Pa. St. 139, it was held that a sealed instrument by a father, in consideration of natural love, ordering his heirs to pay to his daughter, at his decease, \$600 with interest from the date of the instrument, and desiring that the same might be recorded according to law, did not authorize a judgment to be entered against the obligor.

1. *Rabe v. Heslip*, 4 Pa. St. 139; *Patton v. Stewart*, 19 Ind. 233.

2. *Poppers v. Meager*, 33 Ill. App. 19; *Hall v. Jones*, 32 Ill. 38; *Keith v. Kellogg*, 97 Ind. 147; *Frank v. Thomas*, 35 Ill. App. 547; *Blanck v. Medley*, 63 Ill. App. 211; *Wilson Sewing Mach. Co. v. Curry*, 126 Ind. 161; *Patton v. Stewart*, 19 Ind. 233; *Burroughs v. Condit*, 6 N. J. L. 300; *Sweeney v. Stroud*, 55 N. J. L. 97; *Rabe v. Heslip*, 4 Pa. St. 139; *Betz v. Valer*, 39 Leg. Int. (Pa.) 190; *Parker v. Poole*, 12 Tex. 86; *Mikeska v. Blum*, 63 Tex. 44.

3. *Poppers v. Meager*, 33 Ill. App. 19; *Hall v. Jones*, 32 Ill. 38; *Keith v. Kellogg*, 97 Ind. 147; *Blanck v. Medley*, 63 Ill. App. 211; *Patton v. Stewart*, 19 Ind. 233; *Sweeney v. Stroud*, 55 N. J. L. 97; *Betz v. Valer*, 39 Leg. Int. (Pa.) 190; *Parker v. Poole*, 12 Tex. 86.

Authority to A "or Any Other Attorney." — Where a warrant of attorney authorized A "or any other attorney" of the court in which the judgment was to be confessed, to appear and confess a judgment, and A and B, attorneys of the court, appeared and confessed the judgment, it was held to be valid. *Patton v. Stewart*, 19 Ind. 233.

In *Blanck v. Medley*, 63 Ill. App. 211, it was held that the power to confess judgment on a note under a warrant of attorney expressly authorizing "any attorney of any court of record" to make the confession, might well be exercised individually by an attorney in partnership with the attorney who signed the declaration for the holder of the note.

In *Mikeska v. Blum*, 63 Tex. 44, it was held that an agreement which provides that a judgment may be confessed by any attorney selected by the creditor is not for that reason void, if the agreement was voluntarily made by the creditor.

4. *Mason v. Smith*, 8 Ind. 73.

Authority to "Enter" Instead of to "Confess." — In *Mason v. Smith*, 8 Ind. 73, where it was objected that the attorney was authorized by the warrant to "enter" instead of to "confess" judgment, the court said: "We think there is nothing in the objection that the attorney was authorized to enter instead of to confess judgment. The intention of the parties is clear, and that should govern."

Any Writing Signed by the Party, the language of which makes the object in view clear and certain, and accurately defines the power delegated, is sufficient. *Vliet v. Camp*, 13 Wis. 198. See also *Drake v. Simpson*, 30 Ohio L. J. 236; *Frank v. Thomas*, 35 Ill. App. 547.

Unfilled Blanks in Warrant. — A power of attorney to confess judgment will not be rendered invalid by the failure to fill certain blanks therein, where the intention of the party as to what was to be inserted in such blanks is apparent. Thus, in *Sweesey v. Kitchen*, 80 Pa. St. 160, a judgment was confessed by an attorney on a note commencing "I promise to pay," etc., with warrant attached, having unfilled blanks, and signed by the defendant: "And ——— empower any attorney of record in this commonwealth or elsewhere, to appear for ——— and confess judgment against ———," etc. It was held that the warrant was not void, and the attorney properly interpreted the blanks to be intended to be filled with "I" and "me."

In *Vliet v. Camp*, 13 Wis. 198, a warrant of attorney was delivered with the blanks left unfilled in the printed form

Power Contained in a Note or Other Obligation. — According to the statutes of some of the states, authority to confess judgment must be conferred by some proper instrument distinct from that containing the evidence of the debt or obligation for which the judgment is confessed, and capable of being produced and filed with the clerk of the court in which the judgment is entered.¹ In most jurisdictions, however, such a warrant may be either inserted in the bond, annexed to it, or conferred by a separate paper.² Where the warrant is not a part of or accompanied by evidence of the indebtedness, the nature of the liability for which the judgment is rendered must be set out in the warrant with the same certainty as is required in a declaration.³

after the words "being justly indebted," "payable to," and "confess a judgment in favor of said," and these blanks were filled by the holder. It was held that the filling of the blanks was not an alteration such as to invalidate the warrant, since it appeared to be the intention of the parties that they should be so filled. See further, as to the effect of blanks in the warrant of attorney, *Links v. Mayer*, 22 Ill. App. 489; *Packer v. Roberts*, 140 Ill. 9; *Rapley v. Price*, 9 Ark. 428; *Richards v. Globe Bank*, 12 Wis. 692.

Power Not in Writing. — In *Pennsylvania* it is held that the authority to confess judgment need not be in writing. *Bauer v. Rihs*, 4 Pa. Dist. Rep. 583; *Flanigen v. Philadelphia*, 51 Pa. St. 491.

1. *Trombly v. Parsons*, 10 Mich. 272; *Hendrickson v. Fries*, 45 N. J. L. 555. This was formerly the rule, it seems, in *Wisconsin*, *Richards v. Globe Bank*, 12 Wis. 693; *Vliet v. Camp*, 13 Wis. 198; but has been changed by a later statute permitting a warrant of attorney to be now made part of the note or other obligation, so that a certified signature may manifest the obligor's assent to both the obligation and the warrant. *Sloane v. Anderson*, 57 Wis. 123, holding that a warrant of attorney printed in fine type under the body of the note, but above the signature, was sufficient.

Warrants for Use in Other States. — In *Hendrickson v. Fries*, 45 N. J. L. 555, it was held that the statute declaring that every warrant of attorney for confessing judgment which shall be included in any bond, bill, or other instrument for the payment of money shall be void, is a mere regulation of the practice in the *New Jersey* courts, and does not prohibit the making, in

that state, of such warrants of attorney for use in other states, in the form that is legal in their courts.

Both Instruments on Same Paper. — The fact that the warrant of attorney is upon the same paper as the note upon which it authorizes judgment to be taken is not objectionable under such statutes, since the warrant of attorney and note are to be regarded as separate instruments, although thus connected. *Trombly v. Parsons*, 10 Mich. 272.

Obligation and Warrant Executed at Same Time. — The fact that both warrant and note were executed at the same time is no objection to the judgment by confession. *Trombly v. Parsons*, 10 Mich. 272.

Bond and Warrant to Different Persons. — Under the *New Jersey* statute a bond and warrant of attorney need not be given at the same time or to the same person. *Burroughs v. Condit*, 6 N. J. L. 300.

2. *Fortune v. Bartholomei*, 62 Ill. App. 290; *Packer v. Roberts*, 140 Ill. 9; *Scott v. Mantonya*, 164 Ill. 473; *Johnson v. Crane*, 22 Ill. App. 366; *Holmes v. Parker*, 25 Ill. App. 225, 125 Ill. 478; *Banning v. Taylor*, 24 Pa. St. 289.

3. *Gambia v. Howe*, 8 Blackf. (Ind.) 133; *Veach v. Pierce*, 6 Ind. 48; *Agard v. Hawks*, 24 Ind. 276; *Richards v. Barlow*, 140 Mass. 218; *James v. Crownover*, (Pa. 1886) 4 Cent. Rep. 287.

In *Veach v. Pierce*, 6 Ind. 48, a power of attorney purported to authorize a confession of judgment in the Circuit Court in favor of the payee "for the amount of the principal and interest" that might "be due on four certain promissory notes given by" the debtor. A judgment was taken by confession of the attorney for a sum which the record stated was the full

Seal Unnecessary. — A power of attorney need not be under seal.¹

(f) **Effect of Alteration.** — Where a power of attorney is materially altered while in the hands of the payee, without any explanation thereof, the alteration will be presumed to have been made with the consent of the holder, and will render the power void.²

(g) **Confession on Lost Warrant.** — In at least one state it is held that a judgment may be entered on a note and warrant of attorney duly executed, but which has been lost or stolen.³

(h) **Confession under Void Warrant.** — As to the effect of confession of judgment under a void warrant the decisions differ, some holding that a judgment confessed under a power of attorney which does not conform to the statutory requirement is a nullity,⁴ while according to others the judgment confessed by attorney is not void although the letter of attorney be void.⁵

(i) **Filing of Warrant.** — It is essential to the jurisdiction of the court that the warrant of attorney shall be filed in the office of the clerk of the court in which the judgment is entered.⁶ It is

amount of the principal and interest due, at the taking of judgment, on the four notes specified in the warrant; but the notes were not shown by any extrinsic testimony to be the same notes therein referred to. The defendant having taken an appeal, the clerk certified in the transcript that four notes, which he copied therein, were placed on file in his office when the warrant was filed, and that upon them the judgment was rendered. It was held that the warrant did not sufficiently identify the notes to authorize the judgment.

1. *Truett v. Wainwright*, 9 Ill. 411; *Kneedler's Appeal*, 92 Pa. St. 428; *Alexander v. Alexander*, 85 Va. 353; *Vliet v. Camp*, 13 Wis. 198.

2. *Burwell v. Orr*, 84 Ill. 465.

3. *Bauer v. Rihs*, 4 Pa. Dist. Rep. 583.

4. *Edgar v. Greer*, 10 Iowa 279.

5. *Wood v. Ellis*, 10 Mo. 383.

Unauthorized Signature of Firm Name.

— In *Uhlendorf v. Kaufman*, 41 Ill. App. 373, it was held that while a partner is not authorized to sign the firm name to a power of attorney to confess a judgment, a judgment entered under such a power is not void, but voidable only as to, and at the instance of, him whose name has thus been unwarrantably used.

Power Void in Part. — As to the effect of a confession where the power is void in part, see *Fortune v. Bartolomei*, 164 Ill. 51, holding that a judgment by confession for an ascertained amount

will not be set aside though the power of attorney provides also for the confession of judgment for an unliquidated amount, where the provisions are severable, and the judgment for only the ascertained amount is confessed.

Forged Warrant. — Where a judgment by confession is entered on forged notes and warrants of attorney, the proceeding is *coram non judice*, and the judgment is void for want of jurisdiction of the defendant's person. *Bullen v. Dawson*, 139 Ill. 633.

Power Fraudulently Obtained. — In *Johnston v. Loop*, 2 Tex. 331, it was held that a confession of judgment on a letter of attorney fraudulently obtained is null and void.

Warrant Dated on Sunday. — In *Baker v. Lukens*, 35 Pa. St. 146, it was held that a judgment will not be stricken off because the warrant of attorney appears to be dated on Sunday.

6. *Arkansas*. — *Thompson v. Foster*, 6 Ark. 208.

Illinois. — *Stein v. Good*, 16 Ill. App. 516; *Bush v. Hanson*, 70 Ill. 480; *Iglehart v. Chicago M. & F. Ins. Co.*, 35 Ill. 514; *Durham v. Brown*, 24 Ill. 93; *Anderson v. Field*, 6 Ill. App. 307; *Hinds v. Hopkins*, 28 Ill. 344; *Iglehart v. Church*, 35 Ill. 255; *Tucker v. Gill*, 61 Ill. 236; *Roundy v. Hunt*, 24 Ill. 598; *Martin v. Judd*, 60 Ill. 78.

Indiana. — *Gambia v. Howe*, 8 Blackf. (Ind.) 133; *Miller v. Macklot*, 13 Ind. 217; *Applegate v. Mason*, 13 Ind. 75; *McPheeters v. Campbell*, 5 Ind. 107.

not necessary that the original warrant be filed; the filing of a copy thereof is sufficient.¹

(j) **Proof of Authority.** — According to the practice in several states it is necessary that proof shall be made of the execution of the warrant of attorney before the judgment is confessed.² The evi-

Michigan. — *Trombly v. Parsons*, 10 Mich. 272.

Nebraska. — *Howell v. Gilt Edge Mfg. Co.*, 32 Neb. 627.

New York. — *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497.

Ohio. — *Knox County Bank v. Doty*, 9 Ohio St. 505.

Pennsylvania. — *Chambers v. Denie*, 2 Pa. St. 421; *Banning v. Taylor*, 24 Pa. St. 289; *Sweesey v. Kitchen*, 80 Pa. St. 160; *Polhemus's Appeal*, 32 Pa. St. 328.

Texas. — *Lauderdale v. R. & T. A. Ennis Stationery Co.*, (Tex. Civ. App. 1894) 24 S. W. Rep. 834.

Judgment cannot be entered before the actual filing of the warrant. *Chambers v. Denie*, 2 Pa. St. 421.

Statement that It Was Proved. — In *Durham v. Brown*, 24 Ill. 94, the court held that the power of attorney itself to confess a judgment should be filed, and that a mere statement that it was proved is not sufficient.

Setting Aside Judgment for Failure to File. — In *Knox County Bank v. Doty*, 9 Ohio St. 505, it was held that the taking of a judgment upon a warrant of attorney without filing the original warrant or a copy thereof is an irregularity for which the judgment may be set aside upon motion at the same or a subsequent term, the motion having been filed at the first term and regularly continued.

Failure to Indorse Filing upon Warrant. — In *Thompson v. Foster*, 6 Ark. 208, it was held that where a judgment is confessed for the defendants by an attorney in fact in pursuance of a warrant of attorney executed to him by them, and where it appears in the record that a warrant of attorney was in fact filed in court, the neglect to indorse the filing upon the warrant will not prejudice the rights of the parties; and that such omission of duty on the part of the clerk is cured by the statute of amendment after judgment by confession.

Filing Previous to Time of Perfecting Judgment. — A judgment by confession will not be set aside because the warrant of attorney was not placed on file

with the clerk of the court at the time of perfecting judgment, provided that it was then before the clerk, having been previously filed in his office. *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497.

Filing Subsequent to Judgment. — In *Grubbs v. Blum*, 62 Tex. 426, it is held that where the judgment is entered without written authority, it cannot be afterwards amended and corrected by filing in the cause such written authority to the acting attorney, contained in a paper bearing no date, and with no evidence as to the time of its execution.

Filing After Office Hours. — In *Polhemus's Appeal*, 32 Pa. St. 328, it was held that a prothonotary may receive and file a warrant of attorney and enter judgment thereon at his residence after office hours, and may docket it the next day as of the time when filed.

1. *Howell v. Gilt Edge Mfg. Co.*, 32 Neb. 627; *Knox County Bank v. Doty*, 9 Ohio St. 505.

2. *Arkansas.* — *Byrd v. Clendenin*, 11 Ark. 572; *Rapley v. Price*, 9 Ark. 428.

Illinois. — *Gardiner v. Bunn*, 132 Ill. 403; *Ball v. Miller*, 38 Ill. 110; *Bunn v. Gardiner*, 18 Ill. App. 94; *Iglehart v. Chicago M. & F. Ins. Co.* 35 Ill. 514; *Anderson v. Field*, 6 Ill. App. 307; *Stein v. Good*, 115 Ill. 93; *Joliet Electric Light, etc., Co. v. Ingalls*, 23 Ill. App. 45; *Frear v. Commercial Nat. Bank*, 73 Ill. 473; *Hinds v. Hopkins*, 28 Ill. 344; *Durham v. Brown*, 24 Ill. 93; *Bailey v. Snyder*, 61 Ill. App. 472; *Iglehart v. Morris*, 34 Ill. 501; *Oppenheimer v. Giershofer*, 54 Ill. App. 38; *Martin v. Judd*, 60 Ill. 78.

Indiana. — *Gambia v. Howe*, 8 Blackf. (Ind.) 133; *Jarrett v. Andrews*, 19 Ind. 403; *Agard v. Hawks*, 24 Ind. 276; *Boyd v. Crary*, 35 Ind. 363.

Nebraska. — *Howell v. Gilt Edge Mfg. Co.*, 32 Neb. 630.

New Jersey. — *Stediford v. Ferris*, 4 N. J. L. 120.

Ohio. — *Knox County Bank v. Doty*, 9 Ohio St. 505.

In *Stein v. Good*, 115 Ill. 93, the court held as follows: "In this class

dence of such fact need not, however, be preserved in the record where the judgment is confessed in open court, as it should be

of cases, where the whole proceeding is strictly *ex parte*, and the papers filed constitute a part of the record without any bill of exceptions making them so, public interests would seem to demand that some evidence should appear in the record showing unequivocally that the judgment was confessed by authority of the defendant in the judgment—or, in other words, showing that the power of attorney on file was actually executed by him. These judgments are most generally confessed when the defendant is in failing circumstances, and when the business community have an interest in his affairs. In such case it is a matter of importance to his creditors to be able to know with reasonable certainty whether the instrument purporting to be authority for the confession of the judgment is genuine, and, in short, whether the law authorizing the judgment has been substantially complied with. Such information is generally essential to the protection of their own interests."

In *Rapley v. Price*, 9 Ark. 428, it was held that where a judgment is rendered upon a warrant of attorney to confess, it must appear of record that execution of the power was proved before the confession of judgment. Where this is not done the court has no jurisdiction of the maker of such power, and the judgment is invalid.

Setting Aside Judgment for Failure to Prove.—In *Knox County Bank v. Doty*, 9 Ohio St. 505, it was held that where execution of a power is not proved, judgment may be set aside on motion at the same or a subsequent term. See also *Stein v. Good*, 115 Ill. 93.

Collateral Attack on Judgment.—Where the execution of the power of attorney to confess judgment on a note is not proved, no jurisdiction over the debtor is acquired, and the judgment may be collaterally attacked as void. *Oppenheimer v. Giershofer*, 54 Ill. App. 38.

Contrary Authorities.—In *Hays v. State Bank*, Mart. & Y. (Tenn.) 179, it was held that a judgment which recites the power of attorney is good, without the recital that it was proved.

In *Alabama* a judgment by confes-

sion under a power of attorney must show that the authority was verified and authorized the particular judgment, though neither the warrant nor the proof thereof need be set out in the record. *Brown v. Little*, 9 Ala. 416. And, in *Hill v. Lambert, Minor* (Ala.) 91, the court said: "The old practice of filing and entering of record the warrant of attorney has been relaxed for the convenience of parties, * * * and now * * * if an attorney takes upon himself to appear the court looks no farther, proceeds as if he had authority, and leaves the party to his action against him should it be otherwise." See also *Gaines v. Tombeckbee Bank, Minor* (Ala.) 50.

In *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. Car. 507, it was held that the confession itself, with the filing thereof, was express authority for its entry, and that the judgment would not be vitiated by the omission to file the authority where such authority actually existed.

An Affidavit Showing the Execution of a Warrant of Attorney to confess a judgment, filed with the warrant, is sufficient proof of its execution, even when the judgment is entered in vacation. *Ball v. Miller*, 38 Ill. 110. See also *Hall v. Jones*, 32 Ill. 39; *Roundy v. Hunt*, 24 Ill. 600; *Durham v. Brown*, 24 Ill. 93.

In *Bunn v. Gardiner*, 18 Ill. App. 94, the court, in holding that where judgment is confessed by attorney in vacation, it is essential not only that proof of the execution be made, but that it be made by affidavit, said: "The authority of such an agent is never presumed, but must always be proved. The instrument he presented could not prove it. It could not prove itself. Its execution must be shown by evidence *dehors* itself, and in such form that it may be certainly identified and the question of its competency and sufficiency determined whenever occasion may arise, by a judicial tribunal. Hence it must not rest alone in the memory of the clerk or others, but in the record and papers filed, and it must be complete when the judgment is entered, because the fact in its nature is, and by the statute is impliedly declared to be, jurisdictional."

when confessed in vacation before the clerk.¹ In the latter case it must appear in the record, while in the former it will be presumed to have been done unless it appears to have been omitted.² According to some cases, where judgment is not confessed on a warrant within a certain time after the date thereof, an affidavit must be filed showing that the maker of the warrant is alive and that the debt, or at least a portion thereof, is still unpaid;³ and a rule of court, or, if in vacation, an order of a judge, must be obtained granting leave to enter a judgment before it can be confessed on such warrant.⁴ It would seem, however, that before a

1. *Iglehart v. Chicago M. & F. Ins. Co.*, 35 Ill. 514; *Anderson v. Field*, 6 Ill. App. 307; *Gambia v. Howe*, 8 Blackf. (Ind.) 133.

2. *Iglehart v. Chicago M. & F. Ins. Co.*, 35 Ill. 514; *Iglehart v. Church*, 35 Ill. 255; *Hall v. Jones*, 32 Ill. 38; *Osgood v. Blackmore*, 59 Ill. 261.

In *Martin v. Judd*, 60 Ill. 78, the court said: "In this regard there is a broad distinction taken in the adjudged cases where the proceedings are had in open court and where the judgment is confessed in vacation. In the latter case the authority of the attorney must affirmatively appear. No presumptions will be indulged as to his authority." See also *Roundy v. Hunt*, 24 Ill. 598; *Rising v. Brainerd*, 36 Ill. 79; *Jarrett v. Andrews*, 19 Ind. 403; *Merritt v. Clow*, 2 Tex. 582.

Where Papers Filed Make Out Prima Facie Case.—In *Joliet Electric Light, etc., Co. v. Ingalls*, 23 Ill. App. 45, the court, while recognizing the usual rule that where a judgment is entered in vacation evidence necessary to its validity should be filed and preserved in the record, said: "All that is required, however, in order to impose upon the clerk the duty to enter up the judgment by confession in vacation, is that the papers filed with him make out a *prima facie* case; and such judgment will be presumed to be regular unless shown not to be so by the files in the case or otherwise."

Record Reciting Proof.—Where the record of a judgment by confession recites that the execution of the power to confess the judgment was duly proved upon error brought this will be sufficient, though no affidavit was filed of the execution of a warrant of attorney. *Iglehart v. Morris*, 34 Ill. 501.

3. **Warrant Executed More than a Year and a Day.**—Thus it has been held that a judgment cannot be confessed

on a warrant which has been executed more than a year and a day, unless an affidavit be filed showing that the maker is alive and that the debt or some portion of it is still due. *Hinds v. Hopkins*, 28 Ill. 344; *Stein v. Good*, 16 Ill. App. 516; *Hempstead v. Humphrey*, 38 Ill. 90; *Alldritt v. Morrison First Nat. Bank*, 22 Ill. App. 24; *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497.

After Ten Years from Date of Warrant.—In *Eakin v. Smith*, 21 N. J. L. 97, it was held that where ten years have elapsed from the date of the warrant such affidavit is required. *Emery v. Smith*, 2 Pa. Dist. Rep. 133.

4. *Hinds v. Hopkins*, 28 Ill. 344; *Stein v. Good*, 16 Ill. App. 516; *Hempstead v. Humphrey*, 38 Ill. 90; *Eakin v. Smith*, 21 N. J. L. 97; *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497; *Emery v. Smith*, 2 Pa. Dist. Rep. 133. See also *Lushington v. Waller*, 1 H. Bl. 94; *Oades v. Woodward*, 7 Mod. 93.

Contra.—In *Cross v. Moffat*, 11 Colo. 210, the court, holding that it is sufficient to establish by affidavit the genuineness of the defendant's signature, and that the court cannot presume that a warrant of attorney is void after a lapse of six years, said: "But it is insisted that after the lapse of so long a period from the date of the instrument as here appears, a legal presumption should be indulged against the authority of one presuming to act under the warrant as attorney for an absent defendant. A certain rule in England, adopted by the courts of King's Bench and Common Pleas, is confidently relied upon by plaintiffs in error to support their position in the foregoing regard. This rule prohibits judgment by confession on a warrant of attorney where more than a year and a day has expired from the date of such

judgment will be set aside because such affidavit was not filed showing that the defendant was alive and that the debt was due and unpaid, the party making the application must show in addition some equitable reason therefor.¹

(k) **Affidavit of No Collusion, etc.** — In some states it is provided that the party taking a judgment under warrant of attorney must make affidavit that the debt is *bona fide*, and that there is no collusion between himself and the debtor.²

warrant, except upon affidavit stating that the instrument is genuine, that the whole or some portion of the debt is yet due, and that the debtor is still alive. The warrant of attorney in the case at bar was over six years old when judgment was entered, and the affidavit filed does not state that the parties were alive, or that the debt remained unpaid. We shall decline to be governed by the English practice mentioned. It rests upon a special rule, originating in the Court of King's Bench, and not recognized by statute. Some of the controlling reasons leading to the adoption of this rule in England can hardly be considered applicable in this state at the present time. Why should we select the arbitrary period of a year and a day, and say that after that time the instrument shall not have the same force and effect as before? There is nothing in the arrangement of our terms of court calling for such a rule; we have no statute of limitations fixing this period in connection with actions or recoveries; and there is no legal presumption that after a year and a day the debtor is dead or the obligation discharged. It will be observed that the time begins to run under the rule from the date of the warrant of attorney, not from the maturity of the debt. Yet here such warrants of attorney are frequently given in connection with promissory notes to run for two or three or even a greater number of years."

1. *Rising v. Brainerd*, 36 Ill. 80; *Stuhl v. Shipp*, 44 Ill. 133; *Alldritt v. Morrison First Nat. Bank*, 22 Ill. App. 24.

In *Hempstead v. Humphrey*, 38 Ill. 90, it is held that in addition to a want of such proof, or an order of a judge, it must appear that the defendant has a meritorious defense.

In *Emery v. Smith*, 2 Pa. Dist. Rep. 133, it was held that a rule of court requiring leave to enter judgment based on affidavit where the warrant of attor-

ney is above ten years old was not so rigid as to preclude all discretion by the court in its application; and where judgment was entered in such a case without the affidavit required, but such affidavit was filed within a few days after a rule to strike off the judgment, and on the hearing of the latter rule no facts were alleged which would invalidate the judgment on the merits, the judgment would not be stricken off. See also *Herman v. Rinker*, 106 Pa. St. 121.

2. *Arkansas*. — *Johnston v. Glasgow*, 5 Ark. 311.

Missouri. — *Bryant v. Harding*, 29 Mo. 347.

New Jersey. — *Reading v. Reading*, 24 N. J. L. 358; *Mulford v. Stratton*, 41 N. J. L. 466; *Latham v. Lawrence*, 11 N. J. L. 322; *Woodward v. Cook*, 6 N. J. L. 322; *Sheppard v. Sheppard*, 10 N. J. L. 250; *Hoyt v. Hoyt*, 16 N. J. L. 143; *Clapp v. Ely*, 27 N. J. L. 555; *Blackwell v. Rankin*, 7 N. J. Eq. 152; *Den v. Gaston*, 24 N. J. L. 818; *Dean v. Thatcher*, 32 N. J. L. 470; *Den v. Zellers*, 7 N. J. L. 153; *Parker v. Griggs*, 4 N. J. L. 182; *Budd v. Marvin*, 4 N. J. L. 281; *Wright v. Wood*, 20 N. J. L. 308; *Sterling v. Fleming*, 53 N. J. L. 652; *Warwick v. Matlack*, 7 N. J. L. 165; *Scudder v. Scudder*, 10 N. J. L. 345.

Texas. — *Montgomery v. Barnett*, 8 Tex. 143; *Flanagan v. Bruner*, 10 Tex. 257.

Wisconsin. — *Rogers v. Cherrier*, 75 Wis. 54; *McCabe v. Sumner*, 40 Wis. 386; *Sloane v. Anderson*, 57 Wis. 123.

"This judgment may have been confessed for an honest debt, and no actual injustice may have been done by it to the defendant or to his other creditors, yet as the legislature, in seeking 'to secure fairness, honesty, and good faith in such transactions,' in their wisdom have directed upon what condition alone an honest creditor can exercise his common-law right of securing a just debt by a judgment, this court, when called upon to act, must, *ex*

(1) **Revocation of Warrant.** — A simple power authorizing the confession of judgment in favor of a third person which is unsupported by a consideration,¹ or is not given as a security or to render a security effectual, may be revoked at the pleasure of the maker.² Where, however, such authority is given as a security, or is coupled with an interest, it is irrevocable.³

debito justitia, see that the requirements of the statute are not evaded or misunderstood." Ogden, J., in *Reading v. Reading*, 24 N. J. L. 362.

In *New Jersey*, before the Act of Feb., 1820, an affidavit was required only in cases of judgment on bonds and obligations, and not on judgments without bonds. *Sharp v. Young*, 5 N. J. L. 976. See also *Parker v. Griggs*, 4 N. J. L. 182; *Skillman v. Applegate*, 7 N. J. L. 62.

In *Wisconsin* it is provided by the statute authorizing judgments by confession (Rev. Stat. 1889, § 2896) that "the plaintiff shall file with his complaint an answer, signed by the defendant or some attorney in his behalf, confessing the amount claimed in the complaint or some part thereof; and in case such answer is signed by an attorney an instrument authorizing judgment to be confessed or entered shall be produced to the court or judge signing the judgment, and shall be made a part of the judgment roll. The plaintiff, or some one in his behalf, shall make and annex to the complaint an affidavit stating the amount due or to become due on the note or bond; or, if such note or bond is given to secure any contingent liability, the affidavit must state concisely the facts constituting such liability, and must show that the sum confessed does not exceed the same." *Rogers v. Cherrier*, 75 Wis. 54. See also *McCabe v. Sumner*, 40 Wis. 386; *Sloane v. Anderson*, 57 Wis. 123. Such affidavit should be made by some one knowing the facts, and if not made by the plaintiff, should show why not. *McCabe v. Sumner*, 40 Wis. 386. The judgment will not be set aside for the failure of the affidavit to state the amount due, where the complaint states the amount due upon a note, and the affiant swears that the facts alleged in the complaint are true to his own knowledge. *Rogers v. Cherrier*, 75 Wis. 54.

Substantial Compliance with Statute Necessary. — If no affidavit is made, or if the affidavit is not a substantial com-

pliance with the requirements of the statute, the judgment is *ipso facto* fraudulent and inoperative against creditors, and creditors whose rights are affected may contest the validity of the judgment, and for this purpose may show that the judgment has been entered in violation of the statute. *Clapp v. Ely*, 27 N. J. L. 555.

In *Sheppard v. Sheppard*, 10 N. J. L. 250, it was held that an affidavit which did not conform substantially to the words of the statute is the same as no affidavit, and the judgment thereon cannot be received in evidence against third persons.

Effect of Omission. — "It was decided in this court, in the case of *Den v. Gaston*, 24 N. J. L. 820, that a judgment by confession, in the Court of Common Pleas, without an affidavit, is only voidable, and cannot, on the ground of that omission, be attacked collaterally by a stranger to the record. * * * This decision has been too long acquiesced in as the law of the state to be now disturbed. * * * It is a good judgment even against a creditor without an affidavit, and cannot, for that reason only, be questioned." *Dean v. Thatcher*, 32 N. J. L. 470.

Admissible in Evidence Without Affidavit. — A judgment by confession is admissible in evidence without proof of the existence of the affidavit. *Dean v. Thatcher*, 32 N. J. L. 470.

1. A warrant of attorney to confess a judgment upon a valuable consideration cannot be expressly revoked. *Eldridge v. Folwell*, 3 Blackf. (Ind.) 207; *Baker v. Lukens*, 35 Pa. St. 146.

2. *Evans v. Fearn*, 16 Ala. 689.

3. *Evans v. Fearn*, 16 Ala. 689; *Rapley v. Price*, 11 Ark. 714; *Wassell v. Reardon*, 11 Ark. 705.

Where an attorney has a claim for collection, and the debtor, to save costs of suit, executes to him a power to confess judgment thereon, such power is upon a valid consideration, and coupled with an interest, and is therefore not revocable. *Rapley v. Price*, 11 Ark. 714.

(2) *Upon Affidavit and Statement* — (a) **Necessity of Affidavit.** — As a general rule, where judgment is confessed an affidavit by the debtor that such confession is made in good faith is required by statute.¹

Effect of Omission. — As a general rule, the omission of the affidavit required by statute will not render a judgment by confession void, but only voidable.² And such a judgment, though voidable as to creditors, is valid between the parties thereto.³

(b) **Essential Allegations in Affidavit.** — While the statutes of the various states usually prescribe a certain form of words in which to allege the indebtedness, yet such form need not be strictly followed. A substantial compliance with the requirements of the statute will be sufficient.⁴

"A power of attorney to confess judgment is not revocable by act of the party. * * * But if any fact affecting its validity be alleged, the court will permit an issue to be formed and tried, and act in the premises accordingly, annulling the warrant or reducing the amount of judgment upon it, as the case proved may require." Perkins, J., in *Kindig v. March*, 15 Ind. 248.

Subsequent Marriage of Maker. — A warrant of attorney given by a *feme sole* is not revoked by a subsequent marriage. *Baker v. Lukens*, 35 Pa. St. 146.

Subsequent Insanity of Maker. — In *Spencer v. Reynolds*, 9 Pa. Co. Ct. Rep. 249, it was held that a power to confess judgment is not revoked by subsequent insanity of the maker.

Death of Party. — In *Nichols v. Chapman*, 9 Wend. (N. Y.) 452, the court said: "The general rule is that the death of either party to a warrant of attorney is a revocation of it; but this rule does not apply where a judgment entered upon such warrant can be made good by relation. Thus if a person who has executed a bond and warrant of attorney to confess judgment die during a vacation, judgment may be entered against him during the same vacation as of the preceding term, and it will be valid by the common law."

1. *California.* — *Cordier v. Schloss*, 12 Cal. 143.

Indiana. — *Bible v. Voris*, 141 Ind. 569; *Mavity v. Eastridge*, 67 Ind. 211; *Ex p. Knight*, 4 Blackf. (Ind.) 220; *Mann v. Perkins*, 4 Blackf. (Ind.) 271; *McPheeters v. Campbell*, 5 Ind. 107; *Aldrich v. Minard*, 12 Ind. 551;

Kleber v. Block, 17 Ind. 294; *Clouser v. March*, 15 Ind. 82; *Davenport Mills Co. v. Chambers*, 146 Ind. 156; *Chapin v. McLaren*, 105 Ind. 563; *Caley v. Morgan*, 114 Ind. 350; *Hopper v. Lucas*, 86 Ind. 45.

Missouri. — *Gilbert v. Gilbert*, 33 Mo. App. 259.

New York. — *Crouse v. Johnson*, 65 Hun (N. Y.) 337; *Lanning v. Carpenter*, 20 N. Y. 447.

North Carolina. — *Davenport v. Leary*, 95 N. Car. 203; *Smith v. Smith*, 117 N. Car. 348.

Pennsylvania. — *Woods v. Woods*, 126 Pa. St. 396; *Koons v. Hendricks*, 6 Kulp (Pa.) 165.

Judgment Without Affidavit. — The production of an affidavit in the required form is an essential step in the case, and without it the judgment must be considered erroneous. *Bible v. Voris*, 141 Ind. 569; *M'Fadin v. Gill*, 1 Blackf. (Ind.) 309; *Ex p. Knight*, 4 Blackf. (Ind.) 220; *Mann v. Perkins*, 4 Blackf. (Ind.) 271.

2. *Bradley v. Claudon*, 45 Ill. App. 326; *Mavity v. Eastridge*, 67 Ind. 211; *Sheldon v. Stryker*, 34 Barb. (N. Y.) 116; *Hopkins v. Howard*, 12 Tex. 7.

3. *Mavity v. Eastridge*, 67 Ind. 211; *Chapin v. McLaren*, 105 Ind. 563; *Caley v. Morgan*, 114 Ind. 350; *Hopper v. Lucas*, 86 Ind. 43; *Griffin v. Mitchell*, 2 Cow. (N. Y.) 548; *Stone v. Williams*, 40 Barb. (N. Y.) 322. See also *Gilbert v. Gilbert*, 33 Mo. App. 259.

4. *Davenport Mills Co. v. Chambers*, 146 Ind. 156; *Crouse v. Johnson*, 65 Hun (N. Y.) 337.

Omission of Words "Or Taken." — In *Crouse v. Johnson*, 65 Hun (N. Y.) 337, it was held that under the Code Civ. Pro., § 3011, providing that where a

(c) **Filing Affidavit.** — As a general rule, such affidavit must be filed with the other papers.¹

(d) **Necessity of Statement.** — As a prerequisite to the entry of a judgment by confession, it is generally required by the statutes of the various states that the party confessing the judgment must, at the time, file and sign a verified written² statement³ in which the amount of the judgment is to be set out, and also the facts giving rise to the debt for which the judgment is confessed.

judgment confessed before a justice of the peace is for a sum exceeding fifty dollars an affidavit must be filed alleging that the confession was not made "or taken" with intent to defraud any creditor, although the omission of the words "or taken" may render such confession void as to every one except a purchaser in good faith of property thereunder and the defendant making the confession, nevertheless a constable is protected in making a levy under an execution regular on its face, and issued by the justice by virtue of such a judgment.

Indiana and California. — In Indiana it was held that where the complaint fully describes the cause of action, it is not necessary that the affidavit confessing judgment should describe it. *Clouser v. March*, 15 Ind. 82. So also in California. *Cordier v. Schloss*, 12 Cal. 143.

1. *McPheeters v. Campbell*, 5 Ind. 107; *Aldrich v. Minard*, 12 Ind. 551; *Kleber v. Block*, 17 Ind. 294.

2. A statement upon which a judgment by confession may be entered must be in writing. *Winnebrenner v. Edgerton*, 30 Barb. (N. Y.) 185; *Purdy v. Upton*, 10 How. Pr. (N. Y. Supreme Ct.) 494; *Moody v. Townsend*, 3 Abb. Pr. (N. Y. Supreme Ct.) 375; *Germon v. Swartwout*, 3 Wend. (N. Y.) 282. See also *Oyster v. Shumate*, 12 Mo. 580; *Hunter v. Reinhard*, 13 Mo. 23.

3. **California.** — *Wilcoxson v. Burton*, 27 Cal. 228; *Pond v. Davenport*, 44 Cal. 481; *Cordier v. Schloss*, 12 Cal. 143, 18 Cal. 576; *Richards v. McMillan*, 6 Cal. 419.

Colorado. — *Brown v. Miller*, 11 Colo. 431.

Connecticut. — *Wight v. Mott*, Kirby (Conn.) 152.

Indiana. — *Veach v. Pierce*, 6 Ind. 48.

Iowa. — *Miller v. Clarke*, 37 Iowa 328; *Brown v. Barngrover*, 82 Iowa 204; *Dullard v. Phelan*, 83 Iowa 471; *Daniels v. Claffin*, 15 Iowa 152; *Edgar v. Greer*, 7 Iowa 136; *Brown v. Barn-*

grover, 82 Iowa 204; *Kendig v. Marble*, 58 Iowa 529; *Vanfleet v. Phillips*, 11 Iowa 558; *Marvin v. Tarbell*, 12 Iowa 93; *Jarosh v. Easton*, 57 Iowa 569; *Kennedy v. Lowe*, 9 Iowa 580; *Bernard v. Douglas*, 10 Iowa 370.

Louisiana. — *Stein v. Brunner*, 42 La. Ann. 772.

Michigan. — *Kinyon v. Fowler*, 10 Mich. 16.

Minnesota. — *Atwater v. Manchester Sav. Bank*, 45 Minn. 341; *Kern v. Chalfant*, 7 Minn. 487; *Cleveland Co-operative Stove Co. v. Douglas*, 27 Minn. 177; *Wells v. Gieseke*, 27 Minn. 478.

Missouri. — *Stern v. Mayer*, 19 Mo. App. 511; *J. H. Teasdale Commission Co. v. Van Hardenberg*, 53 Mo. App. 326; *McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377; *Gilbert v. Gilbert*, 33 Mo. App. 259; *Hard v. Foster*, 98 Mo. 297; *Oyster v. Shumate*, 12 Mo. 580; *Hunter v. Reinhard*, 13 Mo. 23; *Loth v. Faconesowich*, 22 Mo. App. 68; *St. Louis Fourth Nat. Bank v. Mayer*, 19 Mo. App. 517; *Mechanics' Bank v. Mayer*, 93 Mo. 417; *Mendel v. Mayer*, (Mo. 1888) 7 S. W. Rep. 5; *Claffin v. Dodson*, 111 Mo. 195; *McHenry v. Shepherd*, 2 Mo. App. 378; *Bryan v. Miller*, 28 Mo. 32; *How v. Dorscheimer*, 31 Mo. 349; *Hart v. Harrison Wire Co.*, 91 Mo. 414.

Nevada. — *Humboldt Mill, etc., Co. v. Terry*, 11 Nev. 237.

New York. — N. Y. Code Civ. Pro., § 1274; 2 Bliss, p. 1432; *Winnebrenner v. Edgerton*, 30 Barb. (N. Y.) 185; *Moody v. Townsend*, 3 Abb. Pr. (N. Y. Supreme Ct.) 375; *McDowell v. Daniels*, 38 Barb. (N. Y.) 143; *Forrester v. Strauss*, 21 Civ. Pro. Rep. (N. Y. Supreme Ct.) 166; *Heckemann v. Young*, 55 Hun (N. Y.) 406; *Mosher v. Heydrick*, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 258, 30 How. Pr. (N. Y. Supreme Ct.) 161; *Claffin v. Sanger*, 31 Barb. (N. Y.) 36, 11 Abb. Pr. (N. Y. Supreme Ct.) 338; *Wood v. Mitchell*, 117 N. Y. 439; *Simons v. Goldbach*, 5 Hun (N. Y.) 204;

(e) Requisites of Statement — *aa.* DEGREE OF CERTAINTY — In General. —

Although it is a common requirement of the statute that the statement upon which a judgment by confession is entered must set

- Acker v. Acker*, 1 Abb App. Dec. (N. Y.) 1; *Lanning v. Carpenter*, 20 N. Y. 447; *Hopkins v. Nelson*, 24 N. Y. 518; *Neusbaum v. Keim*, 24 N. Y. 325; *Critten v. Vredenburgh*, 151 N. Y. 536; *Clements v. Gerow*, 30 Barb. (N. Y.) 325; *Terrett v. Brooklyn Imp. Co.*, 18 Hun (N. Y.) 6; *Frost v. Koon*, 30 N. Y. 428; *Johnston v. McAusland*, 9 Abb. Pr. (N. Y. Supreme Ct.) 214; *Davis v. Morris*, 21 Barb. (N. Y.) 152; *Mott v. Davis*, 15 How. Pr. (N. Y. Supreme Ct.) 67; *Hamann v. Keinhart*, 11 Abb. Pr. (N. Y. Supreme Ct.) 132; *Healy v. Preston*, 14 How. Pr. (N. Y. Supreme Ct.) 20; *Gandall v. Finn*, 33 How. Pr. (N. Y. Ct. App.) 444; *Curtis v. Corbitt*, 25 How. Pr. (N. Y. Supreme Ct.) 58; *Freligh v. Brink*, 22 N. Y. 418; *Daly v. Matthews*, 12 Abb. Pr. (N. Y. Supreme Ct.) 403, note; *Kirby v. Fitzgerald*, 31 N. Y. 417; *Kellogg v. Cowing*, 33 N. Y. 408; *Union Bank v. Bush*, 36 N. Y. 631; *Post v. Coleman*, 9 How. Pr. (N. Y. Supreme Ct.) 64; *Read v. French*, 28 N. Y. 285; *DelaWare v. Ensign*, 21 Barb. (N. Y.) 85; *Schoolcraft v. Thompson*, 9 How. Pr. (N. Y. Supreme Ct.) 61; *Purdy v. Up-ton*, 10 How. Pr. (N. Y. Supreme Ct.) 494; *Rae v. Lawser*, 9 Abb. Pr. (N. Y. Supreme Ct.) 380, note, 18 How. Pr. (N. Y.) 23; *Hoppock v. Donaldson*, 12 How. Pr. (N. Y. Supreme Ct.) 141; *Kinderhook Bank v. Jenison*, 15 How. Pr. (N. Y. Supreme Ct.) 41; *Ely v. Cooke*, 28 N. Y. 365; *Stebbins v. East Soc.*, etc., 12 How. Pr. (N. Y. Supreme Ct.) 410; *Lyon v. Sherman*, 14 Abb. Pr. (N. Y. Supreme Ct.) 393; *Lawless v. Hackett*, 16 Johns. (N. Y.) 149; *Chappel v. Chappel*, 12 N. Y. 215; *Brinkerhoff v. Marvin*, 5 Johns. Ch. (N. Y.) 320; *Griffin v. Mitchell*, 2 Cow. (N. Y.) 548; *Germon v. Swartwout*, 3 Wend. (N. Y.) 282; *Snyder v. Warren*, 2 Cow. (N. Y.) 518; *Case v. Redfield*, 7 Wend. (N. Y.) 398; *Ingram v. Robbins*, 33 N. Y. 409; *Marks v. Reynolds*, 12 Abb. Pr. (N. Y. Supreme Ct.) 403; *Dow v. Platner*, 16 N. Y. 562; *Thompson v. Van Vechten*, 27 N. Y. 568; *Boyd v. Johnson*, 11 How. Pr. (N. Y. Supreme Ct.) 503; *White v. Williams*, 1 Paige (N. Y.) 502; *James v. Johnson*, 6 Johns. Ch. (N. Y.) 417; *Weil v. Hill*, 71 Hun (N. Y.) 133; *Miller v. Kosch*, 74 Hun (N. Y.) 50; *Rutherford v. Schattman*, 119 N. Y. 604; *Marrin v. Marrin*, 27 Hun (N. Y.) 601; *Dunham v. Waterman*, 17 N. Y. 9, 3 Duer (N. Y.) 166; *Miller v. Earle*, 24 N. Y. 110; *Mitchell v. Van Buren*, 27 N. Y. 300; *Butts v. Schieffelin*, 5 Civ. Pro. Rep. (N. Y. Supreme Ct.) 415; *Combs v. Bowen*, 20 N. Y. Wkly. Dig. 57; *Citizens' Nat. Bank v. Allison*, 37 Hun (N. Y.) 135; *Flour City Nat. Bank v. Doty*, 41 Hun (N. Y.) 76; *Harrison v. Gibbons*, 71 N. Y. 58; *Norris v. Denton*, 30 Barb. (N. Y.) 117; *Kendall v. Hodgins*, 1 Bosw. (N. Y.) 659; *Von Beck v. Shuman*, 13 How. Pr. (N. Y. Supreme Ct.) 472; *Beekman v. Kirk*, 15 How. Pr. (N. Y. Supreme Ct.) 228; *Von Keller v. Muller*, 3 Abb. Pr. (N. Y.) 375, note; *McKee v. Tyson*, 10 Abb. Pr. (N. Y. Supreme Ct.) 392; *Tilles v. Albright*, (Supreme Ct.) 45 N. Y. St. Rep. 758, 18 N. Y. Supp. 493; *Marsh v. Lawrence*, 4 Cow. (N. Y.) 461; *Murray v. Judson*, 9 N. Y. 73; *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142; *Plummer v. Plummer*, 7 How. Pr. (N. Y. Supreme Ct.) 62; *Johnston v. Fellerman*, 13 How. Pr. (N. Y. Supreme Ct.) 21; *Mann v. Brooks*, 7 How. Pr. (N. Y. Supreme Ct.) 449.
- *North Carolina*. — *Davidson v. Alexander*, 84 N. Car. 625; *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. Car. 507; *Davenport v. Leary*, 95 N. Car. 203; *Uzzle v. Vinson*, 111 N. Car. 138; *Sharp v. Danville*, etc., R. Co., 106 N. Car. 308; *Johnston v. Danville*, etc., R. Co., 106 N. Car. 322.
- Ohio*. — *Rosebrough v. Ansley*, 35 Ohio St. 107; *Sidney First Nat. Bank v. Reed*, 31 Ohio St. 435.
- Oregon*. — *King v. Higgins*, 3 Oregon 406; *Miller v. Bank of British Columbia*, 2 Oregon 292; *Richardson v. Fuller*, 2 Oregon 179.
- Pennsylvania*. — *Baider v. Murray*, 1 Phila. (Pa.) 273; *Burgunder v. Lederer*, 12 Pa. Co. Ct. Rep. 222; *Glassmire v. Neill*, 10 Pa. Co. Ct. Rep. 418; *Jacobs v. Toliver*, 10 Pa. Co. Ct. Rep. 623; *Winton v. Collings*, 4 Kulp (Pa.) 491; *Barker v. Beeber*, 112 Pa. St. 216; *Wolf v. Kohr*, 133 Pa. St. 13.
- South Carolina*. — *Woods v. Bryan*, 41 S. Car. 74; *Weinges v. Cash*, 15 S. Car. 61; *Ex p. Carroll*, 17 S. Car. 448; *Hall v. Moorman*, 4 McCord L. (S. Car.) 283.

forth concisely the facts out of which the debt arose,¹ yet the decisions differ as to the precise degree of certainty requisite, some going so far as to hold that such statement must be at least as precise as a bill of particulars.² This, however, would seem

Tennessee. — *Arnold v. McCorkle*, 6 Baxt. (Tenn.) 301.

Utah. — *Bacon v. Raybould*, 4 Utah 357.

Washington. — *Puget Sound Nat. Bank v. Levy*, 10 Wash. 504.

Wisconsin. — *Nichols v. Kribs*, 10 Wis. 76; *Thompson v. Hintgen*, 11 Wis. 112; *Pirie v. Hughes*, 43 Wis. 531; *Reiley v. Johnston*, 22 Wis. 279.

1. *Arkansas*. — *Ex p. Hays*, 6 Ark. 419.

California. — *Richards v. McMillan*, 6 Cal. 419; *Wilcoxson v. Burton*, 27 Cal. 228.

Colorado. — *Brown v. Miller*, 11 Colo. 431.

Connecticut. — *Wight v. Mott, Kirby (Conn.)* 152.

Iowa. — *Brown v. Barngrover*, 82 Iowa 204; *Daniels v. Clafin*, 15 Iowa 152; *Miller v. Clarke*, 37 Iowa 325; *Edgar v. Greer*, 7 Iowa 136; *Jarosh v. Easton*, 57 Iowa 569.

Minnesota. — *Kern v. Chalfant*, 7 Minn. 487; *Atwater v. Manchester Sav. Bank*, 45 Minn. 341.

Missouri. — *Stern v. Mayer*, 19 Mo. App. 511; *St. Louis Fourth Nat. Bank v. Mayer*, 19 Mo. App. 517; *Mechanics' Bank v. Mayer*, 93 Mo. 417; *Clafin v. Dodson*, 111 Mo. 195; *Bryan v. Miller*, 28 Mo. 32; *J. H. Teasdale Commission Co. v. Van Hardenberg*, 53 Mo. App. 326; *McHenry v. Shephard*, 2 Mo. App. 378.

New York. — *Forrester v. Strauss*, 21 Civ. Pro. Rep. (N. Y. Supreme Ct.) 166; *Wood v. Mitchell*, 117 N. Y. 439; *Chappel v. Chappel*, 12 N. Y. 221; *Kellogg v. Cowing*, 33 N. Y. 408; *Acker v. Acker*, 1 Abb. App. Dec. (N. Y.) 1; *McDowell v. Daniels*, 38 Barb. (N. Y.) 143; *Critten v. Vredenburg*, 151 N. Y. 536; *Lanning v. Carpenter*, 20 N. Y. 447; *Snyder v. Warren*, 2 Cow. (N. Y.) 518; *Purdy v. Upton*, 10 How. Pr. (N. Y. Supreme Ct.) 494; *Ely v. Cooke*, 28 N. Y. 365; *Harrison v. Gibbons*, 71 N. Y. 58; *Winnebrenner v. Edgerton*, 30 Barb. (N. Y.) 185; *Neusbaum v. Keim*, 1 Hilt. (N. Y.) 520; *Thompson v. Van Vechten*, 27 N. Y. 568; *Clafin v. Sanger*, 11 Abb. Pr. (N. Y. Supreme Ct.) 338; *Lawless v. Hackett*, 16 Johns. (N. Y.) 149; *Marrin v. Marrin*, 27 Hun (N. Y.)

601; *Butts v. Schieffelin*, 5 Civ. Pro. Rep. (N. Y. Supreme Ct.) 415; *Mott v. Davis*, 15 How. Pr. (N. Y. Supreme Ct.) 67; *Hamann v. Keinhart*, 11 Abb. Pr. (N. Y. Supreme Ct.) 132; *Clements v. Gerow*, 1 Keyes (N. Y.) 297.

North Carolina. — *Davenport v. Leary*, 95 N. Car. 203.

Ohio. — *Rosebrough v. Ansley*, 35 Ohio St. 107.

Pennsylvania. — *Barker v. Beeber*, 112 Pa. St. 216.

South Carolina. — *Weinges v. Cash*, 15 S. Car. 61.

Wisconsin. — *Nichols v. Kribs*, 10 Wis. 76; *Thompson v. Hintgen*, 11 Wis. 112.

"It is not enough to state one fact, or two facts, such as the amount due and the general nature of the debt; but all the material facts out of which the indebtedness arose must be given with the same particularity as if the judgment was impeached and assailed by a bill filed for that purpose." *Brown, J.*, in *Purdy v. Upton*, 10 How. Pr. (N. Y. Supreme Ct.) 494.

2. *Lawless v. Hackett*, 16 Johns. (N. Y.) 149; *Nichols v. Kribs*, 10 Wis. 76; *Thompson v. Hintgen*, 11 Wis. 112.

Statement as General as Common Counts. — "The specification ought to be so particular and precise as to apprise all persons interested of the nature and consideration of the debt. A statement as general as the common counts in a declaration is not sufficient. It ought to be as special and precise at least as a bill of particulars." *Lawless v. Hackett*, 16 Johns. (N. Y.) 149. See also *Brinkerhoff v. Marvin*, 5 Johns. Ch. (N. Y.) 320; and *compare* *Gandall v. Finn*, 1 Keyes (N. Y.) 217, cited in the next note.

More Minute than a Declaration. — In *McHenry v. Shepard*, 2 Mo. App. 378, the court, after citing the various sections of the statute required in statements, said: "We consider it plain that the object of the provisions we have quoted was to secure, in the statement of the facts out of which a debt to be secured by confession of judgment arises, a much more minute and elementary detail than would suffice in a declaration. * * * The law does

to be an extreme construction of the statutory requirement, which is merely intended to compel the person confessing judgment to disclose what is the real consideration of the judgment confessed, and to show to all interested the transaction out of which the debt has originated.¹ According to the weight of authority, a statement is sufficiently specific which states the transaction creating the indebtedness concisely, and in terms which will make known to the ordinary understanding the manner in which the indebtedness arose.² It is not intended by such statutes to compel the debtor to state sufficient of the transaction out of which the indebtedness arose to enable other creditors to form an opinion

not forbid preferences absolutely and without qualification, because obedience to such an order would be what it could not, in the nature of things, enforce; but it regards preferences with jealousy, and insists upon their not being fraudulent. * * * There is no toleration of concealment or disguise. The whole business must be laid bare, so that all concerned may see and judge it."

1. *Chappel v. Chappel*, 12 N. Y. 221.

In New York it is held that, unlike the Act of 1818, the code does not require that the statement of the indebtedness should be as specific as a bill of particulars, but that it will be sufficient if it states the nature and consideration of the debt, the time in which it accrued, and that it is still due and unpaid. *Gandall v. Finn*, 1 Keyes (N. Y.) 217.

2. *Atwater v. Manchester Sav. Bank*, 45 Minn. 341; *Stern v. Mayer*, 19 Mo. App. 511; *St. Louis Fourth Nat. Bank v. Mayer*, 19 Mo. App. 517; *Hard v. Foster*, 98 Mo. 297; *J. H. Teasdale Commission Co. v. Van Hardenberg*, 53 Mo. App. 326; *McDowell v. Daniels*, 38 Barb. (N. Y.) 143; *Acker v. Acker*, 1 Abb. App. Dec. (N. Y.) 1; *Moody v. Townsend*, 3 Abb. Pr. (N. Y. Supreme Ct.) 375; *Hopkins v. Nelson*, 24 N. Y. 518; *Thompson v. Hintgen*, 11 Wis. 112.

No More Definite than a Complaint. — In *Cordier v. Schloss*, 12 Cal. 143, it was held that a statement of an indebtedness need not be more definite than is required in a complaint upon the same cause of action.

Particularity Dependent upon Transaction. — In *Mechanics' Bank v. Mayer*, 93 Mo. 417, it was held that the degree of particularity requisite in a statement of indebtedness depends in each case upon the particular transaction.

Description Identifying Cause. — In *Ex*

p. Hays, 6 Ark. 419, it was held to be sufficient if a statement contains such a description of the cause of action as will identify it.

Technical Description of Instrument. — Where the confession of judgment is upon a written instrument, the party confessing judgment need not state the technical character of the instrument upon which he confesses the judgment. Thus, where the amount, the date, and the time of payment are stated with sufficient certainty to identify a writing obligatory, the fact that a party calls it in his confession a note will not invalidate the judgment. *Ex p. Hays*, 6 Ark. 419.

One of Several Items Incorrectly Stated.

— Where a statement for judgment by confession authorized judgment for the amount of two items, and alleged that it was for a debt justly due the judgment creditor, the fact that the statement of the facts from which the indebtedness under one item arose was defective was held not to affect the validity of the judgment upon the other item. *Harrison v. Gibbons*, 71 N. Y. 58.

So as to Be Pleadable in Bar. — In *Wight v. Mott*, Kirby (Conn.) 152, it was held that a judgment by confession ought to express the particular debt or duty it was for, that it may be pleadable in bar of a future demand for the same thing.

To Prevent Parties from Shifting Consideration. — In *J. H. Teasdale Commission Co. v. Van Hardenberg*, 53 Mo. App. 326, it is held that the statement of facts out of which the indebtedness arose will be sufficient if the consideration of the judgment is thereby so fixed that the judgment debtor and creditor are prevented from shifting it, and it is such as the law recognizes as valuable.

from the facts stated as to the integrity of the debtor in confessing the judgment,¹ but simply to require him to state enough of such facts to enable creditors to inquire into the transaction and to form an opinion of the honesty of the judgment from the facts they shall ascertain.²

On Promissory Notes. — A statement for confession of judgment setting forth as the facts from which the indebtedness arose simply the making of a promissory note is not a sufficient compliance with the statutory requirement.³ The statement should set

1. *McDowell v. Daniels*, 38 Barb. (N. Y.) 143; *Atwater v. Manchester Sav. Bank*, 45 Minn. 341.

"When it is said that the written authority must state concisely the facts out of which the indebtedness arose, it is not intended that it shall state them particularly and specifically, but briefly. To be concise is to be brief. To make a statement in a concise manner is to make it as short and brief, and yet as intelligent, as possible, and not to make it particular and specific." *Vanfleet v. Phillips*, 11 Iowa 558.

Where Demand Has Been Assigned. — The requirement as to the particularity of the statement applies with the same force in the case of a confession to a subsequent owner of the demand as where the confession is to the original creditor. *Clafin v. Sanger*, 11 Abb. Pr. (N. Y. Supreme Ct.) 338, where the court said: "The statement is to be made by the debtor, and not the creditor, and he can as well state the particulars in one case as the other. He knows the particular transaction out of which the indebtedness arose, and he can state it as easily after the claim has been transferred to a third person as he could before the transfer."

2. *Atwater v. Manchester Sav. Bank*, 45 Minn. 341; *Hard v. Foster*, 98 Mo. 297; *J. H. Teasdale Commission Co. v. Van Hardenberg*, 53 Mo. App. 326; *Bryan v. Miller*, 28 Mo. 32; *Stern v. Mayer*, 19 Mo. App. 511; *McDowell v. Daniels*, 38 Barb. (N. Y.) 143; *Acker v. Acker*, 1 Abb. App. Dec. (N. Y.) 1; *Read v. French*, 28 N. Y. 285; *Frost v. Koon*, 30 N. Y. 428; *Ingram v. Robbins*, 33 N. Y. 409; *Union Bank v. Bush*, 36 N. Y. 631; *Thompson v. Hintgen*, 11 Wis. 112; *Nichols v. Kribs*, 10 Wis. 76.

"Where a judgment is entered by confession, it is necessary that the sworn statement of indebtedness accompanying it should be sufficiently specific in sums, dates, and considerations to enable the other creditors of

the debtor, with reasonable facility, to investigate its genuineness and protect themselves against fraud." *Roosevelt, J.*, in *Moody v. Townsend*, 3 Abb. Pr. (N. Y. Supreme Ct.) 375.

It is sufficient if the statement identifies the transaction, and furnishes a sufficient clew to the indebtedness. *Bryan v. Miller*, 28 Mo. 32.

In *Clafin v. Dodson*, 111 Mo. 195, the court held that the purposes of the statute are satisfied when a sufficient clew is afforded a creditor to enable him to start an investigation as to the honesty and good faith of the transaction.

3. *California*. — *Cordier v. Schloss*, 18 Cal. 576; *Pond v. Davenport*, 44 Cal. 481.

Indiana. — *Veach v. Pierce*, 6 Ind. 48.

Iowa. — *Kennedy v. Lowe*, 9 Iowa 580; *Bernard v. Douglas*, 10 Iowa 370.

Minnesota. — *Wells v. Gieseke*, 27 Minn. 478.

Missouri. — *How v. Dorscheimer*, 31 Mo. 349; *McHenry v. Shephard*, 2 Mo. App. 378; *Bryan v. Miller*, 28 Mo. 32.

New Jersey. — *Reading v. Reading*, 24 N. J. L. 358.

New York. — *Chappel v. Chappel*, 12 N. Y. 215; *Plummer v. Plummer*, 7 How. Pr. (N. Y. Supreme Ct.) 62; *Johnston v. Fellerman*, 13 How. Pr. (N. Y. Supreme Ct.) 21; *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142; *Von Beck v. Shuman*, 13 How. Pr. (N. Y. Supreme Ct.) 472; *Kinderhook Bank v. Jenison*, 15 How. Pr. (N. Y. Supreme Ct.) 41; *Kendall v. Hodgins*, 1 Bosw. (N. Y.) 659; *Case v. Redfield*, 7 Wend. (N. Y.) 398; *Norris v. Denton*, 30 Barb. (N. Y.) 117; *Clafin v. Sanger*, 31 Barb. (N. Y.) 36.

Oregon. — *Richardson v. Fuller*, 2 Oregon 179.

South Carolina. — *Woods v. Bryan*, 41 S. Car. 74; *Ex p. Carroll*, 17 S. Car. 448.

Washington. — *Puget Sound Nat. Bank v. Levy*, 10 Wash. 499.

forth fully the facts out of which the indebtedness arose for which such note was given.¹

For Goods Sold. — According to the decisions in some states, a statement for confession of judgment founded on an indebtedness for goods sold is sufficient if it states that such indebtedness arose

In *Ex p. Carroll*, 17 S. Car. 448, it was held that a description of a note without a statement of the indebtedness for which it was given will not sustain a confession of judgment.

In *Richardson v. Fuller*, 2 Oregon 179, it was held that the sworn statement is insufficient where it merely sets forth that the indebtedness arose on a promissory note, and that such statement ought to show where and how much money was advanced on the note and the circumstances upon which it was advanced.

Statements Held Insufficient. — "That heretofore, at the city of New York, I made my certain promissory note for the sum of two thousand dollars, payable on demand, and that I have not paid such note. And that I am justly indebted to the plaintiff thereupon in the said sum of two thousand dollars." *Kendall v. Hodgins*, 1 Bosw. (N. Y.) 659.

"Promissory note for a specified date and amount, which note was given to L. W. & Co. for goods, wares, and merchandise theretofore purchased of L. W. & Co. by the defendant, which note was indorsed by the debtor and came into the hands of the plaintiffs for a valuable consideration." *Clafin v. Sanger*, 17 How. Pr. (N. Y. Supreme Ct.) 574.

"That we, A. H., E. H., and J. H., are indebted to the said A. B. upon a certain promissory note, of which the following is a copy" (setting out the copy). *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142.

That "said note was given in good faith for a debt justly due said Kennedy, and is unpaid, and this confession of judgment is given without fraud." *Kennedy v. Lowe*, 9 Iowa 580.

1. *California.* — *Pond v. Davenport*, 44 Cal. 481.

Iowa. — *Bernard v. Douglas*, 10 Iowa 370.

Minnesota. — *Wells v. Gieseke*, 27 Minn. 478.

Missouri. — *Bryan v. Miller*, 28 Mo. 32; *McHenry v. Shephard*, 2 Mo. App. 378.

New Jersey. — *Reading v. Reading*, 24 N. J. L. 358.

New York. — *Chappel v. Chappel*, 12 N. Y. 215; *Norris v. Denton*, 30 Barb. (N. Y.) 117.

Oregon. — *Richardson v. Fuller*, 2 Oregon 179.

South Carolina. — *Woods v. Bryan*, 41 S. Car. 74; *Ex p. Carroll*, 17 S. Car. 448.

Washington. — *Puget Sound Nat. Bank v. Levy*, 10 Wash. 504.

In *McHenry v. Shephard*, 2 Mo. App. 378, the court held that the other creditors of the cognizor have an interest in knowing whether the note in its origin was business or accommodation paper; whether it was indorsed by the cognizor for value or for accommodation; whether it was indorsed before or after materializing; whether due notice of its dishonor was given by the holder, and upon what terms the holder took it; and a statement which was silent on all these heads was held not a compliance with the letter or spirit of the statute.

Sufficient as Against the Debtor. — In *Von Keller v. Muller*, 3 Abb. Pr. (N. Y.) 375, note, it was held that a statement which sets out a note as the indebtedness is sufficient as against the debtor, though it may not be as against creditors.

Statements Held Sufficient. — In *Acker v. Acker*, 1 Abb. App. Dec. (N. Y.) 1, it was held that where a promissory note is stated, it is sufficient to state the consideration by giving the nature of the dealings out of which it arose, without giving all the particulars, such as the amount and time of loans or payments to the debtor's use, and the person to whom such payments were made.

A statement setting out the note and reciting that the consideration is money loaned by plaintiff to defendant is a sufficient compliance with the statutory requirement. *Vanfleet v. Phillips*, 11 Iowa 558; *Marvin v. Tarbell*, 12 Iowa 93.

In *Freligh v. Brink*, 22 N. Y. 418, it was held sufficient to state that the indebtedness arose upon a promissory

on account of goods sold and delivered by the plaintiff to the defendant during a certain month,¹ or since a certain day,² or during a certain year,³ or within a certain number of years.⁴ In other states, however, it is held that where the consideration is for goods sold, the specification should state the kind, quantity, and price of such goods.⁵

For Money Lent. — Where the confession of judgment is for money lent, it is sufficient if the statement sets forth that the consideration of the judgment is the indebtedness of the defendant to the plaintiff for a certain sum lent,⁶ at a specified date.⁷

For Balance Due. — Where the confession of judgment is for the balance of account, it seems that such a statement should properly state where the goods were bought, the terms, the amount, quantity, or kind, and should allege any payments made and how such balance was ascertained.⁸

note for seven hundred dollars with interest, "that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of seven hundred and eighty-two dollars and forty-seven cents. * * * And we hereby state that the sum hereby by us confessed is justly due to the said plaintiff."

A statement as the foundation of a confession of judgment which sets out the execution and delivery "for value" of a negotiable note for fifteen hundred dollars "for money which" a creditor "then and there gave" the debtor "for said note as a loan, * * * which sum [of fifteen hundred dollars] is justly due and owing according to the tenor and effect of said note herein described," is sufficient to satisfy the statute. *Stern v. Mayer*, 19 Mo. App. 511.

Filing Note. — In a confession of judgment upon an indebtedness evidenced by a note, such note need not be filed with the confession. *Stern v. Mayer*, 19 Mo. App. 511; *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. Car. 507.

Note Attached to Statement. — In *Dulard v. Phelan*, 83 Iowa 471, it was held that where the note is attached to the statement and properly identified, this will constitute a concise statement of facts within the meaning of the statute.

1. *Delaware v. Ensign*, 21 Barb. (N. Y.) 85.

2. *Gandall v. Finn*, 1 Keyes (N. Y.) 217.

3. *Read v. French*, 28 N. Y. 285.

4. *Clements v. Gerow*, 1 Keyes (N. Y.) 297.

5. *Nichols v. Kribs*, 10 Wis. 76, *approving* *Lawless v. Hackett*, 16 Johns. (N. Y.) 149.

In *Missouri* it was held that the statement, where the indebtedness is for property sold, should set forth when and what kind of property was sold, the price or the aggregate of the purchase, and the amount of payments, if any. *Bryan v. Miller*, 28 Mo. 32.

6. *Miller v. Clarke*, 37 Iowa 325; *Kern v. Chalfant*, 7 Minn. 487.

In *Vanfleet v. Phillips*, 11 Iowa 558, the following statement was held sufficient: "Money borrowed by me from the said Vanfleet, and the interest due thereon."

In *Lyon v. Sherman*, 14 Abb. Pr. (N. Y. Supreme Ct.) 393, a statement that the indebtedness arose for "various sums of money lent and advanced" by the plaintiff to the defendant "during the last three years," including interest thereon to date, was held sufficient. *Contra*, *Daly v. Matthews*, 12 Abb. Pr. (N. Y. Supreme Ct.) 403, note.

7. *Johnston v. McAusland*, 9 Abb. Pr. (N. Y. Supreme Ct.) 214.

On or About a Certain Date. — In *Johnston v. McAusland*, 9 Abb. Pr. (N. Y. Supreme Ct.) 214, it is held that stating the loan to have been made on or about the date mentioned is not indefinite.

8. *Miller v. Earle*, 24 N. Y. 111.

It is not sufficient that the statement should recite that the consideration of the demand on which it is based is a promissory note given to the plaintiff

bb. ALLEGATION THAT DEBT IS "JUSTLY DUE." — While it is provided by the statute in some states that the statement, in addition to setting forth the facts upon which the indebtedness arose, must also state that the sum confessed is justly due, or to become due,¹ it is held, however, that this does not require that the confession must state in terms that the sum for which the judgment is confessed is justly due or to become due,² if the statement shows a valid debt in the beginning.³

cc. ALLEGATION OF AMOUNT OF DEBT. — The statement must also set forth the amount of the debt for which the judgment is confessed.⁴ The amount must be set forth explicitly, and not be left to inference.⁵ Thus a confession of judgment on a note should set out the amount for which the note was given.⁶ If a judg-

for balance due on settlement. *Bernard v. Douglas*, 10 Iowa 370.

In *Wood v. Mitchell*, 117 N. Y. 439, the following statement was held insufficient on account of its indefiniteness: "The said sum of five thousand dollars is a balance due to said plaintiff of various sums of money loaned and advanced by him to me, the said defendant, during a period from about July 1, 1886, to date, and includes interest upon such loans and advances to this date."

1. *Edgar v. Greer*, 7 Iowa 136; *Kinyon v. Fowler*, 10 Mich. 16; *Claffin v. Dodson*, 111 Mo. 195; *Lanning v. Carpenter*, 20 N. Y. 447; *Clements v. Gerow*, 30 Barb. (N. Y.) 325; *Marsh v. Lawrence*, 4 Cow. (N. Y.) 461.

2. *Lanning v. Carpenter*, 20 N. Y. 447; *Claffin v. Dodson*, 111 Mo. 195.

3. *Clements v. Gerow*, 30 Barb. (N. Y.) 325; *Lanning v. Carpenter*, 20 N. Y. 447; *Kinyon v. Fowler*, 10 Mich. 16; *Claffin v. Dodson*, 111 Mo. 195.

In *Kinyon v. Fowler*, 10 Mich. 16, it was held that the confession by defendants of a "judgment on a demand arising upon contract" is substantially a confession that they are "indebted."

Need Not Negative Payment or Discharge. — In *Lanning v. Carpenter*, 20 N. Y. 447, it was held that where the creating of a just debt is averred, it is unnecessary in terms to negative that it has been paid or otherwise discharged. The court said: "The particular facts must be set forth in such a manner as to show not only a just debt, but the amount thereof. That being done, an additional averment, in general terms, of the justice of the debt and its amount is not required. It is true that although the facts stated may

show with all the requisite certainty and detail the creation of a debt, yet it may have been paid. So also it may have been released or discharged by bankruptcy, insolvency, or in some other manner. But it is not required to negative all the conceivable possibilities of the case." See also *Freiligh v. Brink*, 22 N. Y. 419; *Miller v. Earle*, 24 N. Y. 112; *Neusbaum v. Keim*, 24 N. Y. 329; *Read v. French*, 28 N. Y. 294; *Frost v. Koon*, 30 N. Y. 442; *Union Bank v. Bush*, 36 N. Y. 637.

4. *Cordier v. Schloss*, 18 Cal. 576; *Davis v. Joliet*, 15 Ill. App. 664; *Mechanics' Bank v. Mayer*, 93 Mo. 417; *Mendel v. Mayer*, (Mo. 1888) 7 S. W. Rep. 5; *Clements v. Gerow*, 30 Barb. (N. Y.) 325; *Rae v. Lawser*, 9 Abb. Pr. (N. Y. Supreme Ct.) 380, note; *Terrett v. Brooklyn Imp. Co.*, 18 Hun (N. Y.) 6.

5. In *Clements v. Gerow*, 30 Barb. (N. Y.) 325, it was held that this statement of the amount of the debt is a vital part of a valid confession, and the omission of it is a fatal defect. The court said, in speaking of the omission of the amount: "This I regard as a vital part of a valid confession, and the omission of it, in these cases, a fatal defect. It is not to be left to inference. The statute expressly requires, in substance, that the statement should show that the sum confessed does not exceed the amount of the debt."

In *Cordier v. Schloss*, 18 Cal. 576, it is held that the failure of the statement to set out the amounts due severally for goods and for money would be fatal, just as such an averment is insufficient in an ordinary complaint.

6. *Rae v. Lawser*, 18 How. Pr. (N. Y. Supreme Ct.) 23.

ment is confessed for money lent and advanced, the amount of the money lent should be set forth.¹ If for goods sold and delivered, the amount of the sales or total price of the goods must be set forth.² If the confession be to secure against a contingent liability, the statement must set out concisely the facts constituting the liability,³ and must show that the sum confessed does not exceed the same.⁴

dd. SIGNATURE. — Under the statutes authorizing entry of judgment upon confession, it is required that the statement upon which such judgment is entered must be signed.⁵

By Defendant in Person. — Such statement must be signed by the person against whom the judgment is to be rendered.⁶ Where the

1. *Clements v. Gerow*, 30 Barb. (N. Y.) 325.

2. *Clements v. Gerow*, 30 Barb. (N. Y.) 325.

3. *Winnebrenner v. Edgerton*, 30 Barb. (N. Y.) 185; *Marks v. Reynolds*, 12 Abb. Pr. (N. Y. Supreme Ct.) 403; *Hopkins v. Nelson*, 24 N. Y. 518; *Sharp v. Danville, etc.*, R. Co., 106 N. Car. 308; *Johnston v. Danville, etc.*, R. Co., 106 N. Car. 322.

In *Winnebrenner v. Edgerton*, 30 Barb. (N. Y.) 185, it was held that a judgment confessed to secure against a contingent liability on a guaranty should be set aside on motion of a subsequent judgment creditor, if the statement on which it is entered does not show the particulars of the contract on which the liability rests; *e. g.*, in the case of a promissory note, if it does not show who are the parties to it, or the facts which imposed a liability thereon on the plaintiff in behalf of the defendant, and such liability as the defendant is bound to protect.

Statements Held Sufficient. — A confession to secure against contingent liability which set forth that "the said plaintiff has this day indorsed my notes, payable at bank, for six thousand dollars in all; which indorsements are made by said plaintiff for my accommodation, and to enable me to negotiate said notes," was held sufficiently to describe the statement, and that it was not necessary to state the date, time to run, amount, and place of payment of each note indorsed by the plaintiff. *Hopkins v. Nelson*, 24 N. Y. 518.

In *Marks v. Reynolds*, 12 Abb. Pr. (N. Y. Supreme Ct.) 403, it was held that a statement to secure against contingent liability as indorser for the ac-

commodation of the defendant is sufficient if it describes the notes, naming the parties, dates, amounts, and times and places of payment. The consideration need not be stated, nor the fact that the notes have been discounted. See also *Dow v. Platner*, 16 N. Y. 562.

4. *Hopkins v. Nelson*, 24 N. Y. 518; *Winnebrenner v. Edgerton*, 30 Barb. (N. Y.) 185; *Sharp v. Danville, etc.*, R. Co., 106 N. Car. 308; *Johnston v. Danville, etc.*, R. Co., 106 N. Car. 322.

5. *Reynolds v. Lincoln*, 71 Cal. 183; *Chapin v. Thompson*, 20 Cal. 681; *Edwards v. Pitzer*, 12 Iowa 607; *Beach v. Botsford*, 1 Dougl. (Mich.) 199; *Kern v. Chalfant*, 7 Minn. 487; *Lambert v. Converse*, 22 How. Pr. (N. Y. Supreme Ct.) 265; *Post v. Coleman*, 9 How. Pr. (N. Y. Supreme Ct.) 64; *Purdy v. Upton*, 10 How. Pr. (N. Y. Supreme Ct.) 494; *Mosher v. Heydrich*, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 258; *French v. Edwards*, 5 Sawy. (U. S.) 266.

Affidavit and Statement Combined. — Where the affidavit and the written statement are both upon the same page, and the signature is to the affidavit and not to the statement and affidavit separately, the statutory requirement is sufficiently complied with. *Purdy v. Upton*, 10 How. Pr. (N. Y. Supreme Ct.) 494. See also *Post v. Coleman*, 9 How. Pr. (N. Y. Supreme Ct.) 64, holding that where the defendant signed his name at the close or foot of the verification, which immediately followed the statement and confession of judgment, instead of signing the statement, this was a sufficient signature.

6. *Reynolds v. Lincoln*, 71 Cal. 183; *Chapin v. Thompson*, 20 Cal. 687; *Beach v. Botsford*, 1 Dougl. (Mich.) 199; *Liberty Grotto No. 1 v. Meade*, 11

confession of judgment is against two or more persons, the statement must be signed by each of the persons against whom it authorizes the entry of judgment,¹ else a judgment entered upon such statement will be void as to all.²

ee. VERIFICATION — **Necessity.** — It is also required by statute that the statement of indebtedness upon which the judgment is to be entered must be sworn to by the party making it.³

Pa. Co. Ct. Rep. 340; French *v.* Edwards, 5 Sawy. (U. S.) 266.

In Michigan, under the statute authorizing a justice of the peace to enter judgment by confession "provided such confession shall be in writing and signed by the person making the same in presence of the justice and one or more competent witnesses," the judgment will be void for want of conformity to the statute where it does not appear to be thus signed. Beach *v.* Botsford, 1 Dougl. (Mich.) 199.

Signature by Attorney. — A statement merely signed by the attorney of the person against whom judgment by confession is to be rendered will not sustain such judgment. Reynolds *v.* Lincoln, 71 Cal. 183; Chapin *v.* Thompson, 20 Cal. 687; French *v.* Edwards, 5 Sawy. (U. S.) 266.

1. Chapin *v.* Thompson, 20 Cal. 687; Lambert *v.* Converse, 22 How. Pr. (N. Y. Supreme Ct.) 265.

2. Chapin *v.* Thompson, 20 Cal. 681, holding that where two persons sign a confession of judgment against themselves and two others, the judgment entered thereon, being void as to those not signing, was equally so as to those signing, and that the authority being to enter a judgment against four, no judgment thereon could be entered against a less number.

Signature by Two and by Attorney of Third Party. — In French *v.* Edwards, 5 Sawy. (U. S.) 266, judgment was entered upon a statement signed by two of the defendants in person and by the attorney of the third. It was held that the consent of those signing was only that judgment might be entered against all; and as there was no authority to enter judgment as to the third party, judgment was unauthorized and void as to all.

3. Iowa. — Thorp *v.* Platt, 34 Iowa 314; Vanfleet *v.* Phillips, 11 Iowa 558.

Missouri. — Hard *v.* Foster, 98 Mo. 297.

New York. — Teel *v.* Yost, 128 N. Y. 387; Ingram *v.* Robbins, 33 N. Y. 409;

Mosher *v.* Heydrich, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 258; Schoolcraft *v.* Thompson, 9 How. Pr. (N. Y. Supreme Ct.) 61; Delaware *v.* Ensign, 21 Barb. (N. Y.) 85; Cook *v.* Whipple, 55 N. Y. 150; Post *v.* Coleman, 9 How. Pr. (N. Y. Supreme Ct.) 64; Cook *v.* Cressy, 7 Alb. L. J. 140.

Oregon. — King *v.* Higgins, 3 Oregon 406.

Texas. — Lauderdale *v.* R. & T. A. Ennis Stationery Co., (Tex. Civ. App. 1894) 24 S. W. Rep. 834.

Utah. — Bacon *v.* Raybould, 4 Utah 357.

Washington. — Puget Sound Nat. Bank *v.* Levy, 10 Wash. 499.

Between Parties. — In Thorp *v.* Platt, 34 Iowa 314, it was held that as between the parties the statement will be sufficient without being sworn to, and that a defect in that respect may be amended on leave of court.

Confession for Less than Fifty Dollars. — In Snyder *v.* Warren, 2 Cow. (N. Y.) 519, it was held that a judgment by confession for fifty dollars or less was good without the oath required by the New York Fifty Dollar Act then in force. See also Griffin *v.* Mitchell, 2 Cow. (N. Y.) 548; Cornell *v.* Cook, 7 Cow. (N. Y.) 310.

Verification Before Plaintiff's Attorney. — In Post *v.* Coleman, 9 How. Pr. (N. Y. Supreme Ct.) 64, it was held not to be a valid objection to the regularity of a judgment by confession, that the statement was verified before one of the plaintiff's attorneys, since the rule which excludes the attorney from taking the affidavit in an action is merely technical and does not apply to affidavits preparatory to the commencement of a suit.

In Vanfleet *v.* Phillips, 11 Iowa 558, it was held that the mere fact that the statement for the confession of judgment is sworn to before a notary public, who was at the time one of the attorneys of the plaintiff, did not necessarily render it void, but that such circumstances would be considered if it

On Belief. — An affidavit merely that the defendant believes the statement to be true is insufficient. He must swear positively to the truth of the facts so far as they are within his own knowledge.¹

Amendment. — A defective verification to a statement is amendable.²

ff. JUDGMENT, HOW AFFECTED BY DEFECTIVE STATEMENT. — As a general rule the fact that the statement is defective will not render a judgment by confession absolutely void.³ Such a judgment is not a

were claimed that fraud was practiced in procuring the confession.

1. *Ingram v. Robbins*, 33 N. Y. 409; *Cook v. Whipple*, 55 N. Y. 150.

In *Ingram v. Robbins*, 33 N. Y. 409, an affidavit was annexed to the statement in which it was said that the deponent "believes the above statement of confession is true." The court, in holding this not to be the proper verification, said: "In requiring that he should verify the statement, the legislature intended that in so far as it related to things within his own knowledge he should affirm it to be true; a statement that he believes it is something considerably short of this. * * * No one can fail to feel that when that term is used the party commits himself less conclusively to the principal fact. It is a qualification of the direct affirmation of the existence of the fact. Besides, the word is inappropriate when used in relation to a fact which the party either knows or does not know."

Contra. — In *Delaware v. Ensign*, 21 Barb. (N. Y.) 85, it was held that the verification of a statement in which the debtor swears that "he believes the above statement of confession is true" is a sufficient verification, for the reason that "the defendant, on such an affidavit, could be convicted of perjury. He would not be allowed to shield himself from the consequences of crime on the pretense that he swore only to his belief, unless he had good grounds for such belief."

Sufficient Verification. — In *Mosher v. Heydrick*, 30 How. Pr. (N. Y. Supreme Ct.) 161, it was held that an allegation in the affidavit that "the facts stated in the above confession are true" is a sufficient verification of the statements made therein, since, when it is said that the facts stated in the above confession are true, it is in effect saying that the statement is true.

Defect in Jurat. — In *Grattan v. Matteson*, 54 Iowa 229, it was held that

where a notary by mistake omitted to sign his full name below the jurat to a confession of judgment taken before him, the surname being omitted, but his seal, containing the full name, was attached, and the confession was in all respects legally made, and was duly approved by the court and judgment entered thereon, such a judgment would not be held invalid on account of the defective jurat, when assailed in a collateral action.

Failure to Seal Jurat. — In *Chase v. Street*, 10 Iowa 593, the affidavit accompanying the statement for a judgment by confession was sworn to before a notary public, whose seal was not attached to the jurat, and the judgment on the statement was, for that reason, reversed.

2. *Cook v. Whipple*, 55 N. Y. 150; *Cook v. Cressy*, 7 Alb. L. J. 140.

3. *Arkansas.* — *Byrd v. Clendenin*, 11 Ark. 572.

California. — *Richards v. McMillan*, 6 Cal. 419; *Cordier v. Schloss*, 18 Cal. 576; *Lee v. Figg*, 37 Cal. 328; *Pond v. Davenport*, 44 Cal. 481.

Missouri. — *Hard v. Foster*, 98 Mo. 297; *Gilman v. Hovey*, 26 Mo. 280.

New York. — *Read v. French*, 28 N. Y. 285; *Sheldon v. Stryker*, 34 Barb. (N. Y.) 116; *Griffin v. Mitchell*, 2 Cow. (N. Y.) 548; *Germon v. Swartwout*, 3 Wend. (N. Y.) 282; *Dunham v. Waterman*, 3 Duer (N. Y.) 166.

Utah. — *Bacon v. Reybould*, 4 Utah 357.

Plaintiff Purchasing under Defective Statement. — In *Case v. Redfield*, 7 Wend. (N. Y.) 398, it was held that the plaintiff in a judgment founded on an insufficient statement cannot be a *bona fide* purchaser under it.

Judgment Prima Facie Fraudulent. — The omission, in a statement confessing judgment, to set out strictly in accordance with the statute the facts out of which the indebtedness arose, does not render the judgment a nullity, but makes it *prima facie* fraudulent. *Cord-*

nullity, and cannot be collaterally attacked.¹ It is valid as between parties, and is void only as to creditors,² and must be called in question by such creditors in a direct proceeding for that purpose.³ If, however, there is an entire absence of the statement required by statute, judgment, it seems, is not only voidable, but is absolutely void as to creditors.⁴

gg. AMENDMENT OF DEFECTS. — The court may, in its discretion, allow a defective statement to be amended,⁵ but, as a general rule,

ier v. Schloss, 18 Cal. 576; *Richards v. McMillan*, 6 Cal. 419.

The omission fully to comply with the statute by setting forth explicitly the facts and circumstances upon which the debt was incurred does not *ipso facto* make the judgment void; it merely throws on the judgment creditor, if his judgment is contested by other creditors, the burden of proving that his judgment was fair and not fraudulent. *Richards v. McMillan*, 6 Cal. 419.

1. *Lee v. Figg*, 37 Cal. 328; *Pond v. Davenport*, 44 Cal. 481; *Gilman v. Hovey*, 26 Mo. 280; *Dunham v. Waterman*, 3 Duer (N. Y.) 166.

A judgment entered on confession cannot be held void collaterally where an actual intent to defraud creditors is not established, unless the statement upon which such judgment is entered is so essentially defective that it is absolutely void for the reason that no court has jurisdiction or authority to enter judgment on it. *Dunham v. Waterman*, 3 Duer (N. Y.) 166.

2. *California.* — *Lee v. Figg*, 37 Cal. 328; *Pond v. Davenport*, 44 Cal. 481.

Iowa. — *Plummer v. Douglas*, 14 Iowa 69.

Minnesota. — *Coolbaugh v. Roemer*, 30 Minn. 424.

Missouri. — *Gilbert v. Gilbert*, 33 Mo. App. 259; *McHenry v. Shephard*, 2 Mo. App. 378; *How v. Dorscheimer*, 31 Mo. 349; *Bryan v. Miller*, 28 Mo. 32.

New York. — *Seaving v. Brinkerhoff*, 5 Johns. Ch. (N. Y.) 329; *Von Keller v. Muller*, 3 Abb. Pr. (N. Y.) 375, note; *Read v. French*, 28 N. Y. 285; *Sheldon v. Stryker*, 34 Barb. (N. Y.) 116; *Griffin v. Mitchell*, 2 Cow. (N. Y.) 548; *Ely v. Cook*, 2 Hilt. (N. Y.) 406; *Plummer v. Plummer*, 7 How. Pr. (N. Y. Supreme Ct.) 62; *Johnston v. Fellerman*, 13 How. Pr. (N. Y. Supreme Ct.) 21; *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142; *Miller v. Earle*, 24 N. Y. 110; *Neusbaum v. Keim*, 24 N. Y. 325; *Kirby v. Fitzgerald*, 31 N. Y. 417.

3. *Lee v. Figg*, 37 Cal. 328. See also *Gilman v. Hovey*, 26 Mo. 280.

4. *Bacon v. Raybould*, 4 Utah 357, where the court said: "No case has been called to our attention where a court has held that a confession of judgment is merely *prima facie* fraudulent as to creditors, and not liable to be attacked collaterally where there was a total absence of the statement of any facts whatever. We know of no instance in which such a case has reached an appellate court. The statement of such facts is a prerequisite to the confession of judgment; it is not a confession of judgment without it. Every attempt at making such a statement being wanting, the pretended judgment by confession was null and void, and the case, after its entry, was still pending and undetermined."

5. *Wells v. Gieseke*, 27 Minn. 478; *Auerbach v. Gieseke*, 40 Minn. 258; *Bryan v. Miller*, 28 Mo. 32; *Symson v. Selheimer*, 105 N. Y. 660; *Davis v. Morris*, 21 Barb. (N. Y.) 152; *Mitchell v. Van Buren*, 27 N. Y. 300; *National Park Bank v. Salomon*, 17 Civ. Pro. Rep. (N. Y.) 8. See also *Kindig v. March*, 15 Ind. 248.

Addressed to Discretion of the Court. —

In *Symson v. Selheimer*, 105 N. Y. 660, the court, in holding that a motion made by the plaintiff to obtain permission of the court to amend the statement of the confession of judgment is addressed to the discretion of the Supreme Court, said: "It was not an amendment which he had the legal right to demand, but was one which the court might in its discretion refuse, or grant upon such terms as to it might seem to be just."

In *Mitchell v. Van Buren*, 27 N. Y. 300, it was held that, upon a motion by a subsequent creditor to set aside the judgment confessed by the debtor, the court may allow an amendment supporting the judgment by signing and verifying a new statement, stating the facts more specifically.

such amendment will not be allowed where it will affect the rights of existing judgment creditors which may have attached in the meantime.¹

4. Time of Confession — *a.* IN VACATION. — According to the statutes of most of the states authorizing a confession of judgment, the judgment may be confessed in person or by power of attorney either in term time or in vacation.² Upon a warrant of attorney authorizing confession of judgment, a confession in vaca-

In *Ingram v. Robbins*, 33 N. Y. 409, it was held that an error in the statement which occurred from the inadvertence of the attorney employed to enter up the judgment is amendable.

1. *Wells v. Gieseke*, 27 Minn. 478; *Auerbach v. Gieseke*, 40 Minn. 258; *Bryan v. Miller*, 28 Mo. 32; *Symson v. Selheimer*, 105 N. Y. 660.

In *Wells v. Gieseke*, 27 Minn. 478, it was held that the court cannot allow a *nunc pro tunc* amendment of an insufficient statement for judgment by confession so as to affect the rights of creditors who have subsequently acquired liens and who have begun proceedings to avoid the judgment.

Contra. — In *National Park Bank v. Salomon*, 17 Civ. Pro. Rep. (N. Y.) 8, it was held that the power of the Supreme Court to amend a confession of judgment on motion may be exercised, notwithstanding the effect of such amendment may be to deprive subsequent judgment creditors of rights which otherwise would be theirs.

2. *Colorado.* — *Schuster v. Rader*, 13 Colo. 329; *Abbott v. Yuma County*, 18 Colo. 6.

Illinois. — *Oppenheimer v. Giershofer*, 54 Ill. App. 38; *Kellogg v. Keith*, 4 Ill. App. 386; *Towle v. Gonter*, 5 Ill. App. 409; *Jasper v. Schlesinger*, 22 Ill. App. 637; *Conkling v. Ridgely*, 112 Ill. 36; *Tucker v. Gill*, 61 Ill. 236; *Whitney v. Bohlen*, 157 Ill. 571; *Ottawa First Nat. Bank v. Daly*, 34 Ill. App. 173; *Gardner v. Bunn*, 132 Ill. 403; *Bunn v. Gardiner*, 18 Ill. App. 94.

Michigan. — *Watkins v. Wallace*, 19 Mich. 57.

Missouri. — *Harness v. Green*, 19 Mo. 323.

New York. — *Arden v. Rice*, 1 Cai. (N. Y.) 498; *Hogeboom v. Genet*, 6 Johns. (N. Y.) 325.

North Carolina. — *Sharp v. Danville*, etc., R. Co., 106 N. Car. 308.

South Carolina. — *Weinges v. Cash*, 15 S. Car. 61.

Virginia. — *Brown v. Hume*, 16 Gratt. (Va.) 456.

Wisconsin. — *Hempstead v. Drummond*, 1 Pin. (Wis.) 534; *Wells v. Morton*, 10 Wis. 468.

"The judgment is a judgment of a court of record, though confessed in vacation before the clerk." *Kellogg v. Keith*, 4 Ill. App. 386.

In *Wells v. Morton*, 10 Wis. 468, it was said that the practice of allowing clerks and prothonotaries, in vacation, and in the absence of the court or judge, and without his authority, to enter and record judgments by confession, is of very recent date. It had its origin soon after the substitution of written for oral pleadings, and still prevails in England. See also *Shadrack v. Woolfolk*, 32 Gratt. (Va.) 707.

In *Blaikie v. Griswold*, 10 Wis. 293, it was held that the practice of allowing judgments by confession in vacation is not judicial, since the court has a general discretionary control over judgments entered upon powers of attorney, and may always interfere.

Contra. — *Moore v. McGuire*, 26 Ala. 461; *Penn v. Meeks*, 2 N. J. L. 141.

In *Miffin v. Stalker*, 4 Kan. 283, it was held that confession of judgment must be made in open court and that a judgment entered on a confession taken by the clerk in vacation is a nullity. According to this case it seems that the clerk is authorized, in vacation, only to enter a judgment rendered by the court.

In *Arkansas* it seems that formerly a judgment by confession might be taken in vacation. *Pickett v. Thurston*, 7 Ark. 397. But that since the adoption of the Civil Code, providing that the person must appear in a court of competent jurisdiction, a judgment by confession before the clerk of the Circuit Court in vacation is unauthorized and void. *Hare v. Hall*, 41 Ark. 372.

Entry and Not Rendition. — "Under statutes authorizing judgments by con-

tion is valid although the warrant itself does not in express terms authorize a confession of judgment in vacation.¹ But where it is doubtful from the language used in the power to confess whether the maker intended that such judgment might be confessed in vacation, such confession can be taken only in term time.² A warrant to enter judgment as of the last, next, or any subsequent term, authorizes the entry of a judgment at the current term.³

fession in vacation through the agency of the clerk, there being no judicial determination of the controversy, the act of giving judgment in such cases is called the 'entering' rather than the 'rendering' of judgment." *Schuster v. Rader*, 13 Colo. 329; *Abbott v. Yuma County*, 18 Colo. 6.

What Constitutes Vacation.—In *Jasper v. Schlesinger*, 22 Ill. App. 637, it was held that a period of definite adjournment for several weeks during the term will be vacated for the purpose of authorizing the clerk to enter up confessions of judgment. See also *Conkling v. Ridgely*, 112 Ill. 36.

Judgment may be thus confessed where the court has adjourned not *sine die*, but two judicial days, as from Thursday forenoon until Monday. The statutes are to be so construed as to promote the remedy, and such an interval may be deemed vacation within the meaning of the statute. *Ottawa First Nat. Bank v. Daly*, 34 Ill. App. 173.

In *Brown v. Hume*, 16 Gratt. (Va.) 456, it was held that under the act providing that judgment may be confessed in the clerk's office only in vacation, a judgment confessed in the clerk's office on the morning of the first day of the term of the court, before the hour for the opening of the court, is a judgment confessed in vacation and valid.

1. *Kellogg v. Keith*, 4 Ill. App. 386.

Warrant in Vacation.—In *King v. Shaw*, 3 Johns. (N. Y.) 142, a warrant of attorney was given in vacation to enter up judgment in vacation or term, on a bond given at the same time, and payable immediately; and judgment was entered up as of the preceding term. The court, in its refusal on motion to set aside the judgment, said: "An authority to enter up judgment in vacation on a bond payable immediately, will include the vacation in which the bond was given; for the parties must be supposed to mean the present as well as any future vacation.

There was then no breach of good faith in entering up the judgment in the August vacation; and the relation back to the term of August is a fiction which can prejudice neither the parties nor purchasers, since the judgment is a lien only from the day on which it is docketed. To enter up judgment on a bond of a term before it was executed or due, is, however, error on the face of the record; but we do not think it proper to interfere in this way. The defendant must be left to his remedy by writ of error, and the plaintiff to protect himself by a release of errors, if he can procure it."

Notice of Confession.—In *Tennessee*, by the Act of 1801, c. 19, it is required that where a person has a bond with power to confess a judgment, before he shall do so, he shall give the debtor ten days' notice. *Hays v. State Bank*, Mart. & Y. (Tenn.) 179.

A Term's Notice Necessary.—In *Enston v. Mixer*, 15 Rich. L. (S. Car.) 193, it was held that a judgment by confession comes under the general rule which forbids the entry of a judgment without a term's notice after the second term subsequent to that at which it was obtained; the term at which it was obtained being reckoned the first. "It is an indulgence granted to a confession in vacation when it is considered and allowed to be entered as a judgment obtained at the term next preceding; but if as good as a verdict or a final order of court, a confession is no better, and can claim no exemption from a rule which may often serve to prevent great abuses."

2. *Whitney v. Bohlen*, 157 Ill. 571.

A warrant of attorney which authorizes a confession of judgment on a note "as of any term" does not authorize a confession in vacation. Such warrant only gives power to confess at some term. *Whitney v. Bohlen*, 157 Ill. 571.

3. *Montelius v. Montelius*, Bright. (Pa.) 79.

b. AFTER DEATH OF PARTIES — (1) After Death of Plaintiff — In Pending Action. — A judgment by confession in a pending suit after the death of the plaintiff, and before the substitution of his representatives, is void.¹

Under Warrant of Attorney. — The entry of a judgment by confession under a warrant of attorney in favor of a plaintiff then deceased, for the use of such plaintiff's administrator, is erroneous.²

(2) After Death of Defendant. — As a general rule, a judgment by confession cannot be entered on a warrant of attorney, after the death of the defendant.³ Where one of the obligors in a joint or several bond is dead, a judgment against all of them by virtue of the warrant of attorney is irregular and will be wholly set aside.⁴

5. Amount for Which Judgment Is to Be Entered — a. FOR SUM CONFESSED. — While a judgment by confession should be entered only for the sum confessed,⁵ yet it is held that a judgment entered

1. *Finney v. Furgerson*, 3 W. & S. (Pa.) 413.

Set Aside on Application of Personal Representatives. — In *Wentz v. Bealor*, 14 Pa. Co. Ct. Rep. 337, it was held that where a judgment is confessed in a pending suit after the death of the plaintiff, and before his personal representatives have been substituted, such judgment will be set aside on the application of his personal representatives.

2. *Wentz v. Bealor*, 14 Pa. Co. Ct. Rep. 337.

3. *Lanning v. Pawson*, 38 Pa. St. 480; *Tobias v. Dorsey*, 2 W. N. C. (Pa.) 15. See also *Maddock v. Stevens*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 248; *Bennett v. Davis*, 3 Cow. (N. Y.) 68.

On Day of Death. — In *Maddock v. Stevens*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 248, it was held that a judgment by confession cannot be entered after the defendant's death, although on the same day that he died. The doctrine that the law will not ordinarily inquire into fractions of a day has no application to such a case. See also, as to this point, *Lanning v. Pawson*, 38 Pa. St. 480.

Relation to Previous Term. — A judgment and proceedings in entering up a judgment in one term cannot be made to relate to, and be entitled as of, a term preceding. Thus, where a bond and warrant of attorney to confess judgment were executed by two persons on April 10, 1824, and one of them died on April 14, a judgment entered thereon during the subsequent term as of the preceding February term was set

aside as irregular. *Bennett v. Davis*, 3 Cow. (N. Y.) 68.

4. *Lewis v. Ash*, 2 Miles (Pa.) 110.

Entry Against Surviving Obligors. — In *Croasdell v. Tallant*, 83 Pa. St. 193, it was held that on a joint warrant of attorney the prothonotary may enter judgment against the surviving obligors.

5. *Gayle v. Foster*, Minor (Ala.) 125.

Entry by Clerk. — In *Tucker v. Gill*, 61 Ill. 236, it was held that since the clerk has no judicial power, but acts ministerially, he cannot do otherwise than follow the papers filed in entering a judgment by confession. He has no power to disregard the plea of confession and proceed to determine for what sum judgment should be entered. He must enter judgment for the amount confessed, or not at all. In this case there was a power of attorney to confess a judgment on a note for \$26,000, the note was described in the declaration, which claimed \$50,000 damages, the plea of confession admitted an indebtedness for the latter sum, and the clerk rendered judgment for \$26,000. It was held that the attorney confessing the judgment exceeded his power, yet the clerk did not have power to deviate from the plea of confession in rendering the judgment.

Judgment under Warrant on Collectors' Bonds. — Where the judgment is confessed under a power of attorney on the bond of a tax collector, such judgment must be for the whole penal sum, otherwise it will be stricken off. *Com. v. Evans*, 8 Pa. Co. Ct. Rep. 665.

under a power of attorney will not be wholly void because of an erroneous excess,¹ where such excess is not the result of fraud,² and that only the excess included without authority is void.³

6. FOR ATTORNEY'S FEES STIPULATED IN WARRANT. — Where, as is the case in most jurisdictions, a warrant of attorney to confess judgment may contain a stipulation for the payment of attorney's fees,⁴ a judgment entered upon such warrant not only may, but should, include attorney's fees.⁵

1. *Bryan-Brown Shoe Co. v. Block*, 52 Ark. 458; *Tucker v. Gill*, 61 Ill. 236; *Adam v. Arnold*, 86 Ill. 185; *Clapp v. Ely*, 27 N. J. L. 555; *Davenport v. Wright*, 51 Pa. St. 292.

2. *Davenport v. Wright*, 51 Pa. St. 292; *Bryan-Brown Shoe Co. v. Block*, 52 Ark. 458; *Clapp v. Ely*, 27 N. J. L. 555.

Judgment for Excessive Rate of Interest. — In *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. Car. 507, it was held that a confession of judgment will not be vacated for the reason that a greater rate of interest is confessed for than is allowed by the note on which confession is made, unless fraud is shown; but the judgment will be corrected so as to allow the proper rate.

3. *Tucker v. Gill*, 61 Ill. 236; *Mullen v. Russell*, 46 Iowa 386; *Ohm v. Dickerman*, 50 Iowa 671; *Clapp v. Ely*, 27 N. J. L. 555; *Davenport v. Wright*, 51 Pa. St. 292.

Judgment in Excess, How Corrected. — In *Adam v. Arnold*, 86 Ill. 185, it was held that a judgment by confession under a power of attorney for a sum in excess of that due cannot be set aside at the instance of a stranger, although he be also a creditor of the debtor. The defendant in the judgment alone can complain, and he should have the error corrected in the court below.

Modification of Excessive Judgment Entered in Vacation. — Where a judgment entered in vacation upon confession of an attorney under a power is for too great a sum or includes a sum as an attorney's fee which is not proper, the court at the next term should, on motion of the defendant therein, modify or set aside the judgment to the extent of such improper sum. *Campbell v. Goddard*, 117 Ill. 251.

4. *Weigley v. Matson*, 125 Ill. 64; *Ball v. Miller*, 38 Ill. 110; *Campbell v. Goddard*, 117 Ill. 251, 123 Ill. 220; *Dowty v. Holtz*, 85 Ill. 525; *Blanck v. Medley*, 63 Ill. App. 211; *Askew v. Goddard*, 17 Ill. App. 377; *Sweeney v. Stroud*, 55 N.

J. L. 97; *Featherman v. Davison*, 4 Kulp (Pa.) 301; *Allison's Estate*, 4 Pa. Co. Ct. Rep. 550; *McAllister's Appeal*, 59 Pa. St. 204; *Mahoning County Bank's Appeal*, 32 Pa. St. 158; *Faulkner v. Wilson*, 3 W. N. C. (Pa.) 339; *Robins v. Beck*, 2 Penny. (Pa.) 125; *Moore's Appeal*, 110 Pa. St. 433.

Contra. — In *Ohio* it seems that a stipulation in a warrant of attorney to pay collection fees, in addition to the principal debt and interest, is against public policy and void. *Shelton v. Gill*, 11 Ohio 417; *State v. Taylor*, 10 Ohio 378; *Spalding v. Muskingum Bank*, 12 Ohio 544; *Martin v. Belmont Bank*, 13 Ohio 250.

In *Iowa*, where a judgment was confessed on a note in which it was provided that a "reasonable attorney's fee, if sued," should be paid, it was held that no attorney's fee was allowable. In that state a judgment by confession is one entered without action. *Dullard v. Phelan*, 83 Iowa 471.

5. *Ball v. Miller*, 38 Ill. 110; *Weigley v. Matson*, 125 Ill. 64; *Campbell v. Goddard*, 117 Ill. 251; *McAllister's Appeal*, 59 Pa. St. 204; *Faulkner v. Wilson*, 3 W. N. C. (Pa.) 339; *Mahoning County Bank's Appeal*, 32 Pa. St. 158; *Featherman v. Davison*, 4 Kulp (Pa.) 301; *Allison's Estate*, 4 Pa. Co. Ct. Rep. 550; *Robins v. Beck*, 2 Penny. (Pa.) 125.

In *Weigley v. Matson*, 125 Ill. 64, it was held that to include the attorney's fees in the judgment is not fraudulent as to other creditors.

Estoppel of Maker. — In *Blanck v. Medley*, 63 Ill. App. 211, it was held that the maker of a note authorizing judgment by confession and the payment of attorney's fees cannot question such attorney's fees on the ground that he was insolvent when he made the note.

Execution Without Judgment. — Where a warrant of attorney provides that the creditor shall recover an attorney's commission for collection, it must be included in the judgment, or it cannot

Amount Fixed by Court. — Where, as is sometimes the case, the warrant of attorney, instead of specifying the amount of attorney's fee, merely authorizes the inclusion in the judgment of a reasonable fee,¹ it is for the court to determine what shall be a reasonable fee under the circumstances.²

be collected by execution. *McAllister's Appeal*, 59 Pa. St. 204; *Mahoning County Bank's Appeal*, 32 Pa. St. 158; *Faulkner v. Wilson*, 3 W. N. C. (Pa.) 339.

Attorney's Fees as Costs. — Where, upon confession of judgment, attorney's commissions are not made part thereof, they cannot be collected as costs. *Featherman v. Davison*, 4 Kulp (Pa.) 301; *Allison's Estate*, 4 Pa. Co. Ct. Rep. 550.

Addition After Entry. — Where judgment has been entered on a judgment note, the amount (as liquidated in the note) cannot be afterwards changed by the addition of attorney's fees, without the consent of the parties or an order of court. *Ward v. Nice*, 42 Leg. Int. (Pa.) 192.

When Not to Be Included — *Where Note Paid at Maturity.* — A clause in a judgment note authorizing inclusion of an "attorney's commission of five per cent. for collection" in the judgments to be confessed cannot be used to compel the debtor to pay such commissions when he does not dispute the claim and pays it at maturity. *Moore's Appeal*, 110 Pa. St. 433, where the court said: "To permit such a practice as this where the defendant offers to pay all that is due at the maturity of the obligation, would be sanctioning an intolerable and unreasonable oppression. There is no occasion whatever in such a case for the service of an attorney for the purpose of collection, and it was no part of the contract in this case that any commission should be paid for the mere entering of the judgment." See also, to the same effect, *Imler v. Imler*, 94 Pa. St. 375.

Where Attorney Acts for Both Parties. — In *Askew v. Goddard*, 17 Ill. App. 377, it was held that where a judgment on a note with warrant attached, which gives authority to include a reasonable attorney's fee, is confessed by the attorney of the payee, the judgment, including the fee, cannot be sustained; the attorney cannot be permitted to act for both parties.

In an Ordinary Action on Note. — Although an attorney's fee may be

authorized in the power of attorney attached to a promissory note, in case of a confession of judgment under the power, this will not justify the court in allowing such a fee in an ordinary action on the note. *Dowty v. Holtz*, 85 Ill. 525.

Where Provided in Case of Contingency. — In *Sweeney v. Stroud*, 55 N. J. L. 97, the defendant gave a bond in the conditional sum of ten thousand dollars, conditioned to be void on the payment of five thousand dollars and interest, with an agreement added that if judgment should be obtained by virtue of a warrant of attorney annexed thereto, or certain other specific events should occur, an attorney's fee of five per cent. should be payable and should be recovered in addition to all the principal, interest, and costs of the suit. Annexed to the bond was a warrant authorizing any attorney to appear for the obligor, in case of a breach of the condition of the bond, and confess judgment for the penalty. It was held that the warrant of attorney did not authorize the confession of judgment for the five per cent. fee.

1. *Campbell v. Goddard*, 117 Ill. 251, 17 Ill. App. 385.

2. *Campbell v. Goddard*, 117 Ill. 251, where the court said: "If it were a fair matter of doubt whether the power to fix a reasonable fee in this case was conferred upon the court which should render the judgment, or upon the attorney who should confess it, that doubt, under the rule of strict construction, * * * should be solved in favor of the court, and not of the attorney, as the donee of the power. * * * The attorney is authorized to appear before a 'court of record' and confess judgment for such a fee as that court may decide to be reasonable. In order to decide correctly it may be necessary to hear evidence and draw conclusions therefrom. This is pre-eminently the business of a court, acting as such."

Judgment for Excessive Attorney's Fees. — Where an insolvent debtor confessed judgment for eighty-four hundred and fifty-one dollars debt and twelve hun-

c. WHEN JUDGMENT MAY BE ENTERED GENERALLY. — Upon a confession of judgment, if the plaintiff's demand be in the nature of a debt which may be ascertained by calculation, it may be sufficient to enter judgment generally,¹ since in such case the judgment is supposed to be for the amount of damages laid in the declaration, and execution may issue accordingly.² The plaintiff should, however, indorse upon the execution the actual amount of the debt, and if the defendant complains that injustice has been done, the court, on motion, or a judge at chambers before the return of the writ, upon a proper case being made out, will give immediate relief.³

d. WHEN LIQUIDATED BY THE COURT. — Where the extent of the recovery is not determined by the confession itself, this must be ascertained by the court.⁴

e. ENTRY ON WARRANT BY CLERK. — Where, as is the case in certain states, the prothonotary or clerk is authorized, upon the application of the holder of the instrument containing a warrant of attorney to confess judgment, to enter judgment thereon without the agency of an attorney,⁵ such prothonotary or clerk may exercise this power only when the amount due appears on the instrument or can be rendered certain by calculation from its face.⁶

dred and fifty-eight dollars attorney's fees, such judgment was held fraudulent and void as to its other creditors, at least to the extent of such fees. *Hulse v. Mershon*, 125 Ill. 52.

1. *Lewis v. Smith*, 2 S. & R. (Pa.) 142; *Com. v. Baldwin*, 1 Watts (Pa.) 54; *Philadelphia Bank v. Craft*, 16 S. & R. (Pa.) 347.

In Action on Note. — In *Batchelor v. Hickman*, 2 B. Mon. (Ky.) 17, it was held that a confession judgment generally, in an action of debt on a note, should be understood as a confession for the amount specified on the note, subject to such credits as are then indorsed on the note.

2. *Lewis v. Smith*, 2 S. & R. (Pa.) 142.

3. *Lewis v. Smith*, 2 S. & R. (Pa.) 142; *Gray v. Coulter*, 4 Pa. St. 188.

4. *Bonta v. Clay*, 1 Litt. (Ky.) 27.

5. *Connay v. Halstead*, 73 Pa. St. 354; *Hope v. Everhart*, 70 Pa. St. 231; *Whitney v. Hopkins*, 135 Pa. St. 246.

6. *Connay v. Halstead*, 73 Pa. St. 354; *Whitney v. Hopkins*, 135 Pa. St. 246.

Sufficient Instrument to Authorize Entry. — In *Connay v. Halstead*, 73 Pa. St. 354, where a contract was for the sale of land at \$10 per acre, the quantity to be ascertained by a survey, with war-

rant to enter judgment, it was held that the prothonotary could not enter judgment on the instrument.

In *Whitney v. Hopkins*, 135 Pa. St. 246, it was held that judgment might be entered upon a contract for the payment of money in annual instalments, containing a confession of judgment "in case default be made for the space of three months" in any payment, "for the whole amount unpaid on the above agreement," on the ground that both the default and the amount due were ascertainable in the first instance from the face of the instrument; the holder not being required to disprove payment, but the production of the instrument affording proof, *prima facie*, of the right to judgment, if upon its face any instalment should appear to be three months overdue.

Power Barred by Undue Delay. — In *Cook v. Cooper*, 4 Harr. (Del.) 189, it was held that where there was a judgment by confession, "amount to be ascertained by the prothonotary with stay of execution for five months," and the prothonotary neglected for fourteen years to ascertain the amount, both plaintiff and defendant having died in the meantime, the power thus given to the prothonotary was barred by such neglect.

6. Entry by Clerk — Necessity and Nature of Entry. — A judgment by confession must be entered by the clerk in the records of the court.¹ Such entry is a ministerial and not a judicial act.²

Time of Entry. — There is no provision of law requiring a judgment by confession to be entered at any particular time after the confession and statement are made, and such a judgment is not defective because nearly a year has elapsed after the verification of the statement and before the entry of the judgment.³ The

1. *Illinois*. — *Ling v. King*, 91 Ill. 571; *Knights v. Martin*, 155 Ill. 486; *Jasper v. Schlesinger*, 22 Ill. App. 637.

Iowa. — *Risser v. Martin*, 86 Iowa 392; *Burchett v. Casady*, 18 Iowa 342.

Maryland. — *Snowden v. Preston*, 73 Md. 261.

Nevada. — *Humboldt Mill, etc., Co. v. Terry*, 11 Nev. 237.

New York. — *Blydenburgh v. Northrop*, 13 How. Pr. (N. Y. Supreme Ct.) 289.

Pennsylvania. — *Helvete v. Rapp*, 7 S. & R. (Pa.) 306.

United States. — *King v. French*, 2 Sawy. (U. S.) 441.

On judgments by confession under the code there is no suit, recovery, or adjudication, either actual or formal, of any court or officer, until the judgment is entered by the clerk; and it is this act of the clerk that creates not only the lien, but the judgment. And until this entry is made there is no judgment, and nothing of the existence of which notice can be given to subsequent incumbrancers or grantees. *Blydenburgh v. Northrop*, 13 How. Pr. (N. Y. Supreme Ct.) 289.

In *King v. French*, 2 Sawy. (U. S.) 441, where a confession of judgment was filed, and judgment indorsed on the statement, but not entered in the judgment book, and an execution issued thereon, it was held that there was no judgment to support the execution, and therefore a sale of property thereunder was invalid and of no effect. See also *Knights v. Martin*, 155 Ill. 486.

In *State v. Vandever*, 3 Harr. (Del.) 29, it was held that the record entry made by the prothonotary, and not the confession drawn by the attorney, is the judgment.

Entry Relates to Rendition. — Where a judgment is pronounced by the court in open session, it takes effect from the time it is so rendered, though the act of entering the same in the record may be delayed; but a judgment by confes-

sion takes effect from the time it is actually entered in the record, as provided by the statute. *Schuster v. Rader*, 13 Colo. 329, where the court said: "If a judgment by confession be not entered in fact substantially as required by the statute, an execution in advance of such entry will be postponed in favor of a junior execution or attachment creditor who has regularly made a levy based upon valid proceedings." See also *Ling v. King*, 91 Ill. 571; *Chapin v. Thompson*, 20 Cal. 681; *King v. French*, 2 Sawy. (U. S.) 441; *Edgar v. Greer*, 7 Iowa 136; *Criswell v. Ragsdale*, 18 Tex. 443; *Brown v. Hathaway*, 10 Minn. 303.

Effect of Entry. — The entry of the judgment as made by the clerk is a final determination of the rights of the parties, and will be a bar to any suit that might be brought upon the promissory note or indebtedness mentioned in the statement of confession. *Humboldt Mill, etc., Co. v. Terry*, 11 Nev. 237.

Parol Contradiction of Record. — Where a judgment has been once entered the record imports verity, and cannot be contradicted by parol. *Hansen v. Schlesinger*, 125 Ill. 230.

Book of Entry. — The fact that the judgment was not entered in the record of the ordinary proceedings of the court, but was entered in what was known as the "record of judgments by confession," that formed a part of the records of the court, was held not to invalidate the judgment. *Brown v. Barngrover*, 82 Iowa 204.

2. *Pickett v. Thruston*, 7 Ark. 397; *Bradley v. Claudon*, 45 Ill. App. 326; *Humboldt Mill, etc., Co. v. Terry*, 11 Nev. 237.

3. *Curtis v. Corbitt*, 25 How. Pr. (N. Y. Supreme Ct.) 58.

Within a Year and a Day. — The practice before the adoption of the *New York Code* allowed the plaintiff to enter judgment on bond and warrant of attorney at any time within a year and a

entry of judgment by confession being a ministerial and not a judicial act, such entry may be made by the clerk in vacation ¹ or on a legal holiday other than Sunday.²

Manner of Entry upon Statement. — Where judgment is confessed upon a warrant of attorney, the clerk of the court must indorse upon the statement filed with him, and must enter in the judgment book, a judgment for the amount confessed with costs and disbursements.³ The statement and affidavit, with the judgment

day after the same was given. *Curtis v. Corbitt*, 25 How. Pr. (N. Y. Supreme Ct.) 58.

Within a Reasonable Time. — In *Burchett v. Casady*, 18 Iowa 342, it was held that the requirement of the Iowa Code that judgments by confession shall be entered on the docket forthwith means that such entry shall be made within a reasonable time; but that if the delay be unreasonable, the judgment is not for that reason void as between the parties, but only voidable. Such a judgment could not be assailed collaterally by a party to it, but must be set aside by writ of error or other proper or direct proceedings.

1. *Pickett v. Thruston*, 7 Ark. 397; *Durham v. Brown*, 24 Ill. 93; *Conkling v. Ridgely*, 112 Ill. 36; *Vanfleet v. Phillips*, 11 Iowa 558; *Kendig v. Marble*, 58 Iowa 529.

Power Implied. — In *Conkling v. Ridgely*, 112 Ill. 36, it was held that power is conferred upon the clerk, under the statute, to enter judgments by confession in vacation, not expressly, but by implication, and the judge has no power to make an order of entry of such a judgment except in term.

Clerk's Act Ministerial. — In *Durham v. Brown*, 24 Ill. 93, it was held that the entry by the clerk in vacation of the judgment by confession is not a judicial act, the judgment being but a conclusion of law on a contract acknowledged of record.

In *Ling v. King*, 91 Ill. 571, it was held that the clerk, in entering such a judgment, acts under the direction of the defendant and the statute, just as in entering the judgment in term time he acts under the direction of the judge. The judgment must be entered in one case as much as in the other, and in either case the clerk's act is ministerial.

Approval at Next Term. — In Iowa it is provided that a judgment entered by the clerk in vacation shall be approved at the next term. Such provision, it seems, however, is only directory, and

a failure so to approve will not avoid the judgment. *Vanfleet v. Phillips*, 11 Iowa 558; *Kendig v. Marble*, 58 Iowa 529.

Entry at Night and in Office of Counsel. — Where the entry was properly made and complied with all the statutory requirements, the mere fact that the judgment was entered in the nighttime and in the law office of counsel, near to the court-house, did not render it void or irregular. *Sharp v. Danville*, etc., R. Co., 106 N. Car. 308.

2. **Entry on December 25.** — A judgment by confession is not void because entered by the clerk on the twenty-fifth day of December, the same being a legal holiday. *Bradley v. Claudon*, 45 Ill. App. 326, where the court said: "The law seems to be clear that the holding of court or the transaction of other judicial business on a legal holiday, unless prohibited by the statute, or unless such holiday be on the Sabbath, is not illegal, and not even if the statute create or make those holidays."

3. *Dullard v. Phelan*, 83 Iowa 471; *Wells v. Gieseke*, 27 Minn. 478; *Humboldt Mill*, etc., Co. v. Terry, 11 Nev. 237; *Allen v. Smillie*, 1 Abb. Pr. (N. Y. Supreme Ct.) 354; *Neele v. Berryhill*, 4 How. Pr. (N. Y.) 16; *Sharp v. Danville*, etc., R. Co., 106 N. Car. 308; *King v. Higgins*, 3 Oregon 406.

Two Entries Have the Force of Duplicate Copies. — Under the Oregon statute relating to judgments by confession, which requires the filing of a sworn statement, and enacts that the clerk shall indorse the judgment upon the statement, and enter it in the judgment book, the two entries ought to be deemed to have the force of duplicate copies, each having the effect of an original. *King v. Higgins*, 3 Oregon 407, where the court said: "The indorsement and the entry must be considered simultaneous acts, or at least it cannot be contended that the entry of the judgment in the books need precede the writing of it on the back of

indorsed thereupon, then become the judgment roll, and execution may issue thereon.¹

7. Relief from Judgment by Confession — *a. APPEAL.* — The decisions differ as to whether a judgment by confession is appealable, some denying this right of appeal on the ground that a judgment by confession operates as a release of errors,² while according to others a confession of judgment, though it waives formal

the statement. The two entries may be considered duplicates; at least, the indorsement on the statement is not to be a mere copy, and it must be considered an original entry, under the language of the act. Doubtless the two entries ought to be deemed to have the force of duplicate copies, each having the full effect of an original entry."

Formal Words Unnecessary. — "It is the usual practice of clerks in entering the judgment to refer to the statement and affidavit, and then to use the formal words 'it is, therefore, by reason of the law and the premises, considered that said plaintiff * * * do have and recover of and from said defendant * * * the said sum of,' etc., and such a practice ought, for obvious reasons, to be encouraged and commended. There is, however, no special form absolutely necessary. The sufficiency of the writing claimed to be a judgment should always be tested by its substance rather than its form." *Humboldt Mill, etc., Co. v. Terry*, 11 Nev. 237.

Effect of Omission to Enter. — Where the clerk indorsed the judgment on the statement, but by mistake omitted to enter it in the judgment book, it was held that the omission would not invalidate the judgment except in favor of one who should be misled by the omission. *King v. Higgins*, 3 Oregon 407.

1. *Wells v. Gieseke*, 27 Minn. 478; *Humboldt Mill, etc., Co. v. Terry*, 11 Nev. 237; *Sharp v. Danville, etc., R. Co.*, 106 N. Car. 308.

2. *Alabama.* — *Wilson v. Collins*, 9 Ala. 127; *Callier v. Denson, Minor*, (Ala.) 19; *McConnell v. White, Minor* (Ala.) 112; *Hearn v. State*, 62 Ala. 218.

Arkansas. — *Jeffries v. Morgan*, 1 Ark. 169; *Choat v. Bennett*, 11 Ark. 313.

Illinois. — *Weir v. Stephenson*, 13 Ill. 374; *Elliott v. Daiber*, 42 Ill. 467; *Brown v. Galesburg Pressed Brick, etc., Co.*, 132 Ill. 648; *Boettcher v. Bock*, 74 Ill. 332; *Reiman v. Ater*, 88

Ill. 299; *Packer v. Roberts*, 40 Ill. App. 445; *Iglehart v. Chicago M. & F. Ins. Co.*, 35 Ill. 514.

Indiana. — *Lewis v. Brackenridge*, 1 Blackf. (Ind.) 112; *Ryors v. King*, 48 Ind. 237; *Brown v. Trulock*, 4 Blackf. (Ind.) 429.

Kentucky. — *Bonta v. Clay*, 1 Litt. (Ky.) 27; *Payne v. Lewis*, 1 Bibb (Ky.) 164.

Missouri. — *Parker v. Simpson*, 1 Mo. 539.

New Jersey. — *Willson v. Willson*, 5 N. J. L. 912.

New York. — *De Riemer v. Cantillon*, 4 Johns. Ch. (N. Y.) 85.

North Carolina. — *Rush v. Halcyon Steamboat Co.*, 67 N. Car. 47.

Oregon. — *Miller v. Bank of British Columbia*, 2 Oregon 292; *Fassman v. Baumgartner*, 3 Oregon 469.

Texas. — *Garner v. Burleson*, 26 Tex. 348; *Merritt v. Clow*, 2 Tex. 582; *Dunman v. Hartwell*, 9 Tex. 495.

Virginia. — *Brockenbrough v. Brockenbrough*, 31 Gratt. (Va.) 580; *Richardson v. Jones*, 12 Gratt. (Va.) 53.

United States. — *Mandeville v. Holey*, 1 Pet. (U. S.) 136; *Catlett v. Cooke*, 2 Cranch (C. C.) 9.

In *Jeffries v. Morgan*, 1 Ark. 169, it was held that if a judgment by confession is formally and properly entered up, the party confessing is estopped by his own voluntary act from questioning its correctness, and if, in such case, there be error in the computation of interest, it is too late in the Supreme Court to take advantage of it. In *Parker v. Simpson*, 1 Mo. 539, it was held that a confession of judgment is a release of errors, and the judgment cannot afterwards be arrested for defects in the declaration. In *Iglehart v. Chicago M. & F. Ins. Co.*, 35 Ill. 514, a confession of judgment was held to operate as a release of errors in the entering up of judgment or making a record thereof. In *McConnell v. White, Minor* (Ala.) 112, it was held that if a party confessing a judgment, thereby releasing errors, sues out a

errors,¹ will not prevent the defendant from objecting by writ of error to errors of substance.²

b. OPENING JUDGMENT ON BEHALF OF DEFENDANT—

(1) *Power to Open.*—Upon proper cause being shown the court may open a judgment by confession, on the application of the defendant, and allow him to make a defense.³

writ of error, the appellate court will affirm the judgment and not render a judgment dismissing the writ of error. In *Miller v. Bank of British Columbia*, 2 Oregon 292, it was held that a judgment by confession, regular upon its face, can only be impeached by a suit in equity for fraud, etc.

Errors Subsequent to Confession.—In *Payne v. Lewis*, 1 Bibb (Ky.) 164, it was held that while every prerequisite to uphold a judgment is acknowledged by a confession of judgment, errors subsequent to the confession are not thereby released.

1. *Battelle v. Bridgeman*, 1 Morr. (Iowa) 363; *Edgar v. Greer*, 7 Iowa 136.

2. *Battelle v. Bridgeman*, 1 Morr. (Iowa) 363; *Edgar v. Greer*, 7 Iowa 136; *Kennedy v. Lowe*, 9 Iowa 580; *Troxel v. Clark*, 9 Iowa 201; *Burge v. Burns*, 1 Morr. (Iowa) 287; *Portage Canal, etc., Co. v. Crittenden*, 17 Ohio 436; *Montgomery v. Barnett*, 8 Tex. 143; *Hopkins v. Howard*, 12 Tex. 7.

In *Edgar v. Greer*, 7 Iowa 136, it was held that a judgment by confession, though entered by the clerk, is not to be treated as a judgment rendered by him, but by the court, and is subject to revision on appeal in the same manner as any other judgment in a District Court. In *Montgomery v. Barnett*, 8 Tex. 143, it was held that a confession of judgment is not a waiver of errors where the confession is not made conformably to law.

Grounds for Appeal.—A defendant may, by appeal, take advantage of a defect in the statement of the facts out of which the indebtedness arose. *Kennedy v. Lowe*, 9 Iowa 580.

That the statement required by the statute to be filed in writing is insufficient, is such an error of substance as to entitle the defendant to appeal. *Edgar v. Greer*, 7 Iowa 136.

Where judgment is actually entered, but for a larger amount than the particular sum authorized by the power of attorney, the defendant may appeal from such judgment. *Battelle v. Bridgeman*, 1 Morr. (Iowa) 363.

Necessity for Application in Court Below.—In *Ball v. Miller*, 38 Ill. 110, it was held that a judgment by confession in conformity with the power authorizing it will not be reversed for irregularity in its entry, unless the defendant has first applied to the court below for relief, and shown some equitable ground therefor. In *Edgar v. Greer*, 7 Iowa 136, however, it was decided that unless the written statement is in conformity to the requirements of the statute, the defendant may himself take advantage of the defect and have the judgment reversed, and that without first applying to the District Court to set the same aside. See also *Kennedy v. Lowe*, 9 Iowa 580.

3. *California.*—*Arrington v. Sherry*, 5 Cal. 513.

Illinois.—*Seaver v. Siegel*, 54 Ill. App. 632; *Stuhl v. Shipp*, 44 Ill. 133; *Hier v. Kaufman*, 134 Ill. 215; *Walker v. Ensign*, 1 Ill. App. 113; *Packer v. Roberts*, 140 Ill. 9; *Lanyon v. Lanz*, 43 Ill. App. 654; *Jordan v. Huntington*, 58 Ill. App. 646; *McGuire v. Campbell*, 58 Ill. App. 188; *Adam v. Arnold*, 86 Ill. 185; *Martin v. Stubbings*, 20 Ill. App. 381; *Hansen v. Schlesinger*, 125 Ill. 230; *Earl v. Chicago*, 136 Ill. 277; *Holmes v. Parker*, 125 Ill. 478; *Evans v. Barclay*, 38 Ill. App. 496; *Morgan v. Park Nat. Bank*, 44 Ill. App. 582; *Sundberg v. Temple*, 33 Ill. App. 633; *Keist v. Kingman*, 36 Ill. App. 489; *Graves v. Whitney*, 49 Ill. App. 435.

Kansas.—*Satterlee v. Grubb*, 38 Kan. 234; *Babcock Hardware Co. v. Farmers', etc., Bank*, 54 Kan. 273.

Maryland.—*Heaps v. Hoopes*, 68 Md. 383; *Anders v. Devries*, 26 Md. 222.

Massachusetts.—*Dalton v. West End St. R. Co.*, 159 Mass. 221.

New Jersey.—*Heckscher v. Middleton*, 54 N. J. L. 312; *Shallcross v. Deats*, 43 N. J. L. 177.

New York.—*Brinkerhoff v. Marvin*, 5 Johns. Ch. (N. Y.) 320; *Frasier v. Frasier*, 9 Johns. (N. Y.) 80; *Wotkins v. Abrahams*, 14 How. Pr. (N. Y. Supreme Ct.) 191.

As to One of Two Defendants. — Upon motion by each of two defendants to set aside or open a judgment by confession by warrant of attorney so as to allow him to plead, the judgment may be set aside as to one of them where it appears by affidavit that nothing is due or owing from him to the plaintiff, and may be allowed to stand good as to the other.¹

(2) *When Proper* — **Equitable Ground Must Be Shown.** — Courts of law are invested with an equitable jurisdiction over judgments by confession,² and on application to open such judgments some equitable ground should be shown.³

Ohio. — *Wooster Bank v. Stevens*, 1 Ohio St. 237; *Riddle v. Canby*, 4 West. L. M. (Ohio) 124; *Wheeler v. White*, 4 West. L. M. (Ohio) 110.

Pennsylvania. — *Earnest v. Hoskins*, 100 Pa. St. 551; *Hopkins v. West*, 83 Pa. St. 109; *McAllister's Appeal*, 59 Pa. St. 204; *Roenigk's Appeals*, (Pa. 1886) 2 Cent. Rep. 68; *McQuillan v. Hunter*, 1 Phila. (Pa.) 49; *Cake v. Cake*, 162 Pa. St. 584; *Germantown Brewing Co. v. Booth*, 162 Pa. St. 100; *Woodring v. Woodring*, 11 Pa. Co. Ct. Rep. 603; *Zeigler v. Evans*, 8 Kulp (Pa.) 180; *Fisher v. King*, 153 Pa. St. 3; *Rhine v. Swartley*, (Pa. 1889) 16 Atl. Rep. 846; *Conway's Appeal*, (Pa. 1889) 16 Atl. Rep. 847; *Weigley v. Conrade*, 132 Pa. St. 147; *Weigley v. Redding*, (Pa. 1890) 19 Atl. Rep. 58; *Hildreth v. Davis*, 6 Kulp (Pa.) 286; *McLaughlin v. Zeidler*, 13 Pa. Co. Ct. Rep. 47; *Woelfel v. Hammer*, 159 Pa. St. 446; *Hoffman v. Jacobs*, 12 Lanc. L. Rev. (Pa.) 25; *Harris v. Reinhard*, 165 Pa. St. 36; *Shumaker v. Reed*, 3 Pa. Dist. Rep. 45; *Turner v. Smith*, 7 Kulp (Pa.) 139; *Tidioute, etc., Oil Co. v. Shaer*, 161 Pa. St. 508; *Stegner v. Stegner*, 8 Kulp (Pa.) 332; *Wilson v. Cox*, 170 Pa. St. 331; *Massey v. Blair*, 176 Pa. St. 34; *Baker v. Nipple*, 16 Pa. Co. Ct. Rep. 659; *Glass v. Hilberg*, 1 Pa. Dist. Rep. 621; *Morgan v. Stoner*, 12 Lanc. L. Rev. (Pa.) 164; *Steiner v. Scholl*, 163 Pa. St. 465; *Markle v. Fichter*, 7 Kulp (Pa.) 549; *Wells v. Bunnell*, 160 Pa. St. 460; *Saunders v. Mather*, (Pa. 1886) 5 Cent. Rep. 156; *Loraw v. Nissley*, 9 Lanc. L. Rev. (Pa.) 177; *Bennett v. Allen*, 10 Pa. Co. Ct. Rep. 256; *Ellinger's Appeal*, 114 Pa. St. 505; *Peters v. McDonald*, 7 Kulp (Pa.) 308; *Armbrust v. Kennedy*, 7 Kulp (Pa.) 520; *Silberman v. Shukalansky*, 16 Pa. Co. Ct. Rep. 131; *Anderson v. Woodworth*, 1 Lack. Leg. N. (Pa.) 264; *Darragh v. Bigger*, 172 Pa. St. 89; *Hughes v. Moody*, 10 Pa. Co. Ct. Rep. 305;

Greenbaum v. Komorovski, 5 Pa. Dist. Rep. 284; *Walker v. Sallada*, 17 Pa. Co. Ct. Rep. 371; *English's Appeal*, 119 Pa. St. 533; *Rishel v. Crouse*, 162 Pa. St. 3; *Beaver v. Slear*, 168 Pa. St. 466; *Davis v. Reyner*, 12 Montg. L. Rep. (Pa.) 52.

Wisconsin. — *Jones v. Keyes*, 16 Wis. 562; *McCabe v. Sumner*, 40 Wis. 386.

"The power of the courts to open a judgment entered by confession, or in default of an appearance or plea, is not denied, and it is the duty of the courts to exercise such power wherever it is satisfactorily shown that in equity the judgment ought not to be collected." *Earnest v. Hoskins*, 100 Pa. St. 551.

1. *Silvers v. Reynolds*, 17 N. J. L. 275, 18 N. J. L. 238.

Effect of Such Order. — In *Silvers v. Reynolds*, 18 N. J. L. 238, it was held that since the control which the court exercises over judgments by confession is only of a discretionary and equitable character, and not as a court of error, such an order, though in terms it sets aside the judgment as to one defendant, does not alter or affect the record; its technical meaning and legal influence are only to restrain the plaintiff from executing the judgment on the defendant as to whom it was set aside.

2. *Illinois.* — *Hier v. Kaufman*, 134 Ill. 215; *Packer v. Roberts*, 140 Ill. 9; *Heeney v. Alcock*, 9 Ill. App. 431; *Lake v. Cook*, 15 Ill. 353; *Hall v. Jones*, 32 Ill. 38; *Pitts v. Magie*, 24 Ill. 610; *Burwell v. Orr*, 84 Ill. 465; *Wyman v. Yeomans*, 84 Ill. 403; *Condon v. Besse*, 86 Ill. 159; *Walker v. Ensign*, 1 Ill. App. 113; *Seaver v. Siegel*, 54 Ill. App. 632; *Jordan v. Huntington*, 58 Ill. App. 646.

New York. — *Brinkerhoff v. Marvin*, 5 Johns. Ch. (N. Y.) 320; *Frasier v. Frasier*, 9 Johns. (N. Y.) 80.

Wisconsin. — *McCabe v. Sumner*, 40 Wis. 386.

3. *Seaver v. Siegel*, 54 Ill. App. 632;

Defense to the Merits. — As a rule, a judgment confessed under a warrant of attorney will be set aside only where a defense to the

Packer v. Roberts, 140 Ill. 9; *Hier v. Kaufman*, 134 Ill. 215; *Lanyon v. Landz*, 43 Ill. App. 654; *Stuhl v. Shipp*, 44 Ill. 133.

In *Packer v. Roberts*, 140 Ill. 9, it was held that a motion to set aside a judgment confessed in term time under a warrant of attorney appeals to the equitable jurisdiction of the court, and will not be granted except upon equitable grounds, and that where no defense to the merits is shown, the court will refuse to vacate such judgment.

In *Hier v. Kaufman*, 134 Ill. 215, the court said: "We have held, in a number of cases, that a court of law exercises an equitable jurisdiction over a judgment by confession; that where there is a want of service, or an absence of authority to confess, the debtor will not be driven into a court of chancery, but may move to set aside the judgment before the court of law which rendered it; that such court of law may open the judgment and permit the debtor to present his defense to the claim if he has any, but will at the same time protect the creditor by permitting the judgment to stand as security; in such cases the proceedings on the judgment are merely stayed; the enforcement of the plaintiff's lien is suspended, but the lien is fully preserved; if the defense is successful, the judgment falls; if otherwise, the judgment is to be enforced."

Proper Grounds for Opening Judgments.

— The following were held to be proper cases for opening judgments:

Where a judgment confessed was void for a departure from the authority to confess. *Graves v. Whitney*, 49 Ill. App. 435.

Where it was alleged that a note on which judgment was entered was fraudulently altered. *Anderson v. Woodworth*, 1 Lack. Leg. N. (Pa.) 264.

Where there was evidence that a signature to a note containing a warrant of attorney was forged. *Darragh v. Bigger*, 172 Pa. St. 89.

Where the defendant denied the facts alleged as a breach of covenants in a lease containing a warrant of attorney. *Hughes v. Moody*, 10 Pa. Co. Ct. Rep. 305.

Where there was a conflict of testimony as to whether the judgment note,

upon which judgment was entered, had been paid in full or in part. *Greenbaum v. Komorovski*, 5 Pa. Dist. Rep. 284.

Where a defendant claimed that he had paid judgment notes upon which a judgment was entered to the obligee, not knowing that they had been assigned. *Walker v. Sallada*, 17 Pa. Co. Ct. Rep. 371.

Where a judgment by confession by husband and wife was founded on promissory notes by the wife. *Wotkins v. Abrahams*, 14 How. Pr. (N. Y. Supreme Ct.) 191.

In order to show a subsequent breach of warranty of the contract on which the judgment was based. *Keist v. Kingman*, 36 Ill. App. 489.

Where the judgment was charged to be void as involving fraud or forgery, and the testimony was contradictory, the facts depending upon the credibility of the witnesses. *Silberman v. Shuklansky*, 16 Pa. Co. Ct. Rep. 131. See also *Armbrust v. Kennedy*, 7 Kulp (Pa.) 520.

Where three uncontradicted witnesses testified that they knew the handwriting of the defendant, and that in their judgment the signature to the warrant shown in the note was not in his writing. *Peters v. McDonald*, 7 Kulp (Pa.) 308.

Where usury was alleged to constitute part of the judgment. *McGuire v. Campbell*, 58 Ill. App. 188. See also *Riddle v. Canby*, 4 West. L. M. (Ohio) 124.

Where judgment was entered by confession on a non-negotiable note in favor of the transferee, and the maker sought to defend on the ground of want of consideration. *Baker v. Nipple*, 16 Pa. Co. Ct. Rep. 659.

Where the maker of a warrant of attorney upon a note was subsequently found to have been insane at the time. *Glass v. Hilberg*, 1 Pa. Dist. Rep. 621.

To let in a plea of the statute of limitations. *Bennett v. Allen*, 10 Pa. Co. Ct. Rep. 256; *Loraw v. Nissley*, 1 Pa. Dist. Rep. 410; *Ellinger's Appeal*, 114 Pa. St. 505.

Application to Open Properly Denied. — The uncorroborated oath of the defendant that the execution of a note upon which a judgment was entered was obtained by fraud is not a sufficient ground for opening the judgment.

merits is shown,¹ and under a petition to open the burden of proof is upon the petitioner to establish a defense to the judgment.² But if the affidavit shows a *prima facie* case of a good defense on the merits, the court should open the judgment and allow such defense to be made and the issue to be tried by a jury, notwithstanding counter-affidavits to the effect that the whole defense is bad.³

Laches of Defendant. — According to some decisions a judgment will not be opened, even on an affidavit of merits, where the defendant has been guilty of laches.⁴

(3) *Who May Make Application.* — A judgment by confession may be opened on motion of the defendant therein,⁵ his executors or administrators,⁶ or sureties on the judgment bond.⁷

(4) *Form of Application* — **By Affidavit.** — The application to open a judgment by confession to let in the defense should be by motion supported by affidavit showing a good defense.⁸

Should State Facts. — An affidavit on the belief of the party is not sufficient; it should disclose the facts in order that the court may determine whether there is just ground for such belief.⁹

ment. *Davis v. Reyner*, 12 Mont. L. Rep. (Pa.) 52.

Where the defendant's affidavit is not inconsistent with the truth of facts set up by the plaintiff and not denied by the defendant the judgment will not be opened. *Morgan v. Park Nat. Bank*, 44 Ill. App. 582.

A judgment will not be opened on the ground that it has been paid. *Zeigler v. Evans*, 8 Kulp (Pa.) 180.

An application to open a judgment entered by confession on the ground that the bond upon which it was entered was without consideration, and given to enable the obligee to obtain credit, was properly denied, it appearing that the one in whose favor the judgment had been entered made advances to him on such security. *Weigley v. Conrade*, 132 Pa. St. 147.

1. *Packer v. Roberts*, 140 Ill. 9; *Dionne v. Matzenbaugh*, 49 Ill. App. 527; *Hansen v. Schlesinger*, 125 Ill. 230; *Holmes v. Parker*, 125 Ill. 478; *Pomeroy v. Drake*, 1 West. L. M. (Ohio) 282; *Germantown Brewing Co. v. Booth*, 162 Pa. St. 100; *Roenigk's Appeals*, (Pa. 1886) 2 Cent. Rep. 68.

2. *Roenigk's Appeals*, (Pa. 1886) 2 Cent. Rep. 68.

Sufficiency of Evidence. — In English's Appeal, 119 Pa. St. 533, it was held that a judgment by confession under a warrant of attorney should not be opened nor the evidence submitted to the jury unless the written instrument

be overcome by testimony which if believed would move a chancellor to decree that the note was void, or should be reformed because of forgery, fraud, or mistake. The unsupported testimony on oath of a defendant in such a judgment, admitting the execution of the instrument with a knowledge of its provisions, but alleging fraud in the procurement and use of it, which was directly opposed by the testimony, on oath, of the plaintiff, was deemed insufficient to warrant the opening of judgment or to be submitted to the jury on the trial of an issue awarded.

3. *Dionne v. Matzenbaugh*, 49 Ill. App. 527. See also *Pomeroy v. Drake*, 1 West. L. M. (Ohio) 282.

4. *McQuillan v. Hunter*, 1 Phila. (Pa.) 49.

5. *Parker v. Griggs*, 4 N. J. L. 182; *Reading v. Reading*, 24 N. J. L. 358.

6. *Wood v. Hopkins*, 3 N. J. L. 263; *Young v. Stout*, 10 N. J. L. 302.

7. *Alderman v. Diamant*, 7 N. J. L. 197; *Parker v. Griggs*, 4 N. J. L. 182.

8. *Arrington v. Sherry*, 5 Cal. 513; *Dioune v. Matzenbaugh*, 49 Ill. App. 527; *Packer v. Roberts*, 140 Ill. 9; *Chicago F. Proofing Co. v. Park Nat. Bank*, 44 Ill. App. 150; *Alderman v. Diamant*, 7 N. J. L. 197; *Melville v. Brown*, 16 N. J. L. 363; *Bell v. Kelly*, 17 N. J. L. 270; *Wilkinson v. Becker*, 12 Mont. L. Rep. (Pa.) 29; *Franklin v. Morris*, 154 Pa. St. 152.

9. *Melville v. Brown*, 16 N. J. L. 363.

Construction of Affidavit. — An affidavit to open a judgment by confession is to be construed most strongly against the party making the motion.¹

(5) *Proceedings upon Application* — **In General.** — Where, upon an application by the defendant to set aside and vacate a judgment by confession upon notes and warrants of attorney, it clearly appears that the plaintiff was not entitled to judgment, the court should vacate the judgment and leave the plaintiff to pursue the ordinary remedy by action.² If, however, the case is doubtful or the testimony is so contradictory that the truth cannot be ascertained with reasonable certainty, the defendant should be let in to a defense on the merits,³ leaving the judgment to stand as security.⁴

Awarding Issue. — Where the matter is in doubt, the court should enter a conditional order allowing pleas to be filed and issues to be framed to try the defense.⁵

Imposition of Terms on Opening. — Although, as a general rule, a court on opening a judgment has power to impose terms,⁶ it has been held that it has no right to impose as a condition precedent

1. *Chicago F. Proofing Co. v. Park Nat. Bank*, 44 Ill. App. 150.

Opening After Expiration of Term. — In *Heeney v. Alcock*, 9 Ill. App. 431, where it was insisted that the court had no power to open the judgment after the expiration of the term at which it was entered, it was held that the statute providing that the court might "during the term" set aside any judgment upon good and sufficient cause did not apply to judgments by confession entered by virtue of the warrant of attorney in the absence of the defendant. See also *Wyman v. Yeomans*, 84 Ill. 403; *Burwell v. Orr*, 84 Ill. 465.

Delay in Making Application. — A delay of five days on the part of the applicant after knowledge that judgment has been entered by confession on warrant of attorney, before making application to set it aside, is not an unreasonable time in which to make the necessary preparation for the hearing of the motion. *Heeney v. Alcock*, 9 Ill. App. 431.

2. *Walker v. Ensign*, 1 Ill. App. 113.

3. *Walker v. Ensign*, 1 Ill. App. 113; *Hier v. Kaufman*, 134 Ill. 215.

4. *Hier v. Kaufman*, 134 Ill. 216; *Walker v. Ensign*, 1 Ill. App. 113; *Condon v. Besse*, 86 Ill. 159; *McGuire v. Campbell*, 58 Ill. App. 188.

5. *Condon v. Besse*, 86 Ill. 159. See also *Lake v. Cook*, 15 Ill. 353; *Norton*

v. Allen, 69 Ill. 306; *Boynton v. Rendick*, 46 Ill. 280; *McGuire v. Campbell*, 58 Ill. App. 188; *King v. Shaw*, 3 Johns. (N. Y.) 142; *Morey v. Shearer*, 2 Cow. (N. Y.) 465; *Anderson v. Woodworth*, 1 Lack. Leg. N. (Pa.) 264; *Perth Amboy Terra Cotta Co.'s Appeal*, 124 Pa. St. 367.

Evidence to Be Confined to Issue. — Where judgment has been opened and an issue awarded, the court, on a trial of such issue, should confine the evidence to it; it could not be expected that the opposite parties would be prepared to meet any other. *McMurray v. Erie*, 59 Pa. St. 223.

Feigned Issue. — If fraud is suggested or usury alleged in regard to a judgment entered upon a bond and warrant of attorney, the usual and proper way is to let the judgment stand and to award a feigned issue to try the fact. *Alderman v. Diament*, 7 N. J. L. 199, note; *Barrow v. Bispham*, 11 N. J. L. 110; *Audenried v. Woodward*, 28 N. J. L. 265; *Hoyt v. Hoyt*, 16 N. J. L. 138; *King v. Shaw*, 3 Johns. (N. Y.) 142; *Robbins v. Lewis*, 1 How. Pr. (N. Y. Supreme Ct.) 202; *Machir v. Delaval*, Barn. Notes 277. See also, in general, article ISSUES TO THE JURY, ante, p. 599.

6. *McMurray v. Erie*, 59 Pa. St. 223; *Braddee v. Brownfield*, 2 W. & S. (Pa.) 279; *Bailey v. Clayton*, 20 Pa. St. 295.

that the defendant shall bring into court the sum which is supposed to be due.¹

Granting Application as a Matter of Discretion. — The application to open a judgment by confession on a power of attorney is addressed to the sound discretion of the court,² and a refusal to grant the application is not in itself the subject of a writ of error.³ Although this is the general rule, yet according to some decisions it seems that the application may be made as a matter of legal right, and that when a party brings himself clearly within the statute the court has no discretion in the matter, but must grant the application.⁴

c. VACATION ON APPLICATION OF CREDITORS — (1) *Power to Vacate.* — Upon proper ground being shown the judgment by confession may be vacated or set aside on the application of other creditors of the defendant.⁵

1. *Page v. Wallace*, 87 Ill. 84; *McGuire v. Campbell*, 58 Ill. App. 188.

2. *Sweesey v. Kitchen*, 80 Pa. St. 160; *Roenigk's Appeals*, (Pa. 1886) 3 Atl. Rep. 99; *Kerr's Appeal*, (Pa. 1887) 9 Atl. Rep. 670; *Bates v. Cullum*, 163 Pa. St. 234; *Quinn's Appeal*, 86 Pa. St. 447; *Walter v. Fees*, 155 Pa. St. 55; *Silvers v. Reynolds*, 18 N. J. L. 238.

3. *Sweesey v. Kitchen*, 80 Pa. St. 162. See *Roenigk's Appeals*, (Pa. 1886) 3 Atl. Rep. 99.

4. *Satterlee v. Grubb*, 38 Kan. 234; *Albright v. Warkentin*, 31 Kan. 442.

In *Martin v. Stubbings*, 20 Ill. App. 381, it was held that where a motion to vacate a judgment by confession is made in apt time, if the affidavit read in support of the motion discloses a meritorious defense it is the duty of the court, in the exercise of its equitable jurisdiction over its judgments by confession, to either vacate the judgment or stay all proceedings therein and give the defendant an opportunity to present such defense.

In *Burley v. Millard*, 11 Neb. 286, it was held that where a judgment was rendered by confession in the absence of the attorney for the defendant, and a sufficient showing was made of the misunderstanding of the attorney, it was an abuse of discretion for the court to refuse to restore the cause for trial.

5. *California.* — *Arrington v. Sherry*, 5 Cal. 513; *Meeker v. Harris*, 19 Cal. 278; *Pehrson v. Hewitt*, 79 Cal. 594; *Pond v. Davenport*, 45 Cal. 225; *Wilcoxson v. Burton*, 27 Cal. 228; *King v. Davis*, 34 Cal. 100.

Illinois. — *Kingman v. Reinemer*, 58 Ill. App. 173.

Indiana. — *Bruner v. Manville*, 2 Blackf. (Ind.) 485.

Iowa. — *Bernard v. Douglas*, 10 Iowa 370.

New Jersey. — *Shallcross v. Deats*, 43 N. J. L. 177; *Warwick v. Petty*, 44 N. J. L. 542.

New York. — *Frasier v. Frasier*, 9 Johns. (N. Y.) 80; *Chappel v. Chappel*, 12 N. Y. 215; *Rae v. Lawser*, 18 How. Pr. (N. Y. Supreme Ct.) 23; *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142; *Dunham v. Waterman*, 17 N. Y. 9; *Winnebrenner v. Edgerton*, 30 Barb. (N. Y.) 185; *Manufacturers', etc., Bank v. Boyd*, 3 Den. (N. Y.) 257; *Jessup v. Hulse*, 29 Barb. (N. Y.) 539; *Miller v. Earle*, 24 N. Y. 110; *Kendall v. Hodgins*, 1 Bosw. (N. Y.) 659; *Fort v. Fort*, 9 Wend. (N. Y.) 442; *Rutherford v. Schottman*, (Supreme Ct.) 17 N. Y. St. Rep. 263; *Norris v. Denton*, 30 Barb. (N. Y.) 117; *Daly v. Matthews*, 12 Abb. Pr. (N. Y. Supreme Ct.) 403 note; *Murray v. Judson*, 9 N. Y. 73; *Schoolcraft v. Thompson*, 9 How. Pr. (N. Y. Supreme Ct.) 61.

North Carolina. — *Sharp v. Danville, etc., R. Co.*, 106 N. Car. 308.

Pennsylvania. — *Hagy v. Poike*, 160 Pa. St. 522.

South Carolina. — *Ex p. Carroll*, 17 S. Car. 449; *Kohn v. Meyer*, 19 S. Car. 197.

Wisconsin. — *Thompson v. Hintgen*, 11 Wis. 112; *Pirie v. Hughes*, 43 Wis. 531.

Collateral Attack. — In *Indiana* it was provided by statute that "judgments may be rendered by confession, and no

(2) *Grounds for Vacation.* — The power to vacate a judgment by confession being an equitable power, and, whether exercised by courts of law or equity, always to be exercised on equitable principles, a judgment by confession will not be vacated for a mere irregularity.¹ Such judgments will, however, be vacated, upon proper application, on the ground of fraud,² or for failure substantially to comply with the requirements of the statute authorizing such judgments.³

(3) *Who May Move.* — According to some decisions the right to move to set aside the judgment by confession is confined to judgment creditors.⁴ According to the majority of cases, however, it would seem that this right is not confined to such persons.⁵

(4) *Time of Application.* — A motion to vacate a judgment filed at the next ensuing term of court after the confession of judgment in vacation is in apt time.⁶ A judgment entered on an

appeal shall lie therefrom, but the same may be collaterally impeached for fraud by creditors of the judgment debtor, and such judgment shall be void as to such creditors unless, at the time of the rendition thereof, the defendant makes affidavit that he justly owes the debt." In *Feaster v. Woodfill*, 23 Ind. 493, it was held that since no distinction was made by the statute above quoted, a judgment by confession could be impeached collaterally for fraud by creditors of the judgment debtor, whether existing at the time of the rendition of the judgment, or subsequent thereto.

1. *Pirie v. Hughes*, 43 Wis. 531.

2. *Warwick v. Petty*, 44 N. J. L. 542; *White v. Williams*, 1 Paige (N. Y.) 502; *Hagy v. Poike*, 160 Pa. St. 522; *Kohn v. Meyer*, 19 S. Car. 197; *Pirie v. Hughes*, 43 Wis. 531.

Sufficiency of Proof. — Alleged fraud must be established either by direct proof or by clearly proved facts sufficient to warrant a presumption of its existence. It is not enough to charge fraud and prove in support thereof slight circumstances of suspicion only. *Hagy v. Poike*, 160 Pa. St. 522.

3. *Bernard v. Douglas*, 10 Iowa 370; *Warwick v. Petty*, 44 N. J. L. 542; *Chappel v. Chappel*, 12 N. Y. 215; *Murray v. Judson*, 9 N. Y. 73; *Schoolcraft v. Thompson*, 9 How. Pr. (N. Y. Supreme Ct.) 61; *Thompson v. Hintgen*, 11 Wis. 112.

4. *Wintringham v. Wintringham*, 20 Johns. (N. Y.) 296; *Bentley v. Goodwin*, 38 Barb. (N. Y.) 633.

5. *Norris v. Denton*, 30 Barb. (N. Y.) 117; *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142; *Daly v. Matthews*, 12 Abb. Pr. (N. Y. Supreme Ct.) 403, note.

Bona Fide Purchasers. — A judgment entered on an insufficient statement, and an execution issued thereon, may, on motion of a subsequent purchaser in good faith of lands on which the judgment is an apparent lien, be set aside as to such purchasers and the lands so purchased, and such lands may be declared free from the apparent lien and from any proceeding upon such judgment. *Kendall v. Hodgins*, 1 Bosw. (N. Y.) 659, holding that subsequent purchasers in good faith, etc., though not named in the provisions of the code, should be protected, and are entitled to the same relief, and may obtain it by the same procedure, as judgment creditors.

Assignee in Insolvency. — If confessions of judgment are prohibited by the insolvent law, the assignee in insolvency can have them adjudged void upon a proper proceeding for that purpose. *Pehrson v. Hewitt*, 79 Cal. 594.

Lien Acquired by Attachment. — In a suit to set aside a judgment confessed by a party to defraud his creditors, it is not necessary that the plaintiff should be either a judgment or an execution creditor. A lien acquired by attachment suffices. *Scales v. Scott*, 13 Cal. 77.

6. *Kingman v. Reinemer*, 58 Ill. App. 173.

insufficient statement is not merely irregular, and may be set aside upon motion of a judgment creditor more than a year after its entry.¹

(5) *Manner of Application*.—The provisions differ in the various states as to the manner in which the application shall be made. Thus, in some it is to be made by motion,² while in others the remedy is by action in the nature of a creditor's bill.³

(6) *Proceedings upon Application*.—Where an application charges that a judgment by confession has been fraudulently entered upon a bond and warrant of attorney, the court may direct an issue between the parties to try the truth of such allegations⁴ in such manner that the plaintiff may be bound on the trial of such issue to set out and prove the consideration of the bond,⁵ and may

1. *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142.

Within Five Years After Entry.—In *Ex p. Carroll*, 17 S. Car. 446, it was held that a motion by a junior judgment creditor to set aside and invalidate a judgment was not barred by lapse of time when made within five years after the confession of judgment was entered, especially where the moving party had not been guilty of laches.

Motion by Attaching Creditor.—In *Fort v. Fort*, 9 Wend. (N. Y.) 442, it was held that an attaching creditor under the Absent Debtor Act cannot, before an appointment of trustees, move to set aside a judgment as fraudulently confessed.

2. *Bernard v. Douglas*, 10 Iowa 370; *Chappel v. Chappel*, 12 N. Y. 215; *Rae v. Lawser*, 18 How. Pr. (N. Y. Supreme Ct.) 23; *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142; *Dunham v. Waterman*, 6 Abb. Pr. (N. Y. Ct. App.) 357; *Ex p. Carroll*, 17 S. Car. 446. 3. *Arrington v. Sherry*, 5 Cal. 513. See also *Sharp v. Danville, etc.*, R. Co., 106 N. Car. 308; *Bruner v. Manville*, 2 Blackf. (Ind.) 485.

In New York it was held that a judgment by confession upon an insufficient statement may be set aside, not only by motion, but in an action brought for such purpose. *Dunham v. Waterman*, 6 Abb. Pr. (N. Y. Ct. App.) 357; *Jessup v. Hulse*, 29 Barb. (N. Y.) 539; *Miller v. Earle*, 24 N. Y. 110.

Specification of Grounds.—In *Winnebrenner v. Edgerton*, 30 Barb. (N. Y.) 185, it was held that a motion to set aside a judgment entered upon confession, on account of the defects in the statement, is not founded upon an irregularity so as to require the mov-

ing party to specify in his motion papers the grounds of the motion.

Evidence Need Not Be Set Out in Affidavit.—An allegation that a judgment is fraudulent and without *bona fide* consideration, and was confessed and is being used for the purpose of hindering, delaying, and defrauding other creditors, is a sufficient averment of material facts in dispute, and it is not necessary to state in the affidavit the means by which the want of consideration is to be proved. That is to say, the applicant is not bound to give his evidence in his affidavit. *Moore v. Dunn*, 147 Pa. St. 359.

4. *Frasier v. Frasier*, 9 Johns. (N. Y.) 80. See also *Bach v. Morey*, 1 Lehigh Valley Rep. (Pa.) 58; *Lynch v. English*, 4 Del. (Pa.) 481; *Moore v. Dunn*, 147 Pa. St. 359; *M'Neal v. Smith*, 1 Yeates (Pa.) 552; *Reynolds v. Britton*, 18 N. J. L. 304.

Bill of Particulars.—Where the court, at the instance of a subsequent judgment creditor seeking to be relieved from a prior confessed judgment, directs a trial for the purpose of ascertaining whether anything, and if anything how much, is really due on such prior judgment, the plaintiff has no right to demand from the creditor a bill of particulars of what he intends to give in evidence on the trial. *Reynolds v. Britton*, 18 N. J. L. 304, holding that the parties may read the affidavits already before the court and give such further evidence as they may see proper, but that if the creditor intends to rely upon other payments, or other facts than those disclosed by the affidavits, he must give notice of them in writing at least ten days before the trial.

5. *Frasier v. Frasier*, 9 Johns. (N. Y.)

allow the creditor to subpoena witnesses in the name of the defendant to attend the trial.¹

X. JUDGMENTS BY AGREEMENT OR CONSENT — 1. In General. —

As a rule, any disposition of a pending action, not illegal, may be fairly agreed to, and when so agreed to it becomes the duty of the court to permit such disposition.² The parties may, during an action, agree upon the terms of the judgment, and as to what kind of a judgment shall be entered.³

80. See also *Reynolds v. Britton*, 18 N. J. L. 304.

1. *Frasier v. Frasier*, 9 Johns. (N. Y.)

80.

"The usual practice, and doubtless the better one, is to hear such motions on affidavits, and if the defendant shall satisfy the court that it is probable that he has suffered injustice by the entry of judgment by default or confession, the court should vacate the judgment and let the party in to plead and make his defense. But if the court should hear the motion on verbal testimony, or before a jury to try a feigned issue, and should set the judgment aside, no exception can be taken to the proceeding in this court. The object of the evidence, whether by affidavit, deposition, or heard orally in court, is to inform the court of the propriety of setting aside the judgment, and the same end may be attained by either mode. Nor can it be objected that in vacating the judgment the court acted upon the verdict of the jury on the feigned issue, as it is a matter of judicial discretion, to be exercised by the court as in other cases." *Per Walker, J.*, in *Bolton v. McKinley*, 22 Ill. 203.

2. *Berry v. Somerset R. Co.*, 89 Me. 552.

Agreement as to Amount. — When parties determine by agreement the amount which is to be paid by way of compromise of the suit, their determination stands in the place of a judgment of the court, and upon payment of the sum agreed upon the defendant has a right to demand that the plaintiff shall do what in his petition he has expressed a willingness to do, although the defendant has not asked such specific relief. *Robertson v. Iowa Cent. R. Co.*, 57 Iowa 376. See also *Jarrett v. State*, 5 Gill & J. (Md.) 27.

Premature Entry of Judgment on Stipulation. — Where a stipulation authorized the entry of a judgment upon a final judgment being obtained in another action, a judgment pursuant to such

stipulation cannot be entered while a motion for a new trial in the latter cause is pending. *Gillmore v. American Cent. Ins. Co.*, 65 Cal. 63.

3. *California.* — *Partridge v. Shepard*, 71 Cal. 470; *McCreery v. Fuller*, 63 Cal. 30.

Indiana. — *Fletcher v. Holmes*, 25 Ind. 458; *Robinson v. Starley*, 29 Ind. 298; *Jarrett v. Andrews*, 19 Ind. 403.

Iowa. — *Vail v. Stone*, 13 Iowa 284; *Robertson v. Iowa Cent. R. Co.*, 57 Iowa 376; *Brown v. Newman*, 13 Iowa 546.

Kansas. — *Union Pac. R. Co. v. McCarty*, 8 Kan. 126.

Louisiana. — *Dunn v. Pipes*, 20 La. Ann. 276; *Greenwood v. New Orleans*, 12 La. Ann. 426.

Missouri. — *Tupperry v. Hertung*, 46 Mo. 135; *Holmes v. Guion*, 44 Mo. 164.

Nebraska. — *Hamley v. Doe*, 36 Neb. 398.

New Hampshire. — *Hillsborough v. Nichols*, 46 N. H. 379.

New York. — *Herring v. New York, etc., R. Co.*, 105 N. Y. 340; *French v. Shotwell*, 5 Johns. Ch. (N. Y.) 555.

North Carolina. — *Gay v. Grant*, 101 N. Car. 206; *Stancill v. Gay*, 92 N. Car. 455.

Ohio. — *Hart v. Sarvis*, 3 Ohio N. P. 316.

South Carolina. — *Clyburn v. Reynolds*, 31 S. Car. 91; *Jones v. Webb*, 8 S. Car. 202.

Texas. — *Burton v. Varnell*, 1 Tex. 635; *Lauderdale v. R. & T. A. Ennis Stationery Co.*, (Tex. Civ. App. 1894) 24 S. W. Rep. 834; *Henderson v. Moss*, 82 Tex. 69; *Hollis v. Dashiell*, 52 Tex. 187; *Willis v. Pounds*, 6 Tex. Civ. App. 512.

Virginia. — *Richmond, etc., R. Co. v. Shippen*, 2 Patt. & H. (Va.) 327; *Old Dominion Bank v. McVeigh*, 32 Gratt. (Va.) 530.

United States. — *U. S. v. Parker*, 120 U. S. 89; *Simmons v. Baynard*, 30 Fed. Rep. 532; *Burgess v. Seligman*, 107 U. S. 20.

Conclusiveness. — Any judgment entered by consent where the court has full jurisdiction is as efficacious as though it had been entered after a trial of the issues,¹ and is binding and conclusive between the parties and their privies,² unless procured by fraud.³

Canada. — *Charlebois v. Delap*, 26 Can. Super. Ct. Rep. 221.

Distinguished from Judgment by Confession. — In *Lauderdale v. R. & T. A. Ennis Stationery Co.*, (Tex. Civ. App. 1894) 24 S. W. Rep. 834, the court said: "The judgment upon its face shows that it was rendered upon agreement of the parties. We have had some difficulty in determining whether a judgment thus rendered can substantially be distinguished from a judgment by confession. The first presupposes an agreement of the parties as a basis for it, and the latter an act of the defendant alone. The distinction is more technical than substantial. * * * The effect is the same in each instance, whether the judgment is obtained by the agreement or the confession. One is as much the voluntary act of the defendant as the other. * * * The term 'agreement,' * * * we think, necessarily involves the idea of confession, for the agreement is nothing more than an admission or confession by the party defendant that he owes the amount and is willing that judgment be rendered against him for it. This is necessarily the same consequence that results from a confession."

In the Nature of a Contract. — A judgment by consent of parties is in the nature of a contract between them, and cannot be set aside where fraud or mistake is not alleged, merely because of some irregularity of procedure. *Jones v. Webb*, 8 S. Car. 202.

Such Judgment an Entirety. — A judgment entered by consent of parties is entire, even though the court erred respecting the mode of adjusting the compensation to be paid by one party to another. In such case the party will not be permitted to insist upon a right secured by the judgment and to repudiate the compensation required by the judgment to be made. *Union Pac. R. Co. v. McCarty*, 8 Kan. 126.

Verification. — In *Lauderdale v. R. & T. A. Ennis Stationery Co.*, (Tex. Civ. App. 1894) 24 S. W. Rep. 834, it was held that where a judgment is entered "by agreement of parties," such judgment comes under article 1347 of Sayles's Civ. Stat. Tex., which requires

verification by a justice of a debt alleged and confessed without process.

1. *Partridge v. Shepard*, 71 Cal. 470.

2. *California.* — *McCreery v. Fuller*, 63 Cal. 30.

Georgia. — *McDowell v. Sutlive*, 78 Ga. 142.

Louisiana. — *Dunn v. Pipes*, 20 La. Ann. 276.

Nebraska. — *Hamley v. Doe*, 36 Neb. 398.

New Hampshire. — *Hillsborough v. Nichols*, 46 N. H. 379.

New York. — *French v. Shotwell*, 5 Johns. Ch. (N. Y.) 555.

South Carolina. — *Clyburn v. Reynolds*, 31 S. Car. 95.

Texas. — *Henderson v. Moss*, 82 Tex. 69.

Virginia. — *Richmond, etc., R. Co. v. Shippen*, 2 Patt. & H. (Va.) 327.

United States. — *Burgess v. Seligman*, 107 U. S. 20.

3. *French v. Shotwell*, 5 Johns. Ch. (N. Y.) 555; *Richmond, etc., R. Co. v. Shippen*, 2 Patt. & H. (Va.) 327; *Hamley v. Doe*, 36 Neb. 398.

It cannot be attacked by the parties to it, either directly or collaterally, though it may be assailed for fraud. *Jones v. Webb*, 8 S. Car. 202; *Semple v. Wright*, 32 Cal. 659; *Goliad v. Weisiger*, 4 Tex. Civ. App. 653.

Although Pleadings Would Not Authorize. — In *Fletcher v. Holmes*, 25 Ind. 458, it was held that a judgment entered by agreement by a court of general jurisdiction, having the parties before it, will bind those by whose agreement it was entered, even though the pleadings would not, if the case were contested, authorize such a judgment as was agreed to. See also article DECRIES, vol. 5, p. 962.

Consent Does Not Enlarge or Affect Judgment. — An agreement of parties under which a judgment is rendered does not serve to enlarge the scope of the estoppel of the judgment, when it was such as the plaintiff was entitled to without the agreement. *Willis v. Pounds*, 6 Tex. Civ. App. 512. The consent is merged in the judgment. *Holmes v. Guion*, 44 Mo. 164.

Judgment by Consent of Some Parties Only. — The fact that a judgment or

2. Conformity to Agreement. — Where parties agree in writing to a judgment, such judgment must be in conformity to the terms agreed upon.¹

3. For What Rendered. — A judgment may be rendered by agreement or consent not only for debts due, but also to cover future advances.²

4. Who May Agree or Consent. — A party may, in person, agree to a judgment against him,³ or the attorneys of the parties may agree or consent to the judgment.⁴ Such judgment must, however, be in conformity to the law.⁵

order is by consent of some only of the parties in open court will not render it invalid as to those who do not consent. It will be binding upon the latter unless an appeal is taken, and the order or judgment set aside as to those who do not consent, upon other grounds than want of consent. *Clyburn v. Reynolds*, 31 S. Car. 91.

Complaint Unnecessary. — The fact that no complaint appears in the record will not render a judgment invalid where it was either entered by consent or subsequently ratified by assent. *Stancill v. Gay*, 92 N. Car. 455, where the court said: "No complaint appears in the record, nor is it certain one was filed. The clerk finds as a fact that there was one, and that it was lost. The judge finds that the only evidence of this was the recitals in the judgment. These recitals were evidence, but not conclusive. But if there was no complaint filed, this fault alone did not render the judgment void. The court having jurisdiction of the subject of the action and the parties to it, the latter might consent to the entry of a judgment by express agreement, or, one having been entered, they might assent to it. There is a presumption in favor of the regularity of the judgment — that the court gave it in the course of procedure, or that the parties consented to it." See also *Vick v. Pope*, 81 N. Car. 22.

"The object of a complaint is to inform the defendant of the nature of the plaintiff's case. It is for his protection that it is required. If he wishes to waive it, or agrees to the granting of greater relief than could otherwise be given under its averments, without amendment, and such relief is given by his consent, we think that the judgment is not even erroneous, much less void, as to him." *Per* *Frazer, C. J.*, in *Fletcher v. Holmes*, 25 Ind. 458.

Alteration by Court Without Consent of

Parties. — In *Berry v. Somerset R. Co.*, 89 Me. 552, the parties in the pending action agreed to enter it: "Neither party, no further suit for the same cause." It was held that the judgment being so entered, and there being neither fraud nor mistake in the making of the agreement, it was a binding disposition of the cause, and could not be changed by the court without the consent of the parties thereto. See also *Kerchner v. McEachern*, 93 N. Car. 447; *Stump v. Long*, 84 N. Car. 616.

1. *Sprowl v. Stewart*, 19 La. Ann. 433, holding that where the parties to a suit have consented in writing to a judgment, and the judgment of the court does not conform to the consent, either party has a right to appeal to have the error corrected.

2. *Livingston v. M'Inlay*, 16 Johns. (N. Y.) 165.

3. *Robinson v. Starley*, 29 Ind. 298.

Assent by Agent. — In *Brown v. Newman*, 13 Iowa 546, it was held that an agent may appear and assent to a judgment, and that his authority need not appear of record.

4. *Tupper v. Hertung*, 46 Mo. 135; *Hudson v. Allison*, 54 Ind. 215; *Jones v. Webb*, 8 S. Car. 202; *Simmons v. Baynard*, 30 Fed. Rep. 532.

5. *Tupper v. Hertung*, 46 Mo. 135, holding that it is within the province of attorneys in the cause, in the conduct thereof, to agree upon the terms, and what kind of a judgment shall be entered.

Without Summons or Personal Appearance. — In *Jarrett v. Andrews*, 19 Ind. 403, it was held that a judgment by agreement of attorney without a summons or a personal appearance of the defendant can only be rendered when a written authority to the attorney from his client is produced and proven.

Authority Conferred by Authority to Confess. — In *Hart v. Sarvis*, 3 Ohio N. P.

5. Requisites of Agreement — To Be in Writing. — The agreement between the parties for judgment should be in writing.¹

Filing. — The agreement should be filed.²

6. Effect as Waiver of Error. — A judgment by consent or agreement operates as a waiver of all errors committed before its rendition,³ except such as would involve the jurisdiction of the court.⁴

7. Vacating. — A consent judgment may be vacated on the ground of fraud, mutual mistake, or surprise.⁵

XI. JUDGMENTS ON OFFER. — See article OFFERS IN PLEADINGS.

XII. JUDGMENTS ON PLEADINGS — 1. When Proper — a. GENERAL RULE. — Generally speaking, judgment upon the pleadings is only proper in cases where the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be produced.⁶

316, it was held that a warrant of attorney in a note authorizing any attorney to appear for the maker in any court and confess judgment empowers the attorney to appear in a suit upon the note and consent to judgment.

1. *Sprowl v. Stewart*, 19 La. Ann. 433.

Under the *Iowa* Code, which provided that parties may submit to any judgments which may be agreed to between them, it was held that the agreement must be in writing. *Vail v. Stone*, 13 Iowa 284.

2. *Vail v. Stone*, 13 Iowa 284, where it was said that the agreement for judgment, when properly filed, becomes a part of the record in the case.

3. *Tait v. Matthews*, 33 Tex. 112; *McDaniel v. Monday*, 35 Tex. 39; *Buffalo Bayou, etc., R. Co. v. Ferris*, 26 Tex. 588.

Defects in the Complaint. — In *Hudson v. Allison*, 54 Ind. 215, it was held that a judgment by consent waives or cures all defects in the complaint.

Waiver of Demurrer to Complaint. — In *Spinetti v. Brignardello*, 53 Cal. 281, it was held that where a defendant consents to a judgment against him he waives a demurrer to the complaint.

4. *Lessing v. Cunningham*, 55 Tex. 231. See also *Laird v. Thomas*, 22 Tex. 280.

In *Townsend v. Moore*, 13 Tex. 36, it was agreed by the parties that their attorneys should decide upon their respective rights, or, if unable to agree, they should call an umpire. Such umpire was called in, and his opinion was given in writing, and a decree in accordance therewith filed, upon which a

judgment was rendered. This was held to be a judgment by consent, and as such it operated as a waiver of all errors.

5. *Kerchner v. McEachern*, 93 N. Car. 447; *Anderson v. Carr*, (Supreme Ct.) 7 N. Y. Supp. 281; *Elder v. Ottawa First Nat. Bank*, 12 Kan. 238.

Insufficient Grounds for Vacation. — Where, in compromise of a claim, judgment has been rendered against the defendant with his consent, he cannot, in the absence of proof of fraud, have it vacated on the ground that he acted on the erroneous advice of counsel. *Anderson v. Carr*, (Supreme Ct.) 7 N. Y. Supp. 281.

Where, in an action regularly commenced and procured without fraud or fraudulent representations, judgment is rendered by consent against the defendants, they cannot thereafter have the judgment set aside and a new trial granted on the ground of the existence of a plea and legal defense of the action of the nature and existence of which they were unaware at the time the judgment was entered. *Elder v. Ottawa First Nat. Bank*, 12 Kan. 238.

6. *Rice v. Bush*, 16 Colo. 484.

A motion by one party for judgment upon the pleadings after issue joined will be denied if his adversary's pleadings, though defective in form, are sufficient in substance to sustain a judgment in his favor. *Rice v. Bush*, 16 Colo. 484; *Iba v. Central Assoc.*, (Wyoming 1895) 40 Pac. Rep. 527.

In *Watson v. Higgins*, 7 Ark. 475, it was held that where no evidence at all is offered by the party upon whom the burden of proof is thrown by the plead-

b. JUDGMENT ON INSUFFICIENT PLEADINGS — (1) *On Answer.*

— A judgment for the plaintiff is properly rendered where the answer admits or leaves undenied the material allegations of the complaint.¹ Where an answer does not deny all the facts alleged

ings, the other party is entitled to judgment.

In Oregon it was questioned whether, under the code of that state, a court is authorized to render judgment on the pleadings for the defendant except when the answer contains new matter constituting a defense or counterclaim, and the plaintiff fails to reply or demur thereto. *Bowles v. Doble*, 11 Oregon 474. See also *Watkins v. Southern Pac. R. Co.*, 38 Fed. Rep. 711.

In Washington it has been held that a judgment for the defendant on the pleadings for insufficiency of the reply to an affirmative defense in the answer is properly refused under the code, which authorizes such a judgment only where no reply whatever is filed to the affirmative matter in the answer. *Davis v. Ford*, 15 Wash. 107.

In New York it was at one time held improper to grant a motion for judgment on the pleadings. *Giles Lithographic, etc., Co. v. Recamier Mfg. Co.*, 14 Daly (N. Y.) 475.

1. *Arizona*. — *Miles v. McCallan*, 1 Arizona 491; *Hancock v. Herrick*, (Arizona 1891) 29 Pac. Rep. 13.

California. — *Hicks v. Lovell*, 64 Cal. 14; *Botto v. Vandament*, 67 Cal. 332; *Prost v. More*, 40 Cal. 347; *San Francisco v. Staude*, 92 Cal. 560; *Drew v. Pedlar*, 87 Cal. 443; *Whitwell v. Thomas*, 9 Cal. 499; *Gardner v. Donnelly*, 86 Cal. 367; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67; *Loveland v. Garner*, 74 Cal. 298; *Hemme v. Hays*, 55 Cal. 339; *Gay v. Winter*, 34 Cal. 153; *Fitzgibbon v. Calvert*, 39 Cal. 261; *Doll v. Good*, 38 Cal. 287; *Felch v. Beaudry*, 40 Cal. 439, where the court said: "The ground upon which a motion made by plaintiff for judgment on the pleadings proceeds in any case is that his complaint is sufficient to warrant it, and that the answer presents nothing, either by way of denial or of new matter, to bar or defeat the action."

Idaho. — *Alvord v. U. S.*, 1 Idaho 585.

Indiana. — *Barnard v. Haworth*, 9 Ind. 103.

Kansas. — *Hutchison v. Myers*, 52 Kan. 290.

Kentucky. — *Field v. Montmollin*, 5 Bush (Ky.) 457.

Minnesota. — *Lloyd v. Second*, 61 Minn. 448; *Norton v. Beckman*, 53 Minn. 456; *Horn v. Butler*, 39 Minn. 515; *Hitchcock v. Turnbull*, 44 Minn. 475.

Montana. — *State v. Votaw*, 13 Mont. 403; *Sweeney v. Schlessinger*, 18 Mont. 326; *McDonald v. Pincus*, 13 Mont. 83; *Lomme v. Kintzing*, 1 Mont. 290; *Sands v. Maclay*, 2 Mont. 35.

Nebraska. — *Irish v. Pheby*, 28 Neb. 231.

New Hampshire. — *Rochester v. Whitehouse*, 15 N. H. 468.

New York. — *Mallory v. Lamphear*, 8 How. Pr. (N. Y. Supreme Ct.) 491.

Ohio. — *Tootle v. Clifton*, 22 Ohio St. 247.

South Dakota. — *Fargo v. Vincent*, 6 S. Dak. 209.

Washington. — *Port v. Parfit*, 4 Wash. 369; *Lake v. Steinbach*, 5 Wash. 663; *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 636.

Whenever the answer fails to deny any of the material allegations of the complaint in such form as to put the same in issue, the plaintiff is entitled to judgment upon the pleadings. *Doll v. Good*, 38 Cal. 287.

Where the issue taken upon rejoinder is immaterial, but the plea admits the cause of action, there must be a judgment for the plaintiff. *Rochester v. Whitehouse*, 15 N. H. 468.

Illustrations. — Where a complaint in an action on a promissory note executed by two defendants averred that the defendants were partners and that the note was executed by them, and the answer simply denied that the defendants were partners, and did not deny that they executed the note, it was held that the averment of partnership was immaterial, and that the plaintiff was entitled to judgment on the pleadings. The execution of the note, not the co-partnership of the defendants at the time, constituted the material averment. *Whitwell v. Thomas*, 9 Cal. 499. If an answer to a complaint on a promissory note alleges a failure of the payee to perform an agreement for labor which was the consideration for

in the complaint, but denies legal conclusions only, judgment on the pleadings for the plaintiff is proper.¹ Judgment on the pleadings cannot, however, be properly rendered where the answer denies any material allegation of the complaint.² A verified

the note, without alleging the terms of the agreement, or the conditions or effect thereof, no ground of defense is stated, and, the defendant failing to amend his answer, the plaintiff is entitled to judgment on the pleadings. *McDonald v. Pincus*, 13 Mont. 85.

An answer, in an action by a judgment creditor against a garnishee who denies that he is indebted to the judgment debtor, which in effect admits that the garnishee has money belonging to the judgment debtor, either personally or in his representative capacity, and in which capacity the defendant does not know, raises no issue, and a judgment is properly rendered on the complaint if the same be sufficient. *Sweeney v. Schlessinger*, 18 Mont. 326.

Judgment may be rendered on the pleadings against a tenant holding over after default in payment of rent although he denies the plaintiff's right of possession, if he admits that he leased the premises from the plaintiff's intestate, and that as such tenant he is indebted for certain rent. *State v. Votaw*, 13 Mont. 403.

Judgment for the plaintiff may be ordered on the pleadings where the answer states merely a counterclaim or set-off of nominal damages only. *Hitchcock v. Turnbull*, 44 Minn. 475.

No Proof by Plaintiff Necessary.—Where the allegations of a complaint are not denied by the defendants, the plaintiff is entitled to a judgment on the pleadings without any proof on his part. *Alvord v. U. S.*, 1 Idaho 585.

Finding of Facts Unnecessary.—When a judgment is rendered on the pleadings, the court need not make any finding of facts. *Taylor v. Palmer*, 31 Cal. 240. See also *Martin v. Smith*, 53 N. Y. Super. Ct. 277; *Eaton v. Wells*, 82 N. Y. 576.

1. *Simpson v. Prather*, 5 Oregon 86. The denial of indebtedness of the defendants to the plaintiff is a denial of a conclusion of law, and when inconsistent with admitted facts cannot avail to prevent a judgment for the plaintiff on the pleadings. *Drew v. Pedlar*, 87 Cal. 443. See also *State v. Votaw*, 13 Mont. 403; and generally article **LEGAL CONCLUSIONS**.

2. *California*.—*Martin v. Porter*, 84 Cal. 476; *Garvey v. Willis*, 50 Cal. 619; *Botto v. Vandament*, 67 Cal. 332; *Nudd v. Thompson*, 34 Cal. 39; *Amador County v. Butterfield*, 51 Cal. 526; *Forrester v. Flores*, 64 Cal. 24; *Tibbets v. Blade*, 60 Cal. 428.

Idaho.—*Johnson v. Manning*, 2 Idaho 1074.

Indiana.—*Doyal v. Landes*, 119 Ind. 479; *Stevens v. Overturf*, 62 Ind. 331.

Kansas.—*Chapman v. Tallant*, 1 Kan. App. 799; *McCrea v. Leavenworth*, 46 Kan. 767.

Montana.—*Floyd v. Johnson*, 17 Mont. 469; *Horsky v. Moran*, 13 Mont. 267; *Bach v. Montana Lumber, etc., Co.*, 15 Mont. 345.

New York.—*Burns v. Monell*, (City Ct.) 26 N. Y. St. Rep. 942; *Lloyd v. Ballantine*, 20 Misc. Rep. (N. Y. Supreme Ct.) 141.

Oregon.—*Willis v. Holmes*, 28 Oregon 265.

Pennsylvania.—*Laubach v. Meyers*, 147 Pa. St. 447.

United States.—*Jones v. Rowley*, 73 Fed. Rep. 286.

Answers Held to Raise Material Issues.—An answer by an insolvent in an action of replevin by the assignee in insolvency, disclaiming and denying that he was ever the owner, or in possession of, or entitled to, the possession of the property claimed, or ever withheld it or refused to deliver it to the plaintiff, raises material issues which will preclude a judgment on the pleadings in favor of the assignee. *Martin v. Porter*, 84 Cal. 476.

If the complaint in replevin alleges the plaintiff's ownership and right to the possession of the goods, and this allegation is properly denied in the answer in the disjunctive, it is error to render judgment on the pleadings though there be other faulty denials in the answer. *Bach v. Montana Lumber, etc., Co.*, 15 Mont. 345.

In *Forrester v. Flores*, 64 Cal. 24, the complaint alleged the making of an agreement, without stating whether it was in writing or not, and also alleged the payment of the purchase-money. The answer denied the agreement, and averred that there was no contract or

answer which in any part contains a distinct denial of a fact material to the plaintiff's recovery cannot, whatever its defects, be treated as a nullity so as to entitle the plaintiff to judgment on the pleadings.¹

Denial of Unnecessary Averment. — Where an unnecessary issue is tendered by the plaintiff, it may be controverted by the defendant, and such denial will be sufficient to prevent rendition of a judgment on the pleadings.²

(2) *On Insufficient Pleadings of Plaintiff.* — Judgment may be rendered for the defendant on the pleadings when the pleadings of the plaintiff are in substance insufficient to sustain a judgment for him.³ Such judgments are most commonly rendered for the reason that the replication admits or leaves undenied the material averments of fact in the answer,⁴ and are improper where an issue

agreement in writing, but was silent as to the payment of the purchase-money. It was held that a motion for judgment on the pleadings was properly denied.

Inconsistent Defense. — A judgment on the pleadings is not authorized if the answer denies the material allegations of the complaint, although in a special defense separately stated the allegations formerly denied are admitted. *Botto v. Vandament*, 67 Cal. 332.

If the answer contains a denial of the material facts alleged as a cause of action in the complaint, and a special defense, stated separately, the plaintiff is not entitled to a judgment on the pleadings, even if the entire cause of action is confessed in the special defense. *Nudd v. Thompson*, 34 Cal. 39. See also, to the same effect, *Amador County v. Butterfield*, 51 Cal. 526; *Milner v. Chandler*, 59 Cal. 541.

A Single Material Issue raised by an answer is sufficient to preclude judgment on the pleadings for the plaintiff. *Widmer v. Martin*, 87 Cal. 88; *Johnson v. Manning*, 2 Idaho 1073; *Hancock v. Herrick*, (Arizona 1891) 29 Pac. Rep. 13.

In *Speer v. Craig*, 16 Colo. 478, it was held that a motion for judgment on the pleadings "touches the substance and not the form of the pleading attacked. It is usually interposed only where one or more of the material averments of fact in the complaint or answer are admitted or left undenied by the answer or replication."

1. *Ghirardelli v. McDermott*, 22 Cal. 539. See also *Briggs v. Sholes*, 14 N. H. 262.

If it can be gathered in any way from the answer that an issue is tendered by

the defendant's pleading upon a material matter, the plaintiff should not be allowed judgment. *Rourk v. Miller*, 3 Wash. 73, an action to foreclose a mechanic's lien, where it was held, on motion for judgment on the pleadings, that a statement in the answer alleging that the contract price was \$450 instead of \$550, as the complaint alleged, although referred to the wrong paragraph of the complaint, must be construed to be a denial that the contract price was more than \$450.

2. The plaintiff in an action on a note is not entitled to judgment on the pleadings where an allegation in the complaint of transfer and delivery of the note to the plaintiff from the payee before maturity for a valuable consideration, as a result of which the plaintiff is owner and holder of the note, is denied, although such allegation may have been unnecessary. *Hughes v. Wilcox*, 17 Misc. Rep. (N. Y. Supreme Ct.) 32. See, however, *Wallace v. Baisley*, 22 Oregon 572, where it was held that if the only issue in a case is raised by a denial, in the answer, of immaterial allegations in the complaint, without which a complete cause of action would remain, the plaintiff is entitled to a judgment on the pleadings as a legal right which the court cannot refuse.

3. *Rice v. Bush*, 16 Colo. 484.

4. *Speer v. Craig*, 16 Colo. 478; *Limerick v. Barrett*, 3 Kan. App. 573, *Dean v. Messer*, (Ky. 1895) 30 S. W. Rep. 198.

The petition in an action on the official bond of a justice of the peace alleged the collection of certain moneys by the principal of such bond as a jus-

is framed by the plaintiff's pleadings.¹ Where facts sufficient to constitute a cause of action are stated in the complaint, judgment upon the pleadings cannot properly be rendered for the defendant.² A mistake in the petition which is plainly apparent, and is rectified by the evidence, so that the defendant could not have been prejudiced thereby, will not be ground for a motion by the defendant for judgment on the pleadings.³

c. JUDGMENT FOR FAILURE TO ANSWER OR REPLY. — Judgment may also be rendered for the want of a proper pleading; thus, judgment may be rendered for the plaintiff upon his application, where the defendant has failed to answer a complaint.⁴

tice of the peace, and the answer admitted the execution of said bond, and alleged that the moneys so collected were collected by virtue of a contract made and entered into between the plaintiff and the said justice of the peace. A copy of the contract was made part of the answer, which contract showed upon its face that it was illegal and void as being against public policy, and a reply was filed consisting of a general denial, unverified. It was held that the execution of the written contract was properly alleged and was not put in issue by the allegations of the unverified reply, and that, under such pleadings, the legal effect of the instrument set forth in the answer was admitted, and that a judgment for the defendant was properly rendered upon the pleadings. *Limerick v. Barrett*, 3 Kan. App. 573.

1. *Floyd v. Johnson*, 17 Mont. 469; *Miles v. Edsall*, 7 Mont. 185; *Raymond v. Morrison*, 9 Wash. 156.

A complaint for the specific performance of a contract to convey land, which alleged that two persons named were the equitable owners of such land, but that the legal title was in the name of one only, would be sufficient in substance to prevent judgment on the pleadings for the defendant, although such allegations might be open to a special demurrer or to a motion to make more definite and certain. *Rice v. Bush*, 16 Colo. 484.

A motion for judgment on the pleadings upon the ground that the replication does not specifically deny the new matter set up in the answer should be denied where the denials of the replication are as specific as the allegations which they meet, and controvert both their spirit and their substance. *Miles v. Edsall*, 7 Mont. 185.

A judgment for the defendant on the

pleadings is erroneous, where a breach by him of an actually existing contract is alleged and proved, as under such circumstances the plaintiff is entitled to at least nominal damages. *Mollyneaux v. Wittenberg*, 39 Neb. 547.

Answer to Cross-complaint. — A defendant who has filed a cross-complaint is not entitled to judgment on the pleadings if the answer of the plaintiff states facts which are not consistent with the allegations thereof, and which, if true, would defeat the right of the defendant to recover. *Pfister v. Wade*, 69 Cal. 133.

2. *Denis v. Velati*, 96 Cal. 223.

In *Greenleaf v. Egan*, 30 Minn. 316, it was held that a motion by the defendant for judgment on the pleadings on the ground that the complaint assumes to set forth an equitable cause of action, but fails to state some facts essential thereto, should not be granted if a cause of action of any character is set forth.

3. *Clement v. Hughes*, (Ky. 1891) 17 S. W. Rep. 285.

Omission Supplied by Answer. — A motion for judgment on the pleadings for the reason that there is an apparent defect of parties plaintiff, owing to an omission of certain allegations from the petition, was properly denied where a general demurrer had been overruled, and the answer filed supplied the allegations of the petition which had been omitted, and cured the apparent defect of parties. *Chicago, etc., R. Co. v. German Ins. Co.*, 2 Kan. App. 395.

4. *Argall v. Pitts*, 78 N. Y. 239; *Aymar v. Chase*, 1 Code Rep. N. S. (N. Y. Supreme Ct.) 141; *De Forest v. Baker*, 1 Robt. (N. Y.) 700; *Watson v. Brigham*, 3 How. Pr. (N. Y. Supreme Ct.) 290; *Hoffnung v. Grove*, 18 Abb. Pr. (N. Y. Supreme Ct.) 14; *Swart v. Borst*, 17 How. Pr. (N. Y. Supreme Ct.) 69;

So if an answer sets up new matter constituting a counterclaim, to which the plaintiff fails to reply or demur within the proper time, the defendant may apply, upon due notice, for such judgment as he is entitled to.¹

As to judgment by default upon failure of the defendant to plead or failure of the plaintiff to file a replication, see article DEFAULTS, vol. 6, pp. 72 *et seq.*, 76.

Warner *v.* Kenny, 3 How. Pr. (N. Y. Supreme Ct.) 323; Ryan *v.* McCannell, 1 Sandf. (N. Y.) 709. See also Mayer *v.* Tyson, 1 Bland (Md.) 559.

After Demurrer to Replication.—In Haldeman *v.* Starrett, 23 Ill. 393, it was held that where the defendant had an opportunity to answer over after a demurrer was overruled to a replication, a judgment by *nil dicit* is good without the entry of a formal judgment of *respondent ouster*.

After Demurrer to Complaint Overruled.—In Ackerman *v.* Horicon Iron Mfg. Co., 16 Wis. 155, it was held that when an order has been made overruling a demurrer to a complaint and granting the defendant leave to answer within a specified time, and he fails to answer within such time, but, after its expiration, obtains and serves an order staying all further proceedings in the action, pending an appeal from the order overruling the demurrer, it is irregular for the plaintiff to enter judgment for want of an answer while such order staying proceedings is in force, though he might have done so before it was granted and served.

In Story *v.* Jones, 14 La. Ann. 73, it was held that a judgment by default is properly rendered against the defendant in an attachment suit where the curator *ad hoc*, after exceptions filed by him have been overruled, fails to file an answer.

In Missouri it was² held that, under the Practice Act of 1849, where the defendant, upon whom there had been fifteen days' service of process, filed an answer admitting the cause of action or containing no defense, the plaintiff was entitled to judgment at the return term as for want of an answer. North *v.* Nelson, 21 Mo. 360.

When an Answer Is Struck Out as sham and irrelevant, the proper method of obtaining judgment is to proceed as if no answer had been put in. De Forest *v.* Baker, 1 Robt. (N. Y.) 700; Aymar *v.* Chase, 1 Code Rep. N. S. (N. Y. Supreme Ct.) 141.

Where Amended Answer Stricken Out.

—An original answer is not superseded by an amended answer which is stricken out as being improperly filed, but thereupon the original stands as the answer, and it is error to render judgment for the plaintiff on the ground that there is no pleading on file in the defendant's behalf. Spooner *v.* Cady, (Cal. 1894) 36 Pac. Rep. 104.

What Admitted by Failure to Answer.

—By not answering the complaint a defendant does not admit that the plaintiff is entitled to the relief demanded, but simply that he is entitled to such relief as the facts properly alleged entitle him to have. Argall *v.* Pitts, 78 N. Y. 239.

1. N. Y. Code Civ. Pro., § 515; Lawrence *v.* Bank of Republic, 3 Robt. (N. Y.) 142; McKensie *v.* Farrell, 4 Bosw. (N. Y.) 192; Brown *v.* Spear, 5 How. Pr. (N. Y. Supreme Ct.) 146; Comstock *v.* Hallock, 1 Code Rep. N. S. (N. Y. Supreme Ct.) 200; Stoops *v.* Greensburgh, etc., Plankroad Co., 10 Ind. 47; Perkins *v.* Bragg, 29 Ind. 507; Schurmeier *v.* English, 46 Minn. 306; Heebner *v.* Shepard, 5 N. Dak. 56; Iba *v.* Central Assoc., (Wyoming 1895) 40 Pac. Rep. 527; Watkins *v.* Southern Pac. R. Co., 38 Fed. Rep. 711.

In Comstock *v.* Hallock, 1 Code Rep. N. S. (N. Y. Supreme Ct.) 200, it was held that when an answer denies a material allegation, and as a separate defense sets up new matter in avoidance, and the plaintiff omits to reply, the defendant is not entitled to judgment for want of a reply, for there is an issue undisposed of; but where the denial is merely a part of the new matter, the defendant may so move.

Reply to Mere Defense Unnecessary.

—In McKensie *v.* Farrell, 4 Bosw. (N. Y.) 192, it was held that in accordance with Code Pro., § 168, matters of mere defense in the answer call for no reply.

One Good Affirmative Defense Unreplied To.—In Perkins *v.* Bragg, 29 Ind. 507, it was held that when a plaintiff declines to reply to an answer containing

d. JUDGMENT ON FRIVOLOUS PLEADINGS—(1) Generally.—If a demurrer, answer, or reply be frivolous, the party who is prejudiced thereby may apply to the court or a judge of the court for judgment thereon.¹

Where Complaint Is Insufficient.—Judgment for frivolousness of an answer cannot be granted against the defendant where facts sufficient to constitute a cause of action are not stated in the complaint.²

(2) Test of Frivolous Pleading—In General.—On a motion for judgment on account of the frivolousness of the answer, the only question is whether or not it denies any material allegations of the complaint or sets up any defense;³ and if there is a material

one good affirmative defense, judgment may be rendered for the defendant. See also *Stoops v. Greensburgh*, etc., *Plankroad Co.*, 10 Ind. 47, holding that a defendant is entitled to judgment on the pleadings if the answer alleges payment, and there is no reply.

Cannot Be Ordered at Chambers.—In *Aymar v. Chace*, 12 Barb. (N. Y.) 301, it was held that a judge at chambers cannot order judgment for want of a reply; he can do so only in the case of frivolous pleadings.

1. *Hemme v. Hays*, 55 Cal. 337; *Decker v. Kitchen*, 21 Hun (N. Y.) 332; *Lane v. Gilbert*, 9 How. Pr. (N. Y. Supreme Ct.) 150, holding that where redundant or irrelevant matter in an answer—e. g., mere mitigating circumstances in an action for assault and battery—is such that to strike it out would leave the pleading an unintelligible fragment, raising no issue, the proper remedy is not a motion to strike out, but a motion for judgment on account of frivolousness.

In *Darrow v. Miller*, 5 How. Pr. (N. Y. Supreme Ct.) 247, the court said: "A pleading may be frivolous and still be interposed in good faith; * * * and unless the want of good faith in the pleader is manifest, the pleading, though technically frivolous, should remain on the record. For a party has the right to have any defense honestly interposed passed upon, not only in the court of original jurisdiction, but in a court of appeal. In such a case the remedy of the party alleging the frivolousness of the pleading is, if he desire a summary decision, to move for judgment under section 247 of the code."

Cannot Treat Pleadings as a Nullity.—Under the *New York Code* of 1848 it was held that, on a frivolous answer or demurrer, the plaintiff might move

for judgment as for want of an answer. *Noble v. Trowbridge*, 1 Code Rep. (N. Y.) 38. Under the later provision of the code, however (*Bliss's Code*, § 537), a frivolous pleading cannot be treated as a nullity, but the party aggrieved must demur or move. *Decker v. Kitchen*, 21 Hun (N. Y.) 332, where the court said: "We think this provision has superseded the practice of treating an answer as a nullity although the court may deem it frivolous, and the practice of disregarding an answer regularly served has long been discontinued. Its reintroduction is not desirable, as it would lead to innumerable motions if attorneys were to assume to judge for themselves whether an answer is frivolous, and, upon coming to such conclusion, to disregard it." See also *Patridge v. McCarthy*, 1 Code Rep. (N. Y.) 49.

Judgment on Frivolous Demurrers.—For the practice in rendering judgment upon a frivolous demurrer, see article DEMURRERS AT COMMON LAW AND UNDER THE CODES, vol. 6, pp. 385-387.

2. *Van Alstyne v. Friday*, 41 N. Y. 174; *Munger v. Shannon*, 61 N. Y. 251.

3. *California.*—*Hemme v. Hays*, 55 Cal. 337; *Montgomery v. Merrill*, 62 Cal. 385.

New York.—*Livingston v. Hammer*, 7 Bosw. (N. Y.) 670; *Martin v. Kanouse*, 2 Abb. Pr. (N. Y. Supreme Ct.) 327; *Hull v. Smith*, 8 How. Pr. (N. Y. Super. Ct.) 149; *Kelly v. Barnett*, 16 How. Pr. (N. Y. Supreme Ct.) 135; *Brown v. Jenison*, 3 Sandf. (N. Y.) 732; *Lefferts v. Snediker*, 1 Abb. Pr. (N. Y. Supreme Ct.) 41; *Nichols v. Jones*, 6 How. Pr. (N. Y. Supreme Ct.) 355; *Crucible Co. v. New York City Steel Works*, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 195; *Youngs v. Kent*, 46 N. Y. 672; *Sixpenny Sav. Bank v. Sloan*, 12

issue presented by the answer, such answer will not be held frivolous,¹ even though it may also contain immaterial allegations.²

How. Pr. (N. Y. Supreme Ct.) 543; *Leach v. Boynton*, 3 Abb. Pr. (N. Y. Supreme Ct.) 1; *Hecker v. Mitchell*, 5 Abb. Pr. (N. Y. Super. Ct.) 453; *Smith v. Mead*, 14 Abb. Pr. (N. Y. Supreme Ct.) 262; *Shearman v. New York Cent. Mills*, 1 Abb. Pr. (N. Y. Supreme Ct.) 187; *St. Mark's F. Ins. Co. v. Harris*, 13 How. Pr. (N. Y. Supreme Ct.) 95; *Collis v. Alburdis*, 9 Civ. Pro. Rep. (N. Y. C. Pl.) 80; *Berrigan v. Oviatt*, 3 How. Pr. N. S. (N. Y. Supreme Ct.) 199; *People v. Dispensary, etc., Soc.*, 7 Lans. (N. Y.) 304; *Kay v. Whittaker*, 44 N. Y. 565; *Grocers' Bank v. Murphy*, 9 Daly (N. Y.) 510; *Grinnell v. Church*, 65 How. Pr. (N. Y. Supreme Ct.) 399.

Illustrations.—In an action upon a promissory note against the maker, an answer which denies the indebtedness for which the note was given or that the plaintiff presented the note for payment is frivolous. *Berrigan v. Oviatt*, 3 How. Pr. N. S. (N. Y. Supreme Ct.) 199.

In an action for the dissolution of a corporation on the ground that it had paid money in pursuance of a corrupt and overruled agreement and committed acts of extravagant appropriation, the answer alleged that the money was paid on the advice of counsel, and denied the allegation of extravagance, and also alleged that only three of the board of trustees had been re-elected, and that the present board was competent to manage the affairs of the corporation. Such answer was held frivolous, since its denials went to portions of the complaint not necessary to sustain the action. *People v. Dispensary, etc., Soc.*, 7 Lans. (N. Y.) 304.

A denial that the plaintiff in foreclosure was the owner of the bond and mortgage which the defendant executed and delivered to the plaintiff, and a denial that the plaintiff was the real party in interest, were held to be frivolous. *Grinnell v. Church*, 65 How. Pr. (N. Y. Supreme Ct.) 399.

In an action upon a bill of exchange by the payee against the acceptor, an answer denying that the plaintiffs are the owners and holders of the draft is a simple denial of a legal conclusion, and is frivolous. *Witherspoon v. Van Dolar*, 15 How. Pr. (N. Y. Supreme Ct.) 266.

1. *Munger v. Shannon*, 61 N. Y. 251; *Strong v. Sproul*, 53 N. Y. 497; *Davis v. Potter*, 4 How. Pr. (N. Y. Supreme Ct.) 155; *Temple v. Murray*, 6 How. Pr. (N. Y. Supreme Ct.) 329; *Newton v. Gould*, (Supreme Ct.) 14 N. Y. St. Rep. 397; *Warner v. U. S. Land, etc., Co.*, 53 Hun (N. Y.) 312; *Mather v. Union L. & T. Co.*, (City Ct.) 26 N. Y. St. Rep. 58; *Taylor v. Smith*, (Supreme Ct.) 29 N. Y. St. Rep. 365; *Metropolitan Bank v. Lord*, 1 Abb. Pr. (N. Y. Super. Ct.) 185; *Richter v. McMurray*, 15 Abb. Pr. (N. Y. C. Pl.) 346; *Bennett v. Leeds Mfg. Co.*, 110 N. Y. 150; *Hays v. Hathorn*, 74 N. Y. 486; *Farmers' Nat. Bank v. Leland*, 50 N. Y. 673; *Harland v. Howard*, (Supreme Ct.) 32 N. Y. St. Rep. 871.

Answers Held Not Frivolous.—In an action against a foreign corporation upon its mortgage bond, where the complaint alleged a demand for the interest at the defendant's agency in New York, an answer that the defendant had no knowledge or information sufficient to form a belief as to such allegation, and therefore denied the same, was not frivolous, but put the demand in issue. *Warner v. U. S. Land, etc., Co.*, 53 Hun (N. Y.) 312.

Where, in an action on a promissory note, the answer admitted the making and delivery, nonpayment, and protest, and denied each and every allegation in the complaint not theretofore admitted, it was held that the answer was not frivolous, as the allegations of the indorsement and transfer were thereby denied. *Taylor v. Smith*, (Supreme Ct.) 29 N. Y. St. Rep. 365.

Denial of Fact Not Alleged.—An answer is not frivolous which denies a fact essential to a plaintiff's recovery, even though such fact is not directly averred in the complaint. *Lord v. Chesebrough*, 4 Sandf. (N. Y.) 696.

In *Youngs v. Kent*, 46 N. Y. 672, it was held that when the answer puts in issue material allegations of the complaint, although its form and structure indicate that the intention of the pleader is to present a different plea, the issues in fact presented cannot be disregarded, and the court cannot, by summary judgment, deprive the defendants of the right to a trial of the issues thus formed.

2. *Munger v. Shannon*, 61 N. Y. 251;

Where, however, the denials of the answer go merely to immaterial portions of the complaint, proof of which is not necessary to sustain the action, a motion for judgment on the pleadings may properly be granted.¹

Answer Assumed to Be True. — For all the purposes of the motion the answer is to be assumed to be true,² since it is not the motive for which an answer is put in, or its truth or falsity, that is the test,³ and if it is a good defense on its face the motion must be denied.⁴

Effect of Former Decision. — An answer or demurrer will be held to be frivolous where there is a decision in point adverse to its sufficiency,⁵ unless the principle of such decision is questionable.⁶

Frivolous Only in Part. — Judgment on an answer as frivolous can

Thompson v. Erie R. Co., 45 N. Y. 468; Richter v. McMurray, 15 Abb. Pr. (N. Y. C. Pl.) 346; Temple v. Murray, 6 How. Pr. (N. Y. Supreme Ct.) 329.

Clerical Error. — Where it was averred that the word "when," as used in one of the denials of the answer, was a clerical error, and was intended to be "where," a motion for judgment upon the pleadings for such clerical error on the ground that the answer was evasive was properly denied. Raker v. Bucher, 100 Cal. 214.

1. People v. Dispensary, etc., Soc., 7 Lans. (N. Y.) 304.

2. Livingston v. Hammer, 7 Bosw. (N. Y.) 670.

If the Answer Be a Sham, such fact is to be shown by affidavit on motion to strike it out as a sham. Livingston v. Hammer, 7 Bosw. (N. Y.) 670.

3. Hecker v. Mitchell, 5 Abb. Pr. (N. Y. Super. Ct.) 453.

Good Faith No Defense. — The fact that an answer is interposed in good faith furnishes no defense to a motion for judgment for frivolousness, though it is a good reason for the allowance of an amendment. Swinburne v. Stockwell, 58 How. Pr. (N. Y. Supreme Ct.) 312.

4. Hecker v. Mitchell, 5 Abb. Pr. (N. Y. Super. Ct.) 453; Kelly v. Barnett, 16 How. Pr. (N. Y. Supreme Ct.) 135; Lord v. Chesebrough, 4 Sandf. (N. Y.) 696; Tamisier v. Cassard, 17 Abb. Pr. (N. Y. Supreme Ct.) 187; Gantz v. Holgate, 17 N. Y. Wkly. Dig. 434; Harland v. Howard, (Supreme Ct.) 32 N. Y. St. Rep. 871; Churchill v. Witbeck, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 122; Yerkes v. Crum, 2 N. Dak. 72.

It is not sufficient to sustain a judgment on an answer as frivolous that such answer will probably be held bad

on demurrer. Aitken v. Clark, 15 Abb. Pr. (N. Y. Supreme Ct.) 319.

Mere Defect in Form. — The fact that the answer is merely defective in form will not render it frivolous. Thompson v. Griswold, 11 N. Y. Wkly. Dig. 180.

Good Defense "Shadowed Forth." — Mere vagueness in pleading is not frivolousness, but is to be corrected by amendment. It is enough on a motion for judgment for frivolousness of the answer that a good defense is "shadowed forth." Kelly v. Barnett, 16 How. Pr. (N. Y. Supreme Ct.) 135; Yerkes v. Crum, 2 N. Dak. 72.

5. Swinburne v. Stockwell, 58 How. Pr. (N. Y. Supreme Ct.) 312; Wilmington Bank v. Barnes, 4 Abb. Pr. (N. Y. Supreme Ct.) 226; People v. McCumber, 15 How. Pr. (N. Y. Supreme Ct.) 186; Phelps v. Ferguson, 9 Abb. Pr. (N. Y. Super. Ct.) 206; Lattimer v. New York Metallic Spring Co., 9 Abb. Pr. (N. Y. Supreme Ct.) 207, note. See also Strong v. Stevens, 4 Duer (N. Y.) 668.

In Lattimer v. New York Metallic Spring Co., 9 Abb. Pr. (N. Y. Supreme Ct.) 207, note, it was held that a motion will not be granted by a single justice where there is a decision sustaining the answer.

In Strong v. Stevens, 4 Duer (N. Y.) 668, it was held that an answer stating only such facts as, under the former system, if set out in a special plea, would have made the latter bad on general demurrer, according to decisions determining the precise question, is frivolous.

6. Wilmington Bank v. Barnes, 4 Abb. Pr. (N. Y. Supreme Ct.) 226; Chauncey v. Lawrence, 15 Abb. Pr. (N. Y. Supreme Ct.) 106; Chemical Nat. Bank v. Carpenter, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 301.

be given only where the answer as an entirety is frivolous,¹ and is properly denied if a part of the answer is good.²

(3) *Frivolousness Must Be Manifest.* — Judgment should not be rendered on an answer as frivolous unless such defect is apparent to the court upon inspection of the pleadings and without argument.³

e. JUDGMENT UPON PART OF CLAIM ADMITTED — When Proper. — In many of the states it is provided that where the answer admits a part of the plaintiff's claim, upon his motion the action may be severed and judgment may be rendered in his favor for the part so admitted.⁴ Such provisions apply to equitable as

1. *Van Valen v. Lapham*, 13 How. Pr. (N. Y. Super. Ct.) 240; *Henderson v. Manning*, 5 Civ. Pro. Rep. (N. Y. City Ct.) 221; *Strong v. Sproul*, 53 N. Y. 497; *Lockwood v. Sahlenger*, 18 Abb. Pr. (N. Y. C. Pl.) 136; *Grocers' Bank v. O'Rorke*, 6 Hun (N. Y.) 18; *Munger v. Shannon*, 61 N. Y. 251.

2. *Herbert v. Servin*, 1 N. Y. Month. L. Bul. 89; *Strong v. Sproul*, 53 N. Y. 497; *Lockwood v. Sahlenger*, 18 Abb. Pr. (N. Y. C. Pl.) 136; *Grocers' Bank v. O'Rorke*, 6 Hun (N. Y.) 18; *Munger v. Shannon*, 61 N. Y. 251; *Siriani v. Deutsch*, 12 Misc. Rep. (N. Y. Super. Ct.) 213; *Thompson v. Erie R. Co.*, 45 N. Y. 468; *Lee v. Black*, 1 N. Y. Month. L. Bul. 17; *Thompson v. Griswold*, 11 N. Y. Wkly. Dig. 180.

Section 247 of the *New York Code* gives no power to order judgments as frivolous upon one of several defenses in an answer where others are good. *Thompson v. Erie R. Co.*, 45 N. Y. 468.

In *Hecker v. Mitchell*, 5 Abb. Pr. (N. Y. Super. Ct.) 453, it was held, where an answer contained two defenses, and the plaintiff moved for judgment for frivolousness of the answer, and one defense was held good and the other frivolous, that the latter defense might be stricken out under notice that the plaintiff would ask other and further relief.

3. *Vilas Nat. Bank v. Moore*, 14 N. Y. Wkly. Dig. 334; *Platt, etc., Refining Co. v. Hepworth*, 13 Civ. Pro. Rep. (N. Y. Supreme Ct.) 122; *German Exch. Bank v. Kroder*, 13 Misc. Rep. (N. Y. C. Pl.) 192; *Griffin v. Todd*, 48 How. Pr. (N. Y. Supreme Ct.) 15; *Thorn v. New York Cent. Mills*, 10 How. Pr. (N. Y. Supreme Ct.) 19; *Rae v. Washington Mut. Ins. Co.*, 6 How. Pr. (N. Y. Supreme Ct.) 21; *Cook v. Warren*, 88 N. Y. 37; *Youngs v. Kent*, 46 N. Y. 672;

Carpenter v. Adams, 34 Hun (N. Y.) 429; *Webb v. Van Zandt*, 16 Abb. Pr. (N. Y. C. Pl.) 190; *Sixpenny Sav. Bank v. Sloan*, 12 How. Pr. (N. Y. Supreme Ct.) 543; *Nichols v. Jones*, 6 How. Pr. (N. Y. Supreme Ct.) 355.

The answer must be so palpably bad that the court may be able by bare inspection to decide it frivolous and indicative of bad faith. *Strong v. Sproul*, 53 N. Y. 497; *German Exch. Bank v. Kroder*, 13 Misc. Rep. (N. Y. C. Pl.) 192; *Griffin v. Todd*, 48 How. Pr. (N. Y. Supreme Ct.) 15; *Vilas Nat. Bank v. Moore*, 14 N. Y. Wkly. Dig. 334; *Wyckoff v. Andrews*, 5 Civ. Pro. Rep. (N. Y. Super. Ct.) 410; *Schoonmaker v. New York*, (Supreme Ct.) 7 N. Y. St. Rep. 430; *Fargo v. Vincent*, 6 S. Dak. 209.

Judgment at Appearance Term. — In *Johnson City First Nat. Bank v. Pearson*, 119 N. Car. 494, it was held that the plaintiff in an action on a plain note of hand whose complaint is verified is entitled to judgment, even at the appearance term, where the defendant's answer is frivolous and insufficient.

4. *Arkansas.* — *Desha v. Robinson*, 17 Ark. 228.

Illinois. — *Safford v. Vail*, 22 Ill. 327; *Monroe v. Chaldeck*, 78 Ill. 429; *Henry v. Meriam, etc.*, *Paraffine Co.*, 83 Ill. 461; *Allen v. Watt*, 69 Ill. 655; *Mayberry v. Van Horn*, 83 Ill. 289.

Indiana. — *Fitch v. Polke*, 5 Blackf. (Ind.) 86.

Iowa. — *Mann v. Howe*, 9 Iowa 546.

Kentucky. — Civ. Code, § 380; *Mattingly v. Bosley*, 2 Metc. (Ky.) 443; *Maxwell v. Dudley*, 13 Bush (Ky.) 407; *Campbell v. Cincinnati Southern R. Co.*, 80 Ky. 585; *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633; *Mills v. Brown*, 2 Metc. (Ky.) 404.

Mississippi. — *Williams v. Harris*, 2

well as to legal actions.¹ The granting of the motion is without prejudice of the plaintiff's right to proceed in the suit for the

How. (Miss.) 627; *McLaurin v. Parker*, 24 Miss. 509.

Nebraska. — *McConnell v. Lincoln First Nat. Bank*, 38 Neb. 252.

New York. — Code Civ. Pro., § 511; *Hall v. Holt*, 25 Hun (N. Y.) 277; *Bradbury v. Winterbottom*, 13 Hun (N. Y.) 536; *Colt v. Davis*, 50 Hun (N. Y.) 370; *Marsh v. West, etc., Mfg. Co.*, 46 N. Y. Super. Ct. 8; *Davies v. New York*, 48 N. Y. Super. Ct. 203; *Shaw v. Coleman*, 54 N. Y. Super. Ct. 4; *Duncan v. Ainslie*, 26 Barb. (N. Y.) 199; *Meise v. Doscher*, 68 Hun (N. Y.) 557; *Robbins v. Watson*, 22 How. Pr. (N. Y. Supreme Ct.) 293; *Tracy v. Humphrey*, 5 How. Pr. (N. Y. Supreme Ct.) 155; *Russell v. Meacham*, 16 How. Pr. (N. Y. Supreme Ct.) 193.

Ohio. — Code Pro., § 376; *Moore v. Woodside*, 26 Ohio St. 537; *Weaver v. Carnahan*, 37 Ohio St. 363; *Benson v. Stein*, 34 Ohio St. 294.

Oregon. — *Jackson v. New Idrian C. M. Co.*, 10 Oregon 157.

Wisconsin. — Rev. Stat., § 2892; *Eureka Steam Heating Co. v. Sloteman*, 67 Wis. 118; *Buffalo Barb Wire Co. v. Phillips*, 64 Wis. 339. See also *Lathrop v. Snyder*, 17 Wis. 110; *Blaikie v. Griswold*, 10 Wis. 293.

Improper in Absence of Statute. — Judgment cannot be taken by the plaintiff for the amount admitted to be due, and proceedings maintained for the remainder of the claim, where there is no statute or rule of practice permitting it. *Blydenstein v. Haseltine*, 140 Pa. St. 120.

In *New York*, before the provision of the code which authorized judgment upon partial admissions of a plaintiff's claim, he was allowed judgment on motion under Code Pro., § 246, for the part not denied, as for failure to answer. *Tracy v. Humphrey*, 5 How. Pr. (N. Y. Supreme Ct.) 155.

In *Pennsylvania* it was provided by the Act of May 31, 1893, P. L. 185, that "in all cases now pending or hereafter to be commenced in the several courts of this commonwealth, in which affidavits of defense have been or may be filed to part of the claim of the plaintiff or plaintiffs, the plaintiff or plaintiffs may take judgment for the amount admitted to be due and have execution for the collection of the same, and the cases shall be proceeded in for the re-

covery of the balance of the demand of the plaintiff or plaintiffs, if anything more should be justly due to such plaintiff or plaintiffs." See *Calkins v. Keely*, 3 Pa. Dist. Rep. 339; *Johnson v. Carver*, 175 Pa. St. 200; *M'Kinney v. Mitchell*, 4 W. & S. (Pa.) 25; *Maylin v. Root*, 33 W. N. C. (Pa.) 76; *Myers v. Cochran*, 3 Pa. Dist. Rep. 135; *Jordan v. Kleinsmith*, 5 Pa. Dist. Rep. 674; *Roberts v. Sharp*, 3 Pa. Dist. Rep. 136; *Reilly v. Daly*, 159 Pa. St. 605; *Cook v. Lines*, 7 Kulp (Pa.) 503; *Taber v. Olmsted*, 158 Pa. St. 351; *De Morat v. Entrekun*, 33 W. N. C. (Pa.) 160.

In *Myers v. Cochran*, 3 Pa. Dist. Rep. 135, it was held that the act above cited does not give the court the power to determine that an affidavit which goes to the whole claim is insufficient as to a part, and to give judgment for that part, with leave to proceed as to the balance. In *Reilly v. Daly*, 159 Pa. St. 605, it was held that, under the act, judgment cannot be entered for certain amounts claimed by the plaintiff, but denied by the defendants to be due, although the court decides that the affidavit of defense is insufficient as to such amounts, while sufficient as to other portions of the claim. Such a case is not brought literally within the terms of the act, namely, that the amounts are admitted to be due.

Where Judgment Not Proper. — In *Ohio* it was held that the code provision applies only to cases where a part of the cause or causes of action is admitted, and part denied, and does not apply where all are admitted or denied. *Weaver v. Carnahan*, 37 Ohio St. 363.

In *New York* it has been held that such judgment should not be ordered upon an admission by the defendant of part of the plaintiff's claim where the claim is one on which the defendant is exempt from imprisonment by the New York Non-Imprisonment Act of 1831, since in such case the order should be enforced as a provisional remedy by attachment for contempt. *Lane v. Losee*, 11 How. Pr. (N. Y. Supreme Ct.) 360; *Duncan v. Ainslie*, 26 Barb. (N. Y.) 199.

1. *Hall v. Holt*, 25 Hun (N. Y.) 277, which was an action brought to foreclose a mortgage; the defendant, without denying any of the allegations of

balance claimed,¹ and the action may be continued with like effect as to subsequent proceedings as if it had been originally brought for the remainder of the claim.²

Express Admission Not Essential. — The admission which will justify such judgment may be made by the answer either expressly or by its failure to deny a part of the plaintiff's claim.³

the complaint, alleging in his answer that a payment had been made upon the bond and mortgage. It was held that the plaintiff might admit the payment and move upon notice, under section 511 of the Code Civ. Pro., for leave to enter judgment for the balance due under the allegations of the complaint, after deducting payment. The court said: "The language of this section is broad. It is not limited to any class of actions, but applies with equal force to actions at law and in equity. It gives a discretion to the court to allow actions to be severed where a part of the plaintiff's claim is admitted to be just; and if the plaintiff elects to continue his action as to the part denied by the answer, that he may do so. If he does not elect to continue, then costs must be awarded as upon a final judgment in any other case."

1. *Kentucky*. — *Maxwell v. Dudley*, 13 Bush (Ky.) 407; *Campbell v. Cincinnati Southern R. Co.*, 80 Ky. 585.

Mississippi. — *McLaurin v. Parker*, 24 Miss. 509.

New York. — *Bradbury v. Winterbottom*, 13 Hun (N. Y.) 536; *Duncan v. Ainslie*, 26 Barb. (N. Y.) 199; *Meise v. Doscher*, 68 Hun (N. Y.) 557; *Colt v. Davis*, 50 Hun (N. Y.) 370; *Marsh v. West, etc.*, Mfg. Co., 46 N. Y. Super. Ct. 8; *Shaw v. Coleman*, 54 N. Y. Super. Ct. 4; *Hall v. Holt*, 25 Hun (N. Y.) 278.

Ohio. — *Moore v. Woodside*, 26 Ohio St. 537.

Pennsylvania. — *Calkins v. Keely*, 3 Pa. Dist. Rep. 339; *Myers v. Cochran*, 3 Pa. Dist. Rep. 135; *Jordan v. Kleinsmith*, 5 Pa. Dist. Rep. 674; *Roberts v. Sharp*, 3 Pa. Dist. Rep. 136; *Stedman v. Poterie*, 27 W. N. C. (Pa.) 270; *Taber v. Olmsted*, 158 Pa. St. 351.

2. *Bradbury v. Winterbottom*, 13 Hun (N. Y.) 536.

3. *Arkansas*. — *Desha v. Robinson*, 17 Ark. 228.

Illinois. — *Safford v. Vail*, 22 Ill. 327.

Kentucky. — *Mills v. Brown*, 2 Metc. (Ky.) 404; *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633.

Mississippi. — *Williams v. Harris*, 2 How. (Miss.) 627; *McLaurin v. Parker*, 24 Miss. 509.

New York. — N. Y. Code Civ. Pro., § 511; *Duncan v. Ainslie*, 26 Barb. (N. Y.) 199; *Meise v. Doscher*, 68 Hun (N. Y.) 557; *Robbins v. Watson*, 22 How. Pr. (N. Y. Supreme Ct.) 293; *Hall v. Holt*, 25 Hun (N. Y.) 277; *Tracy v. Humphrey*, 5 How. Pr. (N. Y. Supreme Ct.) 155; *Russell v. Meacham*, 16 How. Pr. (N. Y. Supreme Ct.) 193.

Ohio. — *Moore v. Woodside*, 26 Ohio St. 537.

Wisconsin. — *Eureka Steam Heating Co. v. Sloteman*, 67 Wis. 118.

Answer Denying Only a Part of Cause of Action. — In *Tracy v. Humphrey*, 5 How. Pr. (N. Y. Supreme Ct.) 155, it was held that where an answer denies only a part of the cause of action, judgment may be given for the part not denied, with costs of motion and costs of suit, though this may involve the necessity of two defenses on the record.

No Defense to One of Several Causes of Action. — In *Russell v. Meacham*, 16 How. Pr. (N. Y. Supreme Ct.) 193, the action was upon several separate causes of action arising on contract, to one of which the defendant failed to interpose a defense. It was held that an order should be granted requiring him to pay the amount of that cause of action, to be enforced by execution.

Failure Specifically to Controvert Allegations. — In *Mills v. Brown*, 2 Metc. (Ky.) 404, which was an action *ex contractu*, the plaintiff alleged a specific sum to be due, and the answer failed specifically to controvert the allegations in the petition. It was held that the court might render judgment without a jury and without proof of demand.

Admitted Counterclaim. — Where, in an action to recover money, the answer admits the debt, but sets up a counterclaim, which is admitted, the plaintiff may enter judgment for the balance and interest. *Robbins v. Watson*, 22 How. Pr. (N. Y. Supreme Ct.) 293.

In *Hall v. Holt*, 25 Hun (N. Y.) 277,

f. **JUDGMENT FOR WANT OF SUFFICIENT AFFIDAVIT OF DEFENSE** — **In General.** — In those states where the defendant is required to make an affidavit of defense,¹ judgment may be

the defendant in foreclosure did not deny any allegations of the complaint, but alleged in his answer a payment on bond and mortgage. It was held that the plaintiff, upon admitting payment, might move upon notice for leave to enter judgment for the balance.

Pleading Irregularity of Contract as to Interest. — In *McLaurin v. Parker*, 24 Miss. 509, it was held that the defendant, by pleading the irregularity of the contract as to interest, thereby confesses it as to the principal, and that judgment may be rendered for the plaintiff as to such principal and the issue tried as to the interest.

Admission of Smaller Sum than Claimed. — In *McConnell v. Lincoln First Nat. Bank*, 38 Neb. 252, the answer admitted that there was due to the plaintiff a certain sum smaller than that claimed by his petition. It was held that such admission would entitle the plaintiff to judgment for the smaller amount, even though his reply unequivocally denied all the new matter averred in the answer.

On Plea of Tender. — In *Monroe v. Chaldeck*, 78 Ill. 429, it was held that where, under a plea of tender, the amount pleaded is not brought into court, the court may render judgment for the amount admitted with costs.

1. *Delaware.* — *Tallman v. Whitaker*, 2 Houst. (Del.) 72; *Gale v. Myers*, 4 Houst. (Del.) 546.

District of Columbia. — *Lawrence v. Middle States Loan, etc., Co.*, 7 App. Cas. (D. C.) 161; *Johnson v. Wright*, 2 App. Cas. (D. C.) 216; *Richmond v. Cake*, 1 App. Cas. (D. C.) 447.

Pennsylvania. — *Bristol Iron, etc., Co. v. Selliez*, 175 Pa. St. 18; *Mantua Hall, etc., Co. v. Brooks*, 163 Pa. St. 40; *Bank v. Walton*, 1 Pa. Dist. Rep. 423; *Lentz v. Carey*, 8 Kulp (Pa.) 259; *Johnston v. Shurtleff*, 1 Lack. Leg. N. (Pa.) 255; *Wing v. Bradner*, 162 Pa. St. 72; *Praun v. Miller*, 3 Pa. Dist. Rep. 536; *Philadelphia, etc., R. Co. v. Snowden*, 166 Pa. St. 236; *Camburn v. Cox*, 12 Montg. L. Rep. (Pa.) 30; *Com. v. Hart*, 5 Pa. Dist. Rep. 109; *North v. Yorke*, 174 Pa. St. 349; *Heroy Co. v. Smith*, 5 Pa. Dist. Rep. 293; *Wood Co. v. Berry Co.*, 4 Pa. Dist. Rep. 141; *Edison General Electric Co.*

v. Thackara Mfg. Co., 167 Pa. St. 530; *Union Trust Co. v. City Trust, etc., Co.*, 4 Pa. Dist. Rep. 381; *Com. v. Snyder*, 1 Pa. Super. Ct. Rep. 286; *Watson v. Wehrly*, 11 Lanc. L. Rev. (Pa.) 49.

Distinguished from Affidavit of Merits. — An affidavit of defense is a sworn written statement of the facts which constitute the defense in a civil action; its opposite is the affidavit of claim filed by the plaintiff. *Anderson's L. Dict.*, title *Defense*, 2. It is a statement made in proper form that the defendant has a good ground of defense to the plaintiff's action upon the merits. *Bouvier's L. Dict.*, title *Affidavit of Defense*. An affidavit of or to the merits represents that upon the substantial facts of the case justice is with the affiant; it is to the sufficiency of the facts which constitute a defense in a civil action instead of resistance upon technical grounds. *Anderson's L. Dict.*, titles *Merit*; *Affidavit*.

By Whom Made. — An affidavit of defense must be made by the defendant or some person on his behalf who possesses a knowledge of the facts. *M'Carney v. M'Camp*, 1 Ashm. (Pa.) 4.

Affidavit by One of Several Defendants. — Where several defendants have the same defense and plead jointly, an affidavit of defense made by one will inure to the benefit of and be regarded as sufficient for all. *Tyrer v. Chew*, 7 App. Cas. (D. C.) 175.

To What Actions Applicable. — The provisions requiring such affidavits have been held to apply to all actions of assumpsit, to actions against married women, to foreign attachments, to actions against public officers and corporations, and to appeals. See article *AFFIDAVITS OF MERITS OR DEFENSE*, vol. 1, p. 348, note 1. They do not apply to actions for torts, against lunatics, on implied contracts, on judgments, against infants, executors, administrators, or heirs. See article *AFFIDAVITS OF MERITS OR DEFENSE*, vol. 1, p. 349, note 1.

Effect of Filing Unnecessary Affidavit. — The filing of an affidavit of defense in a case where no affidavit is necessary is not a waiver of the right to resist judgment for want of a sufficient affidavit of defense on the ground that no

rendered by default for the plaintiff if the defendant omits to make such affidavit of defense, or makes an insufficient one.¹ The object of this provision is to prevent the delay of justice by resort to sham or false defenses.²

Test of Sufficiency. — On the hearing of a motion for judgment for want of a sufficient affidavit of defense, only the matters which are presented by the plaintiff's claim and the affidavit of defense can be considered,³ and the only proper inquiry is whether or not

affidavit is necessary. *Bartoe v. Guckert*, 158 Pa. St. 124. See also *Hutchinson v. Woodwell*, 107 Pa. St. 509, where the court said: "The first question is, was the plaintiff below entitled to a judgment if no affidavit of defense had been made? If he was not, the judgment, for want of a sufficient affidavit of defense, must be reversed; for in such case no affidavit of defense is required from the defendant. * * * The filing of one is no waiver of an objection to the sufficiency of the plaintiff's affidavit of claim."

1. *Delaware.* — *Tallman v. Whitaker*, 2 Houst. (Del.) 72; *Gale v. Myers*, 4 Houst. (Del.) 546.

District of Columbia. — *Tyrer v. Chew*, 7 App. Cas. (D. C.) 175; *Lawrence v. Middle States Loan, etc., Co.*, 7 App. Cas. (D. C.) 161; *Johnson v. Wright*, 2 App. Cas. (D. C.) 216; *Richmond v. Cake*, 1 App. Cas. (D. C.) 447.

Pennsylvania. — *Lancaster Bank v. M'Call*, 4 Pa. L. J. 287; *Bristol Iron, etc., Co. v. Selliez*, 175 Pa. St. 18; *West v. Simmons*, 2 Whart. (Pa.) 261; *Taylor v. Nyce*, 3 W. N. C. (Pa.) 433; *Pennock v. Kennedy*, 153 Pa. St. 577; *Moore v. Phillips*, 154 Pa. St. 204; *Watson v. Wehrly*, 11 Lanc. L. Rev. (Pa.) 49; *Mantua Hall, etc., Co. v. Brooks*, 163 Pa. St. 40; *Bank v. Walton*, 1 Pa. Dist. Rep. 423; *Lentz v. Carey*, 8 Kulp (Pa.) 259; *Johnston v. Shurtleff*, 1 Lack. Leg. N. (Pa.) 255; *Wing v. Bradner*, 162 Pa. St. 72; *Wood Co. v. Berry Co.*, 4 Pa. Dist. Rep. 141; *Heroy Co. v. Smith*, 5 Pa. Dist. Rep. 293; *North v. Yorke*, 174 Pa. St. 349; *Com. v. Hart*, 5 Pa. Dist. Rep. 109; *Camburn v. Cox*, 12 Montg. L. Rep. (Pa.) 30; *Philadelphia, etc., R. Co. v. Snowdon*, 166 Pa. St. 236.

Right Not Affected by Appearance of Defendant's Attorney. — The right of a plaintiff to judgment by default for want of an affidavit of defense within the time prescribed by law will not be barred by the appearance of the de-

fendant by his attorney within such time. *North v. Yorke*, 174 Pa. St. 349.

Judgment for Part of Claim Admitted by Affidavit. — Where a part of the plaintiff's claim is admitted by or denied in the affidavit of defense, the practice in *Pennsylvania* is to allow the plaintiff to take judgment for that part and to litigate as to the balance. See article AFFIDAVITS OF MERITS OR DEFENSE, vol. 1, p. 351, note 1.

2. *Wilson v. Hayes*, 18 Pa. St. 354; *Bloomer v. Reed*, 22 Pa. St. 51. In *Johnson v. Wright*, 2 App. Cas. (D. C.) 216, the court, speaking of the seventy-third rule of court, providing for such judgment, said: "The rule 73 is a salutary one, and is a law to the court as well as to the suitors as long as it remains in force. It is intended to prevent the delay of justice by the common expedient of resorting to sham or pretended defenses. It exacts nothing that is unreasonable from the parties; and if a defense be pleaded of what the defendant alleges as truth, and he is not willing to swear to it, it is not fair or reasonable to assume that he can get others to do what he declines to do himself; and hence the court is justified in assuming that the alleged defense is unfounded in fact, and in giving judgment to the plaintiff who has supported his claim by affidavit appended to the declaration."

Statement by Plaintiff Necessary. — In order to compel the defendant to present an affidavit of defense, a statement must be served or filed by the plaintiff showing *prima facie* liability on the part of the defendant. See article AFFIDAVITS OF MERITS OR DEFENSE, vol. 1, p. 349, note 2.

Not a Waiver of Right to Statement. — The defendant, by filing an affidavit of defense, does not waive his right to a proper statement by the plaintiff. See article AFFIDAVITS OF MERITS OR DEFENSE, vol. 1, p. 350, note 1.

3. *Musser v. Stauffer*, 178 Pa. St. 99.

the affidavit sets out sufficient facts to send the case to a jury.¹ In passing on the sufficiency of an affidavit of defense, the rule is that all unequivocal traverses or denials of material allegations in support of the claim, and all material allegations of fact contained in the affidavit of defense, must be accepted as verity.² Whenever the court entertains a doubt as to the sufficiency of an affidavit of defense, it is the settled practice to refuse the motion for judgment on the affidavit of the plaintiff's cause of action and to suffer the case to go to pleading, issue, and trial at bar in the usual manner.³

2. Motion for Judgment on Pleadings — a. NECESSITY FOR. — Where a party considers the pleadings insufficient to support a judgment for his adversary, for the reasons hereinbefore stated, he may move for judgment for himself upon the pleadings,⁴ and

See also *Wood Co. v. Berry Co.*, 4 Pa. Dist. Rep. 141.

The court may not go outside of the case as presented by the claim and affidavit to consider extraneous facts either in support of or against the line of defense disclosed. *Allegheny City v. McCaffrey*, 131 Pa. St. 137.

Affidavit of Third Person. — On a motion by the plaintiff for judgment for want of an affidavit of defense, the affidavits of third persons cannot be considered under Rule 73 of the Supreme Court of the *District of Columbia*, since this provides for affidavits by the plaintiff and the defendant. *Richmond v. Cake*, 1 App. Cas. (D. C.) 447.

Additional Affidavit of Defense. — In *Sykes v. Anderson*, 14 Pa. Co. Ct. Rep. 329, it was held that if an affidavit of defense is insufficient the court will not permit the filing of additional conflicting affidavits of defense, but will enter judgment as for want of an affidavit.

1. *Ætna Ins. Co. v. Confer*, 158 Pa. St. 598. See also *Third Reformed Dutch Church v. Jones*, 132 Pa. St. 462; *Johnston v. Callery*, 173 Pa. St. 129.

2. *Johnston v. Callery*, 173 Pa. St. 129.

Reasonable Certainty and Particularity in setting forth the facts of the defense are sufficient. Showing that an affidavit of defense might be more clear, definite, and particular, does not always prove its insufficiency to prevent judgment. *Steiner v. Bartlett*, 2 Pa. Super. Ct. Rep. 4.

3. *Tallman v. Whitaker*, 2 Houst. (Del.) 72; *Gale v. Myers*, 4 Houst. (Del.) 546. See also *Philadelphia v. Second, etc., Streets R. Co.*, 2 Pa. Dist. Rep. 705.

Where the Court Is Equally Divided upon the question whether or not a portion of the affidavit shows a good defense, a judgment for want of a sufficient affidavit of defense will not be granted. *Scranton v. Bush*, 11 Lanc. L. Rev. (Pa.) 57, affirmed in 160 Pa. St. 499.

4. *Douglas v. Rinehart*, 5 Kan. 393.

When Motion Not Proper Remedy. — Motion for judgment is not the proper method of raising the objection of indefiniteness or uncertainty. The objection in such case should be raised by motion to make the pleading more definite. *Webb v. Bidwell*, 15 Minn. 479; *Stewart v. Erie, etc., Transp. Co.*, 17 Minn. 373.

When an answer is not verified as it should be, a motion to strike out and for judgment by default should be made. *Speer v. Craig*, 16 Colo. 478.

A motion for judgment on the pleadings is not proper for raising the objection to the pleading of a double statement of the case. *Spaulding v. Saltiel*, 18 Colo. 86.

Proper Test of Affidavit of Defense. — If the plaintiff does not consider the defendant's affidavit of defense sufficient, the proper procedure is to test its sufficiency by a motion for judgment. *Com. v. Payton*, 1 Pa. Dist. Rep. 609, holding that a rule by the defendant to show cause why he should not be relieved from filing an affidavit of defense is not proper.

Defects to Be Specified. — In *Davis v. Hitz*, 13 Lanc. L. Rev. (Pa.) 238, it was held that a rule for judgment for want of sufficient affidavit of defense will be discharged where the plaintiff, in taking out the rule, fails to comply with a

it seems that the party thus moving should give notice to his adversary of such application.¹

Waiver of Right by Failure to Move. — The right of a party to judgment on the pleadings will be waived by failure to move for such judgment.²

rule of the court requiring him to specify in writing wherein the affidavit is defective.

Exceptions to Affidavit. — In *Trader's Nat. Bank v. Wood*, 2 Pa. Dist. Rep. 76, it was held that where a rule of court requires exceptions to be filed to an affidavit of defense, a rule for judgment for want of a sufficient affidavit will not be entertained in the absence of such exception.

Motion in Court. — In *Pennsylvania* it has been held in some courts that a judgment by default for want of an affidavit of defense must be moved for in court. *Blair v. Warden*, 4 Pa. Co. Ct. Rep. 464; *Doud v. Citizens' Ins. Co.*, 6 Pa. Co. Ct. Rep. 329.

In *Iowa* a motion for judgment upon the pleadings is not proper for the purpose of testing the sufficiency of the petition under the provisions of the code, § 2650, that defects in the petition apparent on its face are waived if not taken advantage of by demurrer. *Fulmer v. Mahaska County*, 92 Iowa 20.

Motion Not Favored. — In *Oregon* a motion for judgment on the pleadings is held not to be in harmony with the spirit of the code, and will not be favored. *Currie v. Southern Pac. Co.*, 23 Oregon 400; *Bowles v. Doble*, 11 Oregon 480.

1. New York Code Civ. Pro., § 537; *Beal v. Union Paper Box Co.*, 4 Civ. Pro. Rep. (N. Y. Super. Ct.) 18; *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630, where the court said: "The practice adopted in this case of granting a judgment on the pleadings upon an oral motion at the time the case was set for trial is not to be commended. It has been recognized by this court in several cases, in one of which, *Port v. Parfit*, 4 Wash. 369, the proper theory of such proceedings is stated, but the portion of the statute there alluded to (Code Pro., § 412) expressly provides for a five days' notice of the time and place of application to the court for the relief demanded in the complaint, where the defendant has appeared. No such notice was given in this case, and in view of the other matters controlling the disposition of the case we only speak of it

because it must undoubtedly operate to the surprise of a party who has filed an answer which has been replied to, to have an oral motion of this kind presented at the time when the case is called for trial on the pleadings, which he has until then supposed to be unexceptionable."

Affidavit Unnecessary. — In *Smith v. Hoyt*, 14 Wis. 252, it was held that affidavits showing service and failure to answer need not be served with the notice of motion for judgment.

On Motion for Judgment for Part of Claim. — In *Shaw v. Coleman*, 54 N. Y. Super. Ct. 4, it was held that, since there is no provision as to giving notice of the application for a judgment for a part of the claim admitted, the court may act on an *ex parte* application and grant an order severing the action, giving the judgment applied for, but that it would seem to be the better practice to require notice to be given. The court, in holding that such *ex parte* order should not be disturbed, said: "In the exercise of its discretion upon the facts presented, the court did not require notice of the application to be given to the defendants. * * * Inasmuch as section 511 does not require notice to be given, the court, in its discretion and under the circumstances of this case, had the power to act upon plaintiff's *ex parte* application, and to make the order complained of, although in general it may be the better practice under the said section to require notice to be given."

2. *Louisville, etc., R. Co. v. Copas*, 95 Ky. 460. See also *Covel v. Smith*, 68 Miss. 296.

In *Nelson v. Wallace*, 48 Mo. App. 193, it was held that the defendant's right to a judgment because new matter in the answer remains undenied will be waived by his going to trial and submitting the issue to the jury.

Although the denial in an answer may be insufficient, yet if the plaintiff omits to move for judgment on the ground that the answer is frivolous, or to have it made more definite and certain, he thereby waives the defect and cannot move at the trial for judgment

b. EFFECT OF MOTION. — A motion for judgment on the pleadings is in the nature of a demurrer, which it closely resembles,¹ and admits for its purposes the truth of all the facts well pleaded by the opposite party.² Thus, if a complaint fails to state a cause of action, and the defendant has answered, the defect may be taken advantage of by a motion of the defendant for judgment upon the pleadings, thereby admitting for its purposes all the facts alleged in the complaint, and testing their sufficiency to show a cause of action.³

c. MOTION MUST BE SPECIFIC. — A motion for judgment on the pleadings should be so drawn as to direct the attention of the court to the specific questions which it seeks to raise.⁴

d. TIME FOR MOTION. — A party who desires judgment on the pleadings should move for such judgment before introducing

on the pleadings. *Green v. Raymond*, 14 N. Y. Wkly. Dig. 322.

For Insufficient Affidavit of Defense. — The right to move for judgment for want of a sufficient affidavit of defense, being for the plaintiff's sole benefit, will be held to have been waived by him if, instead of availing himself of it, he seeks to compel the defendant to enter a plea, or if he moves the court to direct a plea to be entered in behalf of the defendant. *Edison General Electric Co. v. Johnstown Electric Light Co.*, 56 Fed. Rep. 456.

"A rule to plead is a waiver of the right to ask for judgment upon the affidavit of defense." *Fuoss v. Schleines*, 15 W. N. C. (Pa.) 192.

1. *Taylor v. Palmer*, 31 Cal. 257; *Floyd v. Johnson*, 17 Mont. 469; *Burrall v. Moore*, 5 Duer (N. Y.) 654.

In *Floyd v. Johnson*, 17 Mont. 469, both the plaintiff and the defendant, in a suit on a promissory note in which an answer was filed pleading new matter constituting a defense, moved for judgment on the pleadings, which motion was granted as against the plaintiff, who thereupon, and within twenty-four hours after the ruling on the motion, filed a replication denying the affirmative matter in the answer. It was held error for the court to render a final judgment against the plaintiff without allowing the issues to be made up by the filing of the replication, since his motion for judgment, being in effect a demurrer to the answer, was within the spirit and intent of a rule of court allowing a party twenty-four hours in which to answer or reply after demurrer overruled. See also *Power v. Gum*, 6 Mont. 5.

2. *Taylor v. Palmer*, 31 Cal. 257; *People v. Johnson*, 95 Cal. 471; *De Toro v. Robinson*, 91 Cal. 371; *Stewart v. Erie, etc., Transp. Co.*, 17 Minn. 373; *Floyd v. Johnson*, 17 Mont. 469.

"A motion for judgment upon the pleadings confesses the facts to be as there stated, and is equivalent to a general demurrer." *Sanderson, J.*, in *Taylor v. Palmer*, 31 Cal. 257.

A motion for judgment for want of a sufficient affidavit of defense is in the nature of a demurrer. It admits the existence of the facts averred, but denies their sufficiency as an answer to the plaintiff's claim. *Hicks v. National Bank*, 168 Pa. St. 638; *Third Reformed Dutch Church v. Jones*, 132 Pa. St. 462; *Wood Co. v. Berry Co.*, 4 Pa. Dist. Rep. 141; *Class v. Kingsley*, 142 Pa. St. 636.

If a Legal or an Equitable Defense Is Stated, a motion for judgment will be denied. *Class v. Kingsley*, 142 Pa. St. 636. See also article AFFIDAVITS OF MERITS OR DEFENSE, vol. 1, p. 351, note 3.

3. *De Toro v. Robinson*, 91 Cal. 371.

Application to Substitute Another Answer. — Where a motion is made by a plaintiff for judgment on the pleadings, if the defendant intends to abandon his answer and substitute another in its stead, he must make his application before judgment is ordered; if he waits until after that time, a denial of the application involves no abuse of discretion. *Felch v. Beaudry*, 40 Cal. 439.

4. *Brown v. Jones*, 125 Ind. 375.

"On the Pleadings." — In *Holcraft v. King*, 25 Ind. 352, it was held that where an answer to a complaint in three paragraphs professes in terms to answer only the first, a motion after ver-

evidence to support his own pleading.¹ Such motion should not be delayed until too late for the opposing party to amend his pleadings after defects therein have been pointed out.²

e. CONSTRUCTION OF PLEADINGS ON MOTION. — Upon a motion for judgment on the pleadings, the pleadings objected to as insufficient will be liberally construed,³ and the motion will be denied where there is any reasonable doubt as to their insufficiency.⁴

f. AMENDMENT OF PLEADING ON MOTION FOR JUDGMENT. — A motion for judgment on an answer as frivolous being in effect a summary demurrer,⁵ upon notice of the motion the defendant may amend his answer as a matter of course, if the time to amend has not expired.⁶ Service of the answer as amended before the time specified by the notice for hearing the motion will be an answer to it.⁷ Where the plaintiff has a good cause of action which through accident or mistake he has failed to set out in his complaint, the court, on a motion for judgment

dict for the plaintiff for a judgment "on the pleadings" is too vague and indefinite.

1. *Tevis v. Hicks*, 41 Cal. 123, where the plaintiff desired to move for judgment on the pleadings for the reason that the allegations of the complaint were not denied in the answer, and it was held that he should move for it before introducing evidence to support his complaint.

2. *Tevis v. Hicks*, 41 Cal. 123.

After Going to Trial on General Issue. — In *Nelson v. Wallace*, 48 Mo. App. 193, it was held that where the defendant goes to trial on the general issue only, he may still insist that he is entitled to judgment on the pleadings. See also, to the same effect, *State v. Finn*, 19 Mo. App. 560.

After Reply to Defective Answer. — In *Port v. Parfit*, 4 Wash. 369, it was held that if an answer is filed which does not controvert the material allegations of the complaint, the plaintiff is entitled to a judgment for failure to answer although he may have filed a reply to the defective answer.

After Overruling a Demurrer for Same Reason. — In *De Courcey v. Cox*, 94 Cal. 665, it was held that the granting of a motion for judgment on the pleadings, on the ground that the complaint does not state facts sufficient to constitute a cause of action, after the overruling of a demurrer based on that ground, is not a reversible error, but is an irregularity which should be

avoided; but where the demurrer was properly overruled and the motion improperly granted, judgment will be reversed.

3. *McAllister v. Welker*, 39 Minn. 535. See also *Kelly v. Rogers*, 21 Minn. 146; *Dunham v. Byrnes*, 36 Minn. 106; *Malone v. Minnesota Stone Co.*, 36 Minn. 325.

4. *Giles Lithographic, etc., Co. v. Recamier Mfg. Co.*, 14 Daly (N. Y.) 475.

In *McAllister v. Welker*, 39 Minn. 535, upon a motion for judgment on the pleadings by the defendant at the trial and after answering, the court held that the complaint should be liberally construed, and should be sustained if, upon such liberal construction, a cause of action was disclosed.

5. *Burrall v. Moore*, 5 Duer (N. Y.) 654.

6. *Burrall v. Moore*, 5 Duer (N. Y.) 654.

In *Stedecker v. Bernard*, 4 N. Y. Month. L. Bul. 31, it was held that on a motion for judgment under Code Pro., § 247 (Code Civ. Pro., § 537), upon a frivolous answer, a court or judge may allow an amended answer to be served on terms, and the application, therefore, should be made to the judge making such decision, though it may be formally made to the court immediately afterwards. Where the judge refuses, however, to entertain the application, a formal motion may be made to the court.

7. *Burrall v. Moore*, 5 Duer (N. Y.) 654.

on the pleadings for the defendant, should, on the plaintiff's application, permit him to amend.¹

3. Form of Judgment on Frivolous Pleading. — A judgment granted upon motion of the plaintiff upon a frivolous answer may be either final, as, for instance, where nothing is left to be ascertained but the amount of damages, or it may simply adjudge the pleading frivolous and leave the plaintiff to apply to the court for the relief he seeks.²

XIII. JUDGMENTS ON AWARDS — 1. Conditions Precedent to Entry of Judgment. — Parties acting under a statute authorizing the settlement of disputes by arbitration must substantially pursue its provisions to entitle the award to be made the judgment of the court.³

1. *Kelley v. Kriess*, 68 Cal. 210.

Failure to Apply for Amendment. — Should the plaintiff fail to make application for leave to amend, the defendant is entitled to judgment on the pleadings. *Kelley v. Kriess*, 68 Cal. 210, where the court said: "There can be no good reason for proceeding to trial in a cause where, admitting all the facts charged as true, the plaintiff is still not entitled to a judgment."

2. *Guilhon v. Lindo*, 9 Bosw. (N. Y.) 605.

3. *Alabama*. — *Crook v. Chambers*, 40 Ala. 239; *Lamar v. Nicholson*, 7 Port. (Ala.) 158; *Bell v. Sampey*, 80 Ala. 372; *Dudley v. Farris*, 79 Ala. 187.

California. — *Fairchild v. Doten*, 42 Cal. 125; *Kreiss v. Hotaling*, 96 Cal. 617; *Ryan v. Dougherty*, 30 Cal. 218; *Pieratt v. Kennedy*, 43 Cal. 393; *Kettleman v. Treadway*, 65 Cal. 505.

Florida. — *O'Bryan v. Reed*, 2 Fla. 448.

Georgia. — *Walker v. Walker*, 25 Ga. 65.

Illinois. — *Low v. Nolte*, 15 Ill. 368; *Martine v. Harvey*, 12 Ill. App. 587; *Weinz v. Dopler*, 17 Ill. 111; *Cromwell v. March*, 1 Ill. 295; *Cook v. Schroeder*, 55 Ill. 530.

Indiana. — *Healy v. Isaacs*, 73 Ind. 226; *Coffin v. Woody*, 5 Blackf. (Ind.) 423; *Flatter v. McDermott*, 15 Ind. 389; *Coats v. Kiger*, 14 Ind. 179.

Kansas. — *Morgan v. Smith*, 33 Kan. 438.

Kentucky. — *Carson v. Carson*, 1 Metc. (Ky.) 434.

Massachusetts. — *Heath v. Tenney*, 3 Gray (Mass.) 380; *Abbott v. Dexter*, 6 Cush. (Mass.) 108; *Franklin Min. Co. v. Pratt*, 101 Mass. 359; *Mott v. Anthony*, 5 Mass. 489; *Jones v. Hacker*, 5

Mass. 264; *Burghardt v. Owen*, 13 Gray (Mass.) 300; *Monosiet v. Post*, 4 Mass. 532; *Short v. Pratt*, 6 Mass. 496.

Michigan. — *Vanderhoof v. Dean*, 1 Mich. 463.

Minnesota. — *Barney v. Flower*, 27 Minn. 403.

Missouri. — *Wolfe v. Hyatt*, 76 Mo. 156.

Nevada. — *Steel v. Steel*, 1 Nev. 27.

New York. — *Goodsell v. Phillips*, 49 Barb. (N. Y.) 353; *Hollenback v. Fleming*, 6 Hill (N. Y.) 303; *Ocean House Corp. v. Chippu*, 5 Hun (N. Y.) 419.

Pennsylvania. — *Marshall v. Bozorth*, 17 Pa. St. 409.

Texas. — *Owens v. Withee*, 3 Tex. 161; *Alexander v. Witherspoon*, 30 Tex. 291; *Thompson v. Seay*, (Tex. Civ. App. 1894) 26 S. W. Rep. 895; *Fortune v. Killebrew*, 86 Tex. 172; *Officiers v. Dirks*, 2 Tex. 468.

Entry of Submission. — If no note of the submission is entered by the clerk in his register of actions, judgment cannot be entered on the award. *Pieratt v. Kennedy*, 43 Cal. 393; *Kettleman v. Treadway*, 65 Cal. 505; *Steel v. Steel*, 1 Nev. 27.

Attestation of Submission. — Nor can judgment be entered on the award if the instrument submitting the differences between the parties is not attested by a subscribing witness as required by statute. *Cook v. Schroeder*, 55 Ill. 530; *Estep v. Larsh*, 16 Ind. 82; *Goodsell v. Phillips*, 49 Barb. (N. Y.) 353; *Ocean House Corp. v. Chippu*, 5 Hun (N. Y.) 419. But see *Lovell v. Wheaton*, 11 Minn. 92, where it was held that an award not attested by a subscribing witness was not necessarily void.

Service of Copy of Award. — The failure

2. Awards on Which Judgment May Be Entered — *a.* **AWARD UNDER SUBMISSION IN PAIS.** — In the absence of statutory authorization no judgment can be entered on an award under a submission *in pais*.¹ But if the submission has been made a rule of court,² or contains a stipulation that judgment shall be entered on the award,³ judgment may be entered.

b. **AWARD UNDER SUBMISSION IN PENDING SUIT.** — A court cannot enter up judgment on an award made in a cause pending in such court, unless the submission has been made a rule of court⁴ or contains a stipulation that the award shall be made the judgment of the court.⁵

to serve a copy of the award on the parties, when the statute provides for such service, is fatal to the entry of judgment. *Flatter v. McDermott*, 15 Ind. 389; *Coats v. Kiger*, 14 Ind. 179; *Estep v. Larsh*, 16 Ind. 82; *Adams v. Hammon*, 10 B. Mon. (Ky.) 5; *Cleaveland v. Dixon*, 4 J. J. Marsh. (Ky.) 227; *Wrigglesworth v. Morton*, 2 Bibb (Ky.) 157.

Affidavit. — Though an award is not entitled to entry on the docket without the affidavit required by the statutes, a judgment on an award entered without such affidavit is only voidable, and not void. *Wall v. Fife*, 37 Pa. St. 394.

Waiver of Requirement. — Though the submission and award should be recorded before the grant of a rule to show cause why judgment should not be entered, consent of the parties to the entry of the rule waives the recording. *Jacobs v. Moffatt*, 3 Blackf. (Ind.) 395.

1. *Dudley v. Farris*, 79 Ala. 187; *Davis v. M'Connell*, 3 Stew. (Ala.) 492; *Coxetter v. Huertas*, 14 Fla. 270; *Halloram v. Bray*, 29 Ga. 422; *Eaton v. Arnold*, 9 Mass. 519; *Shearer v. Mooers*, 19 Pick. (Mass.) 308; *White v. Shriver*, 2 Watts (Pa.) 471.

Where the parties to an action of replevin entered into a written agreement to refer the cause to A., and a rule was entered that the cause be referred to A., and that he report to the court, it was held that this was not a reference under the statute, but a voluntary submission working a discontinuance, and that, therefore, the court had no authority to give judgment on the report. *Camp v. Root*, 18 Johns. (N. Y.) 22.

2. *Sherron v. Wood*, 10 N. J. L. 7; *Richardson v. Cassily*, 3 Watts (Pa.) 320.

3. *Tennant v. Divine*, 24 W. Va. 387.

In North Carolina a judgment cannot be entered on an award where the reference to the arbitrators was not under an order of court made in a pend-

ing cause. *Metcalf v. Guthrie*, 94 N. Car. 447; *Long v. Fitzgerald*, 97 N. Car. 39; *Gibbs v. Berry*, 13 Ired. L. (N. Car.) 388; *Simpson v. McBee*, 3 Dev. L. (N. Car.) 531; *Cunningham v. Howell*, 1 Ired. L. (N. Car.) 9; *Moore v. Austin*, 85 N. Car. 179; *Lusk v. Clayton*, 70 N. Car. 184; *Robbins v. Killebrew*, 95 N. Car. 19; *Jackson v. McLean*, 96 N. Car. 474. Unless by consent. *Long v. Fitzgerald*, 97 N. Car. 39; *Moore v. Austin*, 85 N. Car. 179.

The filing of exceptions to an award is a waiver of an objection that the submission was not had under a rule of court. *Long v. Fitzgerald*, 97 N. Car. 39.

4. *Jewell v. Blankenship*, 10 Yerg. (Tenn.) 439.

Judgment Against Person Not a Party.

— Where a pending cause is submitted to arbitration under an agreement that the award shall be entered as the judgment of the court, and the award is against the defendant and another, it is error to render judgment against such other, where he in no way assented to the proceedings. *Smith v. Byrd*, 7 Ill. 412.

Nonsuit After Submission. — Where a pending suit has been submitted to arbitration and an award has been rendered conforming to the provisions of the statute, the plaintiff cannot prevent the award from being entered up as the judgment of the court by taking a voluntary nonsuit. *Davis v. Forshee*, 34 Ala. 107.

Presumption of Consent. — Though the consent of parties, either before or after an award, is necessary to make the award the judgment of the court, it will be presumed, after judgment, where there is no proof to the contrary, that such consent was given. *Edrington v. League*, 1 Tex. 64.

5. *Davis v. M'Connell*, 3 Stew. (Ala.)

3. Courts in Which Judgment May Be Entered — a. STATUTORY PROVISIONS. — The statutes relating to the submission of controversies and pending actions to arbitration, and the entry of judgment on the award of the arbitrators, usually make provision for the court in which the judgment is to be entered.¹

b. COURTS OF RECORD. — As a general rule, the courts invested by statute with jurisdiction to enter judgment on awards are courts of record.²

c. DESIGNATION OF COURT IN AGREEMENT. — In some states the statutes provide that the agreement of submission must designate the court in which the award must be filed and the judgment entered. It follows that judgment must be entered in the court so designated.³

d. COURT MUST HAVE JURISDICTION. — But the court designated in the agreement of submission must be a court having jurisdiction of the subject-matter of the award.⁴

e. JUSTICES OF THE PEACE. — Justices of the peace have no jurisdiction to enter judgment on an award,⁵ except in cases

492; *Handy v. Cobb*, 44 Miss. 699; *Wear v. Ragan*, 30 Miss. 83; *Green v. Patchin*, 13 Wend. (N. Y.) 293; *Yates v. Russell*, 17 Johns. (N. Y.) 461; *Camp v. Root*, 18 Johns. (N. Y.) 22; *Farrington v. Hamblin*, 12 Wend. (N. Y.) 212; *Rogers v. Nall*, 6 Humph. (Tenn.) 29. And see *Gunter v. Sanchez*, 1 Cal. 45.

In *Georgia* an order of court is not necessary to make an award of arbitrators the judgment of the court. *Jones v. Bond*, 76 Ga. 517.

1. See statutes of the several states.

2. *Weinz v. Dopler*, 17 Ill. 111; *Richards v. Reed*, 39 Ind. 330; *Hubbel v. Baldwin*, *Wright* (Ohio) 86.

3. *Richards v. Reed*, 39 Ind. 330; *McKnight v. McCullough*, 21 Iowa 111; *District Tp. v. Independent Dist.*, 60 Iowa 141.

Designation of Court in Agreement. —

Under the provisions of the *Iowa* statute that the agreement must designate the court in which the judgment on the award is to be entered, an agreement providing that "judgment shall be entered in any court having jurisdiction of the same" authorizes the District Court of the county where both parties reside to enter judgment on an award of \$741. *McKnight v. McCullough*, 21 Iowa 111.

An agreement specifying the court wherein the award is to be filed sufficiently indicates the court wherein judgment is to be rendered. *District Tp. v. Independent Dist.*, 60 Iowa 141.

Necessity of Designation of Court. — A provision in the agreement of submission that the court to which the award is to be returned shall render judgment thereon is necessary to authorize the court to render judgment on the award. *Love v. Burns*, 35 Iowa 150.

Abolishment of Court. — In *Kendall v. Lewiston Water Power Co.*, 36 Me. 19, the terms of submission required that the award should be returned to the District Court by July 9, 1852. This court was abolished by a law which took effect May 1, 1852, and all its jurisdiction was transferred to the Supreme Court, and all processes made returnable to the District Court at its June term were directed by the law to be returned to the Supreme Court at its October term, 1852. It was held that the award was properly returned and judgment rendered thereon at the October term of the Supreme Court.

4. *Williams v. Walton*, 9 Cal. 142. In this case the parties entered into a submission to arbitration in which it was stipulated that the award be entered as the judgment of the County Court. It was held that the judgment entered by the County Court on the award was void, as that court had no jurisdiction over the subject-matter.

5. *Weinz v. Dopler*, 17 Ill. 111; *Richards v. Reed*, 39 Ind. 330; *Hubbel v. Baldwin*, *Wright* (Ohio) 86; *Worthen v. Stevens*, 4 Mass. 448; *Kingsley v. Bill*, 9 Mass. 197.

pending before them.¹ But a stipulation in an agreement of submission that a designated justice of the peace shall enter judgment on the award warrants such justice in entering judgment, provided the sum for which judgment is entered does not exceed in amount the jurisdiction of a justice.²

f. COURTS OF OTHER COUNTY. — A judgment may be entered in the court of a county other than the one in which the arbitration was held, and the award rendered, and the parties reside, if the agreement for submission so provides,³ or the parties so consent.⁴

4. Time of Entry of Judgment — *a.* STATUTORY PROVISIONS. — The statutes likewise provide for the time of the entry of judgment on an award. Such time is usually a certain number of days after the date or filing of the award or a certain term of court.⁵

b. CONSENT OF PARTIES. — As the provisions of the statute that judgment cannot be entered on an award until a certain time after the rendition of the award are only intended to prevent judgment from being taken before the losing party shall have had an opportunity of filing objections to the award, judgment may be entered on an award before the statutory time if the parties consent thereto or waive the privilege as to time.⁶ And the filing

1. *Weinz v. Dopler*, 17 Ill. 111.

2. *Van Horn v. Bellar*, 20 Iowa 255; *King v. Hampton*, 4 Greene (Iowa) 401; *Whitis v. Culver*, 25 Iowa 30.

3. *McMillan v. Allen*, 98 Ga. 405.

4. *Henry v. Hilliard*, 120 N. Car. 479.

5. See the statutes of the several states. See also the following cases: *Hoogs v. Morse*, 31 Cal. 128; *Schaffer v. Lehman*, 2 MacArthur (D. C.) 305; *Middleton v. Hume*, 3 J. J. Marsh. (Ky.) 221; *Wrigglesworth v. Morton*, 2 Bibb (Ky.) 158; *Phillips v. Travis*, Sneed (Ky.) 174; *Hollingsworth v. Willis*, 64 Miss. 152; *Alexander v. Witherspoon*, 30 Tex. 291.

In *Wheatley v. Martin*, 6 Leigh (Va.) 62, it was held that a submission by rule of court of a matter of controversy in a suit pending was not within the statute of awards, and that judgment could be entered on an award rendered in such a submission at the same term at which it was returned.

Estoppel to Question Time of Entry. — If a judgment on an award of arbitrators is entered by the clerk at the request of the prevailing party less than five days after the award is filed, such prevailing party cannot afterwards question its validity on the ground that it was irregularly entered. *Hoogs v. Morse*, 31 Cal. 128.

Effect of Premature Entry. — A judg-

ment prematurely entered on an award is not void, but only voidable. *Gibbon v. Dougherty*, 10 Ohio St. 365; *Fortune v. Killebrew*, (Tex. Civ. App. 1893) 21 S. W. Rep. 986.

Agreement as to Entry. — An agreement that an award may be returned to the court at the term at which the submission is made is not a waiver of that provision of the statute requiring that there shall be fifteen days between the date of the award and the time of its return to court, and a judgment on an award returned within nine days is erroneous. *Phillips v. Travis*, Sneed (Ky.) 174.

Entry in Vacation. — An appellate court, on reversing a judgment on an award because entered in vacation, may remand the case with directions to the lower court to proceed to the entry of a new judgment. *Hopkins v. Flynn*, 7 Cow. (N. Y.) 526. But see *Tisdale v. Gandy*, 1 Hawks (N. Car.) 282. In this case the action was referred to arbitrators, who returned their award in vacation. The clerk thereupon entered it as a judgment rendered in the court. The entry was ordered to be expunged and the proceedings held to be void, though the party against whom it was entered gave a subsequent release of errors.

6. *Middleton v. Hume*, 3 J. J. Marsh.

of exceptions to an award, or a motion to set it aside, pending the entry of judgment on it, is a waiver of the privilege as to time.¹

c. DELAY IN ENTRY. — Failure to enter judgment at the time designated in the statute is not fatal to the award.²

5. Procedure on Entry of Judgment — *a.* NOTICE OF MOTION OR RULE. — In some states a motion to enter judgment on an award or a rule to show cause why judgment should not be entered thereon must be upon notice to the opposite party.³ In others it would seem that no notice is necessary.⁴

b. PRESENCE OF PARTIES. — If the parties agree that the award shall be returned and entered as the judgment of the court at a particular term, it is no objection to the judgment of that term that one of the parties was not present at the return and judgment.⁵

c. DEATH OF PARTY. — The death of one of the parties to a submission abates the proceeding, in the absence of a statute providing for the revival of the proceeding or the substitution of another party in the place of the deceased party.⁶

(Ky.) 221; *Lovell v. Wheaton*, 11 Minn. 92; *Hughes v. Bywater*, 4 Hill (N. Y.) 551; *Mitchell v. Kelly*, 1 Call (Va.) 379; *Alexander v. Witherspoon*, 30 Tex. 291.

1. *Hollingsworth v. Willis*, 64 Miss. 152; *Mitchell v. Kelly*, 1 Call (Va.) 379.

2. *Savannah, etc., R. Co. v. Decker*, 94 Ga. 149; *Hall v. Morris*, 30 Tex. 280.

Delay in Entry. — An award made five years after the order of reference, and returned six years after the reference, and three years after the suit had been dismissed by order of court, is not such an award as authorized the court to render judgment thereon, though entered and ordered to record by consent of the parties. *Hay v. Cole*, 11 B. Mon. (Ky.) 70.

3. *Nelson v. Hinesley*, 3 Blackf. (Ind.) 432; *Price v. White*, 27 Mo. 275; *Hubbel v. Baldwin*, *Wright* (Ohio) 86; *Anonymous*, 6 Wend. (N. Y.) 520.

Notice of Motion. — In *Anonymous*, 6 Wend. (N. Y.) 520, it was held that if confirmation be asked at the next term after publication of the award, notice of the application must be given, but where a term intervenes between the publication and the confirmation no notice is necessary.

A notice between a regular and an adjourned term is sufficient for the entry of judgment at the adjourned term. *Green v. Shields*, 37 Ga. 35.

Change in Term of Court. — Where notice is given that a motion for the confirmation of an award will be presented to a court on the first Monday of May,

and the legislature subsequently changes the time of holding such court from the said Monday to a later date, no further notice need be given. *Price v. White*, 27 Mo. 275.

Confirmation After Reversal of Order Vacating. — Where an order vacating an award is reversed on error, it is necessary to give notice to the defendants in error to show cause at a special term why the award should not be confirmed. *Bergh v. Pfeiffer*, *Hill & D. Supp.* (N. Y.) 110.

Waiver of Notice. — Consent to the entry of a rule to show cause why judgment should not be entered on an award waives the right to a formal notice of the rule. *Jacobs v. Mofatt*, 3 Blackf. (Ind.) 395.

4. *Anderson v. Beebe*, 22 Kan. 768.

5. *Keans v. Rankin*, 2 Bibb (Ky.) 88.

6. *Manning v. Pratt*, 18 Abb. Pr. (N. Y. Supreme Ct.) 344; *Whitfield v. Whitfield*, 8 Ired. L. (N. Car.) 163; *Farmer v. Frey*, 4 McCord L. (S. Car.) 160.

In *Turner v. Maddox*, 3 Gill (Md.) 190, it was held that a judgment entered on an award after the death of one of the parties is not invalid on that account, as the statute expressly provides that the death of one of the parties shall not abate the proceeding. But see *Wheatley v. Martin*, 6 Leigh (Va.) 62, where it was held that a submission by rule of court was not avoided by the death of the plaintiff where the cause was revived by the

d. **OBJECTIONS TO MOTION.** — Objections may be made to the entry of judgment on an award though the objecting party failed to file his objections within the time limit specified by the statute.¹

e. **SUFFICIENCY OF OBJECTIONS.** — An objection to the entry of judgment on an award must state specifically the grounds of objection.²

f. **EXCEPTIONS TO ENTRY OF AWARD ON MINUTES.** — The filing of exceptions to a judgment ordering an award to be entered on the minutes of the court does not prevent the entry of judgment on the award.³

g. **MANNER OF ENTERING JUDGMENT.** — On a reference to arbitrators of matters in a pending suit, by order of court, upon agreement of the parties, judgment should be entered on the award as on the verdict of a jury.⁴

administrator, who, with the defendant, proceeded under it.

1. *Shores v. Bowen*, 44 Mo. 396; *Hinkle v. Harris*, 34 Mo. App. 223.

Objections to Motion. — A clause in an agreement of arbitration providing that the unsuccessful party should comply with the award within ten days after notice thereof is no objection to making the award the judgment of the court. *Forshey v. Galveston, etc., R. Co.*, 16 Tex. 516.

Showing on Motion. — On a motion to enter judgment on an award, it may be shown that the arbitrators considered and passed on matters not submitted to them. *Hinkle v. Harris*, 34 Mo. App. 223. *Ex parte* affidavits may be read against or in support of objections to the entering of an award as the judgment of the court. *Tennant v. Divine*, 24 W. Va. 387.

Jury Trial of Issue. — One against whom an award is made on a submission signed for him by an attorney may deny the latter's authority on a proceeding to enter judgment on the award, and is entitled to a jury trial on the issue of the attorney's authority. *Boyden v. Lamb*, 152 Mass. 416.

Raising Objections on Appeal. — As a rule, no objection can be made to an award on appeal that was not made in the court below. *Price v. Kirby*, 1 Ala. 184; *Wright v. Bolton*, 8 Ala. 548; *Mobile Bay Road Co. v. Yeind*, 29 Ala. 325; *Carson v. Carson*, 1 Metc. (Ky.) 435. But an objection going to the jurisdiction of the arbitrators may be made at any time. *Gaines v. Clark*, 23 Minn. 64; *Barney v. Flower*, 27 Minn. 403; *Heglund v. Allen*, 30 Minn. 38.

Effect of Appeal. — Where the charter of a corporation, after prescribing for arbitration to determine damages from flowage of land, provided that "the award shall remain in force and judgment be rendered thereon," it was held that judgment should be entered on the award though the corporation appeals from the award. *Darge v. Horicon Iron Mfg. Co.*, 22 Wis. 417.

Effect of Garnishment. — One in whose favor an award is made under a rule of court is entitled to a judgment thereon though his creditor may have attached the same by a trustee process after the acceptance of the award. *Holt v. Kirby*, 39 Me. 164; *Codman v. Strout*, 22 Me. 292.

2. *Shaifer v. Baker*, 38 Ga. 135, where it was held that an affidavit to prevent an award from becoming a judgment because of "fraud, accident, mistake, or illegality," was insufficient, and that the facts showing the fraud, accident, mistake, or illegality should have been set forth; *Conrad v. Johnson*, 20 Ind. 421; *Bash v. Christian*, 77 Ind. 290, where it was held that an objection to the entry of judgment on an award that it was obtained by the partiality and misbehavior of an arbitrator should specify in what the partiality and misbehavior consisted.

3. *Walker v. Walker*, 25 Ga. 257; *Hart v. Stewart*, 13 La. Ann. 37.

4. *Thorpe v. Starr*, 17 Ill. 199.

Form of Judgment. — It is not necessary to insert in a judgment on an award an order requiring the plaintiff to execute releases of certain claims, though the award requires the execution of such releases, where the claims

h. ENTRY BY CLERK. — If the submission is made an order of court, the clerk may enter judgment on the award without any further order of the court.¹

i. ENTRY OF ARBITRATOR'S MINUTES OF RECORD. — In entering judgment on an award the minutes of the arbitrators cannot be made a part of the record.²

j. LOSS OF AWARD. — Where an award is lost, judgment may be entered on a copy of it duly proved or on affidavit of its contents.³

k. AMENDMENT OR CORRECTION OF AWARD. — Though it is the general rule that the judgment entered on an award must conform to the award,⁴ a clerical error or mistake in the award may be corrected,⁵ or it may be modified by striking out an unauthorized provision.⁶

6. Allowance of Interest — In General. — A judgment on an award

and the final decision rejecting them, together with the arbitrator's explicit decision that they shall be released, fully appear. *Chicago, etc., R. Co. v. Hughes*, 28 Mich. 186.

Where it is agreed in the submission to arbitrators that the money awarded to the plaintiff, if any, shall be paid to the sheriff for the benefit of the plaintiff's creditors, the judgment should be so entered. *Coupland v. Anderson*, 2 Call (Va.) 106.

Proceedings Subsequent to Entry of Judgment. — An order continuing a cause after the entry of judgment on an award made therein by arbitrators, and the rendition of another judgment, are *coram non iudice*. *Taylor v. Harris*, 16 Tex. 574.

1. *Carsley v. Lindsay*, 14 Cal. 390. But see *Heslep v. San Francisco*, 4 Cal. 1.

2. *Walker v. Walker*, 25 Ga. 257.

3. *Little v. Gardner*, 5 N. H. 415; *Hill v. Townsend*, 3 Taunt. 45; *Robinson v. Davis*, 1 Stra. 526.

Loss of Submission. — Though the original agreement of submission is not produced and filed, the court has jurisdiction to enter judgment on the award on satisfactory evidence that an agreement of submission was signed, acknowledged, and certified conformably to the statutory requisitions, and has been lost, and on proof of a copy thereof, or of its contents, so full and complete as to be substantially a copy. *Eaton v. Hall*, 5 Met. (Mass.) 287.

4. *Lamar v. Nicholson*, 7 Port. (Ala.) 158; *Jones v. Morris*, 4 Harr. (Del.) 104; *District Tp. v. Independent Dist.*, 60 Iowa 141; *Com. v. Pejepsut*, 7

Mass. 399; *Nelson v. Andrews*, 2 Mass. 164; *Bouck v. Bouck*, 57 Minn. 490; *Gunn v. Bowers*, 126 Pa. St. 552; *Conger v. James*, 2 Swan (Tenn.) 213.

Statutory Grounds. — In *Huss v. Turner*, 2 Ind. 217, it was held that an award could only be modified on the grounds enumerated in the statute.

Addition of Interest. — The court has no authority to change an award by adding interest thereto. *District Tp. v. Independent Dist.*, 60 Iowa 141.

Remittitur of Excess. — Judgment may be entered for a less sum than that which was awarded, if the party in whose favor the sum was reported releases the difference on the record. *P Phelps v. Goodman*, 14 Mass. 252.

Changing Time of Payment. — Where arbitrators award a party a sum of money payable in several annual instalments, it is erroneous to order judgment for the whole amount payable immediately. *Bouck v. Bouck*, 57 Minn. 490.

Judgment at Variance with Award. — A judgment on an award is not inconsistent with the award because it provides for the payment of the costs of the court to be taxed, while the award provided that the expenses and charges of the arbitration should be mutually borne and paid by the parties. *Chicago, etc., R. Co. v. Hughes*, 28 Mich. 186.

5. *Gunn v. Bowers*, 126 Pa. St. 552; *Deford v. Deford*, 116 Ind. 523.

6. *Conrad v. Johnson*, 20 Ind. 421, where a provision in an award that it be collected "without relief from valuation or appraisal laws" was stricken out.

may include interest from the time of the award to the time of the entry of judgment upon it.¹

Statutory Provisions. — In some states the statutes provide for interest on an award from the time it is payable² or from the time of its acceptance by the court.³

7. Enforcement of Judgment — Issuance of Execution. — Execution may issue upon a judgment entered on an award for the payment of money as upon a judgment on a verdict.⁴

XIV. JUDGMENTS ON APPEAL — 1. In General — a. NECESSITY OF DECISION. — It is the duty of an appellate court to decide only actual controversies, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.⁵ Consequently when, pending an appeal, an event occurs which

1. *Kintner v. State*, 3 Ind. 86.

2. *Hamilton v. Wort*, 7 Blackf. (Ind.) 348.

3. *Cary v. Whitney*, 50 Me. 337.

In **Maine**, before the enactment of Rev. Stat. 1857, c. 77, § 29, no interest could be included in a judgment on an award. *Kendall v. Lewiston Water Power Co.*, 36 Me. 19; *Southard v. Smyth*, 19 Me. 458.

4. *King v. Jemison*, 33 Ala. 499; *Caton v. McTavish*, 10 Gill & J. (Md.) 192; *Shriver v. State*, 9 Gill & J. (Md.) 1; *Com. v. Pejepsicut*, 7 Mass. 399.

Prospective Award. — If the award be prospective by ordering money to be paid at some future time or a specific act to be done, no execution will issue, but the remedy is by attachment or action on the award. *Com. v. Pejepsicut*, 7 Mass. 399; *Skillings v. Coolidge*, 14 Mass. 43.

In **Pennsylvania** an award of arbitrators for a certain sum has the effect of a judgment upon which an execution may issue without a *scire facias*. *O'Donnell v. Lynch*, 1 W. & S. (Pa.) 283; *Coleman v. Lukens*, 4 Whart. (Pa.) 347. But execution cannot issue until judgment is entered. *Book v. Edgar*, 3 Watts (Pa.) 29.

But where, on a rule to show cause why a judgment should not be opened and the defendant let in to defend, the parties entered into an agreement to refer the cause to arbitrators, whose award should be final, and upon which execution might issue, it was held that the plaintiff was entitled to execution on filing the award, without any order or sanction of court. *Gallup v. Reynolds*, 8 Watts (Pa.) 424.

5. *Martinez Bank v. Jahn*, 104 Cal.

238; *Hunter v. Dickinson*, 3 Colo. App. 372; *Salmon v. Pixlee*, 2 Day (Conn.) 242; *Atlanta, etc., R. Co. v. Blanton*, 80 Ga. 563; *Wildman v. Shambaugh*, 43 Neb. 371; *Jackson v. Daugherty*, (Tex. Civ. App. 1894) 26 S. W. Rep. 1116; *Paris Electric Light, etc., Co. v. Martin*, (Tex. Civ. App. 1895) 31 S. W. Rep. 243; *Mills v. Green*, 159 U. S. 651; and authorities cited in article APPEALS, vol. 2, p. 341 *et seq.*

Release of Right to Appeal. — An appeal will not be considered where it appears that the appellant has released his right to appeal. *Elwell v. Fosdick*, 134 U. S. 500.

Acquirement by Appellant of Subject-matter of Controversy. — Nor will an appeal be considered where the appellant comes into possession of the subject-matter in controversy pending the appeal. *Cleveland v. Chamberlain*, 1 Black (U. S.) 419; *Little v. Bowers*, 134 U. S. 547; *Russell v. Campbell*, 112 N. Car. 404.

Settlement Pending Appeal. — Where, pending the appeal, the parties make a settlement or compromise, the appeal will be dismissed. *Martinez Bank v. Jahn*, 104 Cal. 238; *Hunter v. Dickinson*, 3 Colo. App. 372; *Dakota County v. Glidden*, 113 U. S. 222.

Satisfaction of Judgment. — An appeal will not be considered where the judgment has been satisfied. *Morton v. Superior Ct.*, 65 Cal. 496; *People v. Burns*, 78 Cal. 645.

Payment of Tax. — Where, pending a suit concerning the validity of the assessment of a tax, the tax is paid, the appeal will not be considered. *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138; *Little v. Bowers*,

renders it impossible for the appellate court, if it should decide in favor of the appellant, to grant him any effectual relief, the court will not proceed to a formal judgment.¹

b. REMAND WITHOUT DECISION. — An appellate court may, without passing on a question raised on appeal, remand the cause to the lower court for the determination of such question.²

c. DELIVERY OF WRITTEN OPINION. — In the absence of constitutional provisions, the duty of an appellate court is performed on its rendition of judgment.³ The legislature cannot, therefore, require the Supreme Court to give reasons for its decisions in writing.⁴ And a constitutional or statutory provision requiring the Supreme Court to reduce its opinions to writing and notice every error assigned does not require a notice of points not essential to a full and effectual disposition of the cause, or of unimportant points, or of points involving no new question.⁵

134 U. S. 547; *Singer Mfg. Co. v. Wright*, 141 U. S. 696. So, too, where the amount of the tax is tendered and deposited in a bank. *California v. San Pablo, etc., R. Co.*, 149 U. S. 308.

Distinction Between Judgment and Opinion. — The opinion filed by an appellate court is not the judgment of the court, but only the reasons for the judgment. *Houston v. Williams*, 13 Cal. 24; *Lambert v. Hyers*, 27 Ill. App. 400; *Ex p. Dial*, 14 S. Car. 586; *Davidson v. Carroll*, 23 La. Ann. 108; *Watkins v. Junker*, 4 Tex. Civ. App. 629.

1. *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170; *Parker v. Bilgery*, 47 La. Ann. 1348; *Meloy v. Scott*, 83 Md. 375.

In *Cheong Ah Moy v. U. S.*, 113 U. S. 216, the court declined "to decide questions arising in cases which no longer exist, in regard to rights which it cannot enforce."

A writ of error sued out to a judgment refusing to enjoin a sale of land will not be entertained where the sale sought to be enjoined has actually taken place. *Thornton v. Manchester Invest. Co.*, 97 Ga. 342.

2. *Blumenthal v. Shaw*, 70 Fed. Rep. 801.

3. *Houston v. Williams*, 13 Cal. 24.

4. **Delivery of Written Opinion.** — In *Houston v. Williams*, 13 Cal. 24, Field, J., speaking for the court, said: "The legislature can no more require this court to state the reasons of its decisions than this court can require, for the validity of the statutes, that the legislature shall accompany them with the reasons for their enactment."

5. *Henry v. State Bank*, 3 Ind. 216; *Clark v. Trovinger*, 8 Ind. 334; *Marvin v. Carter*, 8 Ind. 462; *Trayser v. Indiana Asbury University*, 39 Ind. 556; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 116 Ind. 578. See, generally, article OPINIONS.

Necessity of Written Opinions. — In *Baker v. Kerr*, 13 Iowa 384, the court said: "In view of the great press of business, in our anxiety to pass upon and adjudicate the causes submitted with as little delay as possible, we have felt at liberty, and indeed that it was our duty, to announce that a case was affirmed, without filing a written opinion, when it was unimportant, involved no new question, and when an opinion would be but repetition and tend to unnecessarily encumber our published reports."

In *Willets v. Ridgway*, 9 Ind. 368, it is said that a constitutional provision requiring a written opinion upon every point arising in the record of every case, "if literally followed, tends to fill our reports with repetitions of decisions upon settled as well as frivolous points, and often to introduce into them, in the great press of business, premature and not well-considered opinions, upon points only slightly argued."

In *Burnett v. Powell*, 6 Tex. Civ. App. 39, Head, J., speaking for the court, says: "Believing that the legal literature of this state is already sufficiently voluminous, * * * this court * * * has felt that it could subserve the interests of litigants better by devoting its time to the decision of cases than by writing at length the reasons for such decisions, unless some

d. **CHANGE IN LAW OR STATE OF FACTS.** — An appellate court, in determining a cause, is confined to an inquiry as to whether the judgment, when rendered, was correct or incorrect.¹ Consequently a judgment of an inferior court will not be reversed for any fact arising after the rendition of such judgment.² But if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and changes the rule which governs, the rights of the parties must be determined by such law.³ So, too, a judgment imposing a penalty will be reversed on appeal where the law imposing the penalty expires or is repealed after the rendition of the judgment and pending an appeal therefrom.⁴

useful purpose could be accomplished thereby; and we have, therefore, adopted the practice of delivering our opinions orally in affirmed cases in which our jurisdiction is believed to be final. * * * This practice we shall continue to follow until convinced of our error in its adoption."

Writing Out Reasons at Length. — Under a statute providing that the Supreme Court shall not write out its reasons at length unless necessary, no reasons will be stated on affirmance on second appeal where the principles laid down on the first appeal have been carefully followed by the trial court. *Bradsher v. Cheek*, 112 N. Car. 838.

1. *Parmalee v. Lawrence*, 48 Ill. 331; *Montague v. State*, 54 Md. 481; *Ryerson v. Eldred*, 18 Mich. 490; *Boone v. McJunkin*, 63 Miss. 559; *Hartung v. People*, 22 N. Y. 95; *U. S. v. Schooner Peggy*, 1 Cranch (U. S.) 103.

Inquiry Confined to Correctness at Rendition. — In *State v. McGlynn*, 20 Cal. 233, the attention of the court was called to a statute relating to the subject-matter at issue, passed pending the appeal. The court declined to consider it, saying: "We must decide whether the order made by the court below was correct or erroneous at the time it was pronounced." To the same effect is *Parmalee v. Lawrence*, 48 Ill. 331.

2. *Boone v. McJunkin*, 63 Miss. 559, where it is said: "We know of neither an authority nor a principle upon which we can try on appeal the existence of a fact which has arisen since the judgment in the court below, or upon which the alleged fact, if now found to be true, would warrant a reversal of a judgment right when it was rendered. This court can only reverse a case erroneously determined by the inferior court; a judgment right when

rendered is not subject to reversal because of any fact arising after its rendition, and which, if it had existed at the time, would have produced a different result."

Plea Puis Darrein Continuance. — On appeal to the general term from a judgment of the Superior Court at special term, a plea showing that the appellant, since taking the appeal, had commenced another action in the federal court will not be considered. *Voorhees v. Indianapolis Car, etc., Co.*, 140 Ind. 220.

3. *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 144; *Atwell v. Grant*, 11 Md. 101; *State v. Norwood*, 12 Md. 177; *Keller v. State*, 12 Md. 322; *Day v. Day*, 22 Md. 530; *Price v. Nesbitt*, 29 Md. 263; *Wade v. Saint Mary's Industrial School*, 43 Md. 178; *Smith v. State*, 45 Md. 49; *Turner v. Bryan*, 83 Md. 373; *Meloy v. Scott*, 83 Md. 375; *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677; *Yeaton v. U. S.*, 5 Cranch (U. S.) 281.

Appeal Determined by Existing Law. — In *U. S. v. Schooner Peggy*, 1 Cranch (U. S.) 110, it is said that "the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

U. S. v. Preston, 3 Pet. (U. S.) 57, declares that "any statute which governs the case must be an existing valid statute at the time of affirming the decree below."

4. *The Schooner Rachel v. U. S.*, 6 Cranch (U. S.) 329; *Butler v. Palmer*, 1 Hill (N. Y.) 324; *Hartung v. People*, 22 N. Y. 95.

Repeal of Statute Imposing Penalty. — In *Com. v. Duane*, 1 Binn. (Pa.) 60r, a judgment of conviction was arrested,

e. DEATH OF PARTY AFTER SUBMISSION. — The death of a party after argument and submission of the appeal does not constitute any ground for delaying a decision or departing from the ordinary course of procedure, except as to the entry of the judgment which may be rendered. The entry should be of a day anterior to the death.¹

f. JUDGMENT IN EXCESS OF JURISDICTION OF LOWER COURT. — On appeal from the judgment of a court whose jurisdiction is limited by the amount in controversy, no judgment can be rendered in excess of such jurisdictional amount.²

g. RENDERING FINAL JUDGMENT — (1) *In General.* — Although it is the usual practice of the appellate court, on rendering judgment, to remand the cause to the trial court,³ the appellate court may, in the absence of a statute requiring a remand, pronounce final judgment.⁴ But final judgment should not be rendered in

it appearing that the statute under which the conviction was had was repealed pending a decision on a motion in arrest. To same effect, see *Com. v. Marshall*, 11 Pick. (Mass.) 350; *Com. v. Kimball*, 21 Pick. (Mass.) 373.

1. *Black v. Shaw*, 20 Cal. 68; *Savings, etc., Soc. v. Gibb*, 21 Cal. 596; *Jeffries v. Lamb*, 73 Ind. 202; *Gas Light, etc., Co. v. New Albany*, 139 Ind. 660; *Campbell v. Mesier*, 4 Johns. Ch. (N. Y.) 334; *King v. Dunn*, 21 Wend. (N. Y.) 253; *Miller v. Gunn*, 7 How. Pr. (N. Y. Supreme Ct.) 159; *Macon v. Dasher*, 90 Ga. 195; *Central Sav. Bank v. Shine*, 48 Mo. 456; *Mead v. Mead*, 1 Mo. App. 247; *Aultman v. Utsey*, 35 S. Car. 596; *Davies v. Davies*, 9 Ves. Jr. 461; *Jones v. Le Davids*, 2 Fowl. Exch. Pr. 169.

Death of Party After Submission. — Where a party dies after submission of an appeal, and the appellate court, in ignorance of the death, renders judgment and issues a remittitur, the remittitur will be recalled and a judgment rendered as of the date of the submission. *Holloway v. Galliac*, 49 Cal. 149.

Where the party in whose favor a judgment is rendered by the appellate court is dead at the time such judgment is rendered, the judgment will be set aside at a subsequent term, and the judgment revived in the name of his legal representatives. *Slagel v. Murdock*, 52 Mo. 521.

Where the complainant died after the entry of an appeal and after the cause was ready for a hearing, but, his death being unknown to counsel, the cause was heard and decided, the decree

upon the appeal was ordered to be entered *nunc pro tunc* as of a day previous to the death of the complainant, and after the entering of the appeal. *Vroom v. Ditmas*, 5 Paige (N. Y.) 528. To the same effect, see *U. S. Bank v. Weisiger*, 2 Pet. (U. S.) 481.

Death of Party Pending Appeal. — See article APPEALS, vol. 2, p. 196.

2. *Glover v. Collins*, 18 N. J. L. 232; *Union Pac. R. Co. v. Ogilvy*, 18 Neb. 638.

Judgment in Excess of Jurisdiction of Lower Court. — In *Pruitt v. Stuart*, 5 Ala. 112, it is said: "Where a suit seeking the recovery of money originates in one of these inferior tribunals, if it is removed to the Circuit or County Court, the judgment should not exceed the amount for which the primary jurisdiction was authorized to proceed. * * * If the law were otherwise, a party having a demand for a sum far beyond the limitation prescribed might cause a warrant to be issued by a justice, suffer a judgment to be rendered against him by an intentional failure to adduce any proof, and immediately prosecute an appeal and recover all he claimed — a state of things which would be in itself an intolerable perversion of justice."

3. *Halsey v. Flint*, 15 Abb. Pr. (N. Y. Supreme Ct.) 367; *Boyd v. Sumner*, 10 Wis. 41.

4. *Commercial Ins. Co. v. Scammon*, 123 Ill. 601; *Musser v. Harwood*, 23 Mo. App. 495; *Edmonston v. McLoud*, 16 N. Y. 543; *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436; *Bush v. Livingston*, 2 Cal. Cas. (N. Y.) 66; *Crawford v. Wingfield*, 25 Tex. 414; *Porter*

favor of the appellant if it will prevent the appellee from raising questions upon exceptions reserved in the court below.¹

(2) *On Exceptions.* — Cases brought into the Supreme Court upon exceptions are finally disposed of there, unless a jury trial becomes necessary, or unless, by the decision of the court, the case is placed in such a state that either party has a right to a trial by a jury.²

h. LEAVE TO APPLY TO TRIAL COURT FOR RELIEF. — Where the form in which a cause is presented to the trial court, and on appeal, is such that it does not raise an issue material to the cause, and an absolute affirmance or reversal would bar the presentation of such issue, the appellate court may remand with leave to present the matter to the trial court in such form as to raise such issue.³

v. Smith, 20 Vt. 344; *Wires v. Farr*, 24 Vt. 645; *Reed v. Jones*, 8 Wis. 421; *Boyd v. Sumner*, 10 Wis. 41.

Rendering Final Judgment. — In *Person v. Merrick*, 5 Wis. 231, the court said: "We have no doubt of our power to render original and final decrees, * * * yet we are free to confess that experience has shown that this practice is inconvenient and open to serious objections."

In *Boyd v. Sumner*, 10 Wis. 41, it is said that "as the parties desired that final judgment might be entered here, in consequence of the situation of the premises and the length of time before the next term of the circuit, although the late practice in this court has been different, the judgment may be entered here accordingly, though as a general rule we shall adhere to the practice of remanding to the Circuit Court for such further proceedings as may be necessary."

In *Illinois* the statute expressly authorizes the Supreme Court to render final judgment. See *Commercial Ins. Co. v. Scammon*, 123 Ill. 603.

In *Vermont* the Supreme Court cannot make a final decree in an equity case, as the statute provides that the proceedings and decree of the Supreme Court shall be remanded to the Court of Chancery, where such proceedings shall be had as may be necessary to carry the decree into effect. *Downer v. Dana*, 22 Vt. 337.

On Reversal. — The statutory grant of power to the general term to order a final judgment in a cause appealed to it, where the judgment is wholly or partly affirmed, does not exclude the exercise of such power in case of reversal. *Flatow v. Van Bremsen*, (C. Pl.) 17 N. Y. Supp. 506.

1. *Baird v. Chicago, etc., R. Co.*, 55 Iowa 125.

2. *Peach v. Mills*, 13 Vt. 501.

3. *Lucke v. Clothing Cutters, etc.*, Assembly No. 7507, 77 Md. 396; *Pickett v. Jones*, 63 Mo. 195; *Ledlie v. Wallen*, 17 Mont. 150; *Roehr v. Liebmann*, 9 N. Y. App. Div. 247; *Koch v. Purcell*, 45 N. Y. Super. Ct. 162.

Leave to Apply to Trial Court for Relief. — In *Koch v. Purcell*, 45 N. Y. Super. Ct. 162, it is said that "it is sometimes the practice to look after the equity of the case on appeal, if justice demands it, even where it has not been presented in due form to the court below."

In *Roehr v. Liebmann*, 9 N. Y. App. Div. 247, there was a misjoinder of causes of action. A demurrer for such misjoinder was overruled. On appeal the Supreme Court granted leave to the plaintiff to sever.

In *Ryan v. Spieth*, 18 Mont. 45, a demurrer to the complaint on the ground that it did not state a cause of action was sustained. It appeared that the plaintiff had a good cause of action. The Supreme Court accordingly remanded the case to give the plaintiff an opportunity to amend. To the same effect is *Ledlie v. Wallen*, 17 Mont. 150.

Where, in a bill for the specific performance of a contract, the contract proved varies from that set up in the bill, but is clear and certain in its terms and is such as equity might enforce, and the trial court decrees a specific execution of the contract set out in the bill, though the decree must be reversed, the Supreme Court will not dismiss but will remand the cause to the court below to put the plaintiff to his election either to have a specific execution of the "contract as proved"

And this is true though the judgment appealed from is correct.¹

i. GRANT OF AFFIRMATIVE RELIEF TO APPELLEE — (1) *In General.* — While it is the general rule that appellate courts only grant relief to parties who appeal,² affirmative relief may be granted to an appellee who has properly saved the question below,³ or where the entire record and all the parties to the cause are before the court.⁴

(2) *On Appeals in Chancery.* — A decree in chancery may in some cases be reversed at the instance of the appellee if it contains errors prejudicial to his rights, though no appeal is taken by him.⁵

j. RELIEF BETWEEN CO-APPELLEES. — An appellate court is only concerned with the determination of the controversy as between the appellants on the one hand and the appellees on the other. No cognizance will, therefore, be taken on appeal of any question between co-appellees.⁶

or to have the same rescinded and the parties put *in statu quo*. *Baldenberg v. Warden*, 14 W. Va. 397.

1. *Pickett v. Jones*, 63 Mo. 195; *Ryan v. Spieth*, 18 Mont. 45; *Koch v. Purcell*, 45 N. Y. Supr. Ct. 162.

2. *Arkansas.* — *Turner v. Turner*, 44 Ark. 25.

Georgia. — *Allison v. Chaffin*, 8 Ga. 330.

Iowa. — *Carbiener v. Montgomery*, 97 Iowa 659; *Hintrager v. Hennessy*, 46 Iowa 600; *Alexander v. Buffington*, 66 Iowa 360; *Cassady v. Spofford*, 57 Iowa 237.

Kansas. — *Missouri Pac. R. Co. v. Lea*, 47 Kan. 268.

Louisiana. — *Jamison v. Barelli*, 20 La. Ann. 452; *Gathe v. Broussard*, 49 La. Ann. 312; *Leeds v. Jones*, 37 La. Ann. 427.

Michigan. — *Campbell v. Smith*, 103 Mich. 427; *Lamont v. Le Fevre*, 96 Mich. 175; *Aplin v. Baker*, 84 Mich. 113.

Nebraska. — *Rogers v. Central Loan, etc., Co.*, 49 Neb. 676.

Oregon. — *Thornton v. Krimbel*, 28 Oregon 271; *Conrad v. Pacific Packing Co.*, (Oregon 1897) 49 Pac. Rep. 659.

Texas. — *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13.

Washington. — *Pepperall v. City Park Transit Co.*, 15 Wash. 176; *Glenn v. Hill*, 11 Wash. 541; *Tacoma v. Tacoma Light, etc., Co.*, 16 Wash. 288; *Langert v. David*, 14 Wash. 389.

United States. — *Cherokee Nation v. Blackfeather*, 155 U. S. 218; *The Stephen Morgan*, 94 U. S. 599.

And see authorities cited in article APPEALS, vol. 2, p. 514.

3. *Johnson v. Culver*, 116 Ind. 278; *Feder v. Field*, 117 Ind. 386.

Grant of Affirmative Relief to Appellee. — In *Patoka Tp. v. Hopkins*, 131 Ind. 142, it is said: "It is a mistake to suppose that an appellee who properly saves a question, and duly presents it by the assignment of cross-errors, is not entitled to affirmative relief. An appeal may do more than save costs or prevent a reversal by appropriately assigning cross-errors. He may in many instances accomplish as much by the assignment of cross-errors in a case appealed by his adversary as by himself prosecuting an appeal."

4. *Feder v. Field*, 117 Ind. 386; *Shinkle v. Ripley First Nat. Bank*, 22 Ohio St. 516.

5. *O'Neil v. Percival*, 25 Fla. 118; *Foster v. Ambler*, 24 Fla. 519; *Fairchild v. House*, 18 Fla. 770; *Southern L. Ins., etc., Co. v. Cole*, 4 Fla. 359; *Grubb v. Browder*, 11 Heisk. (Tenn.) 299. See, generally, article APPEALS, vol. 2, pp. 157, 514.

On Appeals in Chancery. — In *Parsons v. Kinzer*, 3 Lea (Tenn.) 342, it is said: "The very nature of a chancery suit proper requires the presence of all parties interested, and a final determination of their rights."

In *Neubert v. Massman*, 37 Fla. 91, it is said: "An appeal in chancery opens the whole case for the consideration of the appellate court."

6. *Berthelot v. Fitch*, 44 La. Ann. 503; *Jamison v. Barelli*, 20 La. Ann.

2. Entry, Form, and Amendment of Judgment — *a. ENTRY OF JUDGMENT.* — It is not necessary that the judgment of the appellate court be enrolled and signed by the judges. An entry of it on the journals of the court is sufficient.¹

b. FORM OF JUDGMENT — (1) *On Affirmance* — *In General.* — As a general rule, an appellate court on affirming a judgment simply declares that the judgment is affirmed. And in those jurisdictions where there is an appeal from the special to the general term it has been said that the entry of judgment should contain nothing more.²

Explanation of Judgment. — The court, however, may add to a judgment of affirmance such explanation as may be necessary to make the judgment below fully understood.³

Entry of New Judgment. — No new judgment should be entered on affirmance, especially where the affirmance is by a general term of a judgment of the special term.⁴

452; *Moore v. Moore*, 20 La. Ann. 159; *Gantt v. Eaton*, 25 La. Ann. 508; *Deblanc v. Levasseur*, 26 La. Ann. 542; *La Vega v. League*, 2 Tex. Civ. App. 252.

Relief Between Co-appellees. — In *Powell v. White*, 11 Leigh (Va.) 322, it is said: "The decree being deemed right in all respects, as it affects the questions in controversy between the appellants on the one hand and each and all of the appellees on the other, I think the court cannot take cognizance on this appeal of any question between the appellees. The power of the court to take cognizance of such questions arises only when, on the questions between the appellants on the one hand and one or more of the appellees on the other, a decision is made which directly or incidentally disturbs the rights of one or more of the appellees, as settled by the decree appealed from. When such disturbance is the consequence of the decision of the question between the appellants and the appellees, there must necessarily result the questions that arise from the new position in which the rights of the appellees are placed; and of such questions the Court of Appeals has cognizance, and they should be decided by the court."

1. *Ryerson v. Eldred*, 18 Mich. 492.

Entry of Judgment in Lower Court. — See article MANDATE AND PROCEEDINGS THEREON.

2. *Eno v. Crooke*, 6 How. Pr. (N. Y. Supreme Ct.) 462; *De Agreda v. Mantel*, 1 Abb. Pr. (N. Y. Super. Ct.) 130;

Halsey v. Flint, 15 Abb. Pr. (N. Y. Supreme Ct.) 367.

For Form of Judgment on Appeal in Probate Proceedings, see article PROBATE AND ADMINISTRATION.

3. *Mayo v. Purcell*, 3 Munf. (Va.) 243; *Brooke v. Shelly*, 4 Hen. & M. (Va.) 266.

Addition to Terms of Judgment. — An appellate court on affirming a judgment may make such additions to its terms as may be necessary to secure to both parties the benefits, advantages, and prospective rights for which they mutually stipulate in relation to which the judgment appealed from was silent or not sufficiently precise. *Jones v. Belt*, 2 Gill (Md.) 106.

4. *Beers v. Hendrickson*, 45 N. Y. 665; *De Agreda v. Mantel*, 1 Abb. Pr. (N. Y. Super. Ct.) 130; *Halsey v. Flint*, 15 Abb. Pr. (N. Y. Supreme Ct.) 367.

Entry of New Judgment. — In *Eno v. Crooke*, 6 How. Pr. (N. Y. Supreme Ct.) 463, it is said: "Under the old system, when a judgment brought into this [Supreme] court from an inferior court, by writ of error, was affirmed, a new judgment was entered in this court. * * * But that practice was founded upon the theory that the cause was taken from the court below, and remained thereafter in the Supreme Court. * * * The reason of the rule does not apply to appeals from a judgment entered on the direction of a single judge to the general term. For here both judgments are in the same court, and there is an obvious impropriety in entering up two judgments

Inclusion of Judgment of Lower Court. — And it has been held to be irregular to include in the judgment of affirmance the amount of the judgment of the court below.¹

Judgments of Inferior Courts. — The rule that on the affirmance of a judgment a mere entry of affirmance is all that is necessary does not apply to the affirmance of judgments of inferior courts. In such cases the affirmance should be for a specific sum.²

(2) *On Modification.* — On rendering a judgment modifying the judgment appealed from, the modification directed need not be embodied in the formal order of court entered of record.³

(3) *On Reversal.* — The form of a judgment entered upon a reversal depends on the disposition made of the cause or the nature of the order or judgment from which the appeal is taken.⁴

in the same court for the same demand."

1. *Beers v. Hendrickson*, 45 N. Y. 665; *De Agreda v. Mantel*, 1 Abb. Pr. (N. Y. Super. Ct.) 130; *Eno v. Crooke*, 6 How. Pr. (N. Y. Supreme Ct.) 462.

Inclusion of Judgment of Lower Court. — In *Halsey v. Flint*, 15 Abb. Pr. (N. Y. Supreme Ct.) 367, it is said that "it has become the established practice, and is settled by the Court of Appeals as the only proper practice, to exclude from the judgment of affirmance all sums and amounts secured by the judgment in the court below."

2. *Woodruff v. Badgley*, 12 N. J. L. 367; *Jones v. Pitman*, 12 N. J. L. 93; *Saxton v. Landis*, 16 N. J. L. 302; *Ivins v. Schooley*, 18 N. J. L. 269; *Doremus v. Howard*, 23 N. J. L. 390.

Judgments of Inferior Courts. — In *Ivins v. Schooley*, 18 N. J. L. 269, *Hornblower, C. J.*, said: "If the judgment [of the justice] is affirmed in all things, the court must go further and specify the amount of debt or damages and costs for which they give judgment."

In *Hann v. Gosling*, 9 N. J. L. 248, the judgment was: "The court do affirm the judgment of the justice below, with costs of increase. Whereupon it is considered that the said John Gosling, appellee, do recover of the said Azariah Hann, the appellant, the sum of — debt, and — costs of suit," and *Ewing, C. J.*, said: "The judgment is not properly entered. No sum is mentioned."

But see *Benedict v. Dillehunt*, 4 Ill. 287, where it was held that a judgment of affirmance on appeal from a justice, not stating the amount, is sufficiently certain if it can be made so by reference to the justice's judgment.

3. *Washburn, etc., Mfg. Co. v. Chicago Galvanized Wire Fence Co.*, 119 Ill. 30, wherein it was said that it was conformable with the practice of the court, and sufficient, if the modification be specifically directed in the written opinion of the court filed in the case.

Modification of Decree. — In *Hunter v. Hatch*, 45 Ill. 178, the court said: "After a decree is reversed, then the court may modify it by a decree in this court, or by remanding it with instructions. But before it can be modified, the erroneous portion, at least, must be reversed." And see, to same effect, *Washburn, etc., Mfg. Co. v. Chicago Galvanized Wire Fence Co.*, 119 Ill. 30.

4. **Illustrations.** — Where a demurrer to a plea is sustained and a judgment of *respondent ouster* entered, and another plea is filed, a demurrer to which is overruled by the court below, but sustained on appeal, the judgment of the appellate court will be *quod recuperet*. *Atkinson v. Fortinberry*, 7 Smed. & M. (Miss.) 302.

Where a judgment in an action tried by the court is reversed by the general term, and a new trial ordered upon questions of fact, the general term is not required to specify in its order the particular errors of fact. It is sufficient if the order states generally that the reversal was based wholly or in part upon errors in fact. *Hubbell v. Meigs*, 50 N. Y. 480.

So, in a case tried by a jury, it is not necessary that the order of reversal by the general term should state whether the reversal was on questions of law or of fact. *Harris v. Burdett*, 73 N. Y. 136; *Goodwin v. Conklin*, 85 N. Y. 21.

On reversing an order of the special term discharging a mechanic's lien and

(4) *Conclusions and Findings of Fact.* — In some states intermediate appellate courts are required, on rendering judgment, to file a "conclusion of the facts and law of the case," if their judgment is not final,¹ or to recite in their judgment "the facts as found" by them, if their judgment is the result of a finding of fact different from that of the court from which the cause was brought.²

vacating an order continuing the lien, the general term may include in the order of reversal an order requiring the county clerk to restore the lien and the record of the order continuing it. *McGuckin v. Coulter*, 33 N. Y. Super. Ct. 328.

Reversal of Judgment Entered upon a Verdict. — In *Louisiana* the Supreme Court, on setting aside a judgment entered upon the verdict of a jury, must declare that the finding of the jury was erroneous. *Halliday v. Lanata*, 25 La. Ann. 373.

1. Rev. Stat. Texas (1895), art. 1039, p. 245; *Galveston, etc., R. Co. v. Arispe*, 5 Tex. Civ. App. 611; *Burnett v. Powell*, 6 Tex. Civ. App. 39; *Sturgis Nat. Bank v. Smith*, 9 Tex. Civ. App. 540; *Burnett v. Powell*, 86 Tex. 382; *Muhle v. New York, etc., R. Co.*, (Tex. Civ. App. 1893) 24 S. W. Rep. 312.

Conclusions of Fact. — "It is not the statement of facts that must be incorporated into the opinion of the court or appended to the same, but the conclusions drawn by the court from the statement of facts." *Galveston, etc., R. Co. v. Arispe*, 5 Tex. Civ. App. 611.

No conclusions of fact need be filed in cases which are reversed and remanded. *Sturgis Nat. Bank v. Smith*, 9 Tex. Civ. App. 540.

Motion for Filing Conclusions of Fact. — In *Muhle v. New York, etc., R. Co.*, (Tex. Civ. App. 1893) 24 S. W. Rep. 312, it was held that a motion asking the Court of Civil Appeals to file its conclusions of fact must point out the particulars in which the findings in the opinion as rendered are deficient.

2, 3 *Starr & Curt. Anno. Stat. Ill.* (1896), c. 110, par. 88, p. 3114; *Goodrich v. Lincoln*, 93 Ill. 359; *Tenney v. Foote*, 95 Ill. 99; *Brant v. Lill*, 96 Ill. 608; *Tibballs v. Libby*, 97 Ill. 552; *Fitzsimmons v. Cassell*, 98 Ill. 332; *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *Coalfield Co. v. Peck*, 98 Ill. 139; *Gammon v. Huse*, 100 Ill. 234; *Paddon v. People's Ins. Co.*, 107 Ill. 196; *Thomas v. Fame Ins. Co.*, 108 Ill. 91;

Schroeder v. Trade Ins. Co., 109 Ill. 157; *Brown v. Aurora*, 109 Ill. 165; *Williams v. Forbes*, 114 Ill. 167; *Rogers v. Chicago, etc., R. Co.*, 117 Ill. 115; *People v. Soucy*, 122 Ill. 335; *Commercial Ins. Co. v. Scammon*, 123 Ill. 601, 126 Ill. 355; *Hayes v. Massachusetts Mut. L. Ins. Co.*, 125 Ill. 626; *Jones v. Fortune*, 128 Ill. 518; *Neer v. Illinois Cent. R. Co.*, 138 Ill. 20; *Scovill v. Miller*, 140 Ill. 504; *Siddall v. Jansen*, 143 Ill. 537; *Hawk v. Chicago, etc., R. Co.*, 147 Ill. 399; *Neer v. Illinois Cent. R. Co.*, 151 Ill. 141; *U. S. Mutual Acc. Assoc. v. Mueller*, 151 Ill. 254; *Ohio, etc., R. Co. v. Wangelin*, 152 Ill. 138; *Huntington v. Metzger*, 158 Ill. 272; *Morris v. Wibaux*, 159 Ill. 627; *Travelers' Ins. Co. v. Pulling*, 159 Ill. 603; *Lamson v. Illinois Trust, etc., Bank*, 166 Ill. 162; *Cassell v. Fitzsimmons*, 9 Ill. App. 78; *Joliet, etc., R. Co. v. Velie*, 140 Ill. 59. See, generally, article FINDINGS OF COURT, vol. 8, p. 931.

The Finding of Facts which the appellate court must make is the finding of the ultimate fact or facts upon the existence or nonexistence of which, as set up in the pleadings of the cause, the rights of the parties depend; it does not mean that the appellate court shall find what was the evidence of these facts, or that it shall find those merely subordinate or evidentiary facts which, when established, contribute to the establishment of the ultimate fact which must exist in order to sustain the alleged cause of action or defense. *Brown v. Aurora*, 109 Ill. 165. To the same effect see *Travelers' Ins. Co. v. Pulling*, 159 Ill. 603.

Manner of Setting Out Findings. — The facts found should be set out by way of recital in the final order or judgment of the court, in the same manner in which they are usually set forth and recited in decrees in chancery. *Tibballs v. Libby*, 97 Ill. 552; *Tenney v. Foote*, 95 Ill. 99; *Neer v. Illinois Cent. R. Co.*, 138 Ill. 29.

Necessity of Finding. — No finding of

c. AMENDMENT OF JUDGMENT—(1) *Power to Amend.*—An appellate court may amend or correct its judgment for clerical errors or mistakes, or for defects of form,¹ or where it is founded

fact is necessary on the affirmance of the judgment of the lower court. *Lamson v. Illinois Trust, etc., Bank*, 166 Ill. 162. Nor where the judgment is reversed and the court remanded for a new trial. *Cassell v. Fitzsimmons*, 9 Ill. App. 78; *Union Nat. Bank v. Manistee Lumber Co.*, 43 Ill. App. 528. Nor where all the facts but one are admitted by a stipulation of the parties, and as to that fact, the finding is the same as that of the trial court. *U. S. Mutual Acc. Assoc. v. Mueller*, 151 Ill. 254. Nor where there is no controversy as to what the facts are. *Goodrich v. Lincoln*, 93 Ill. 359.

Certificate in Lieu of Recital.—In *Tenney v. Foote*, 95 Ill. 99, it was held that a certificate of the judges of the appellate court as to the facts of the case was not a compliance with the statute. To the same effect is *Tibbals v. Libby*, 97 Ill. 552.

For Consideration by the Supreme Court of the United States.—Where the parties desire it, the court will, in a proper case, find the facts in such a manner that the questions of law can be fairly raised for the consideration of the Supreme Court of the United States. *Wiggins v. Guier*, 13 La. Ann. 356.

1. *Iowa.*—*Drake v. Smythe*, 44 Iowa 410; *Roberts v. Corbin*, 26 Iowa 315.

Louisiana.—*Mahony v. Mahony*, 41 La. Ann. 135.

Maryland.—*Kemp v. Cook*, 18 Md. 130.

Michigan.—*Crawford v. Osmun*, 90 Mich. 82.

Mississippi.—*Le Blanc v. Illinois Cent. R. Co.*, 73 Miss. 463; *Cotten v. McGehee*, 54 Miss. 621.

New Jersey.—*Fraley v. Feather*, 46 N. J. L. 429; *King v. Ruckman*, 22 N. J. Eq. 551.

New York.—*Legg v. Overbagh*, 4 Wend. (N. Y.) 188; *People v. New York*, 25 Wend. (N. Y.) 252; *Delaplaine v. Bergen*, 7 Hill (N. Y.) 591; *Hosack v. Rogers*, 7 Paige (N. Y.) 108; *Palmer v. Lawrence*, 5 N. Y. 455.

North Carolina.—*Scott v. Queen*, 95 N. Car. 340; *Cook v. Moore*, 100 N. Car. 294; *Summerlin v. Cowles*, 107 N. Car. 459; *Solomon v. Bates*, 118 N. Car. 321.

Oregon.—*Morrell v. Miller*, 28 Oregon 354.

South Carolina.—*Pringle v. Sizer*, 3 S. Car. 337; *Tillinghast v. Boston, etc., Lumber Co.*, 39 S. Car. 484; *Hartsfield v. Chamblin*, 44 S. Car. 110.

Tennessee.—*Hill v. Walker*, 7 Baxt. (Tenn.) 310.

Texas.—*Ximenes v. Ximenes*, 43 Tex. 458; *Chambers v. Hodges*, 3 Tex. 529.

Washington.—*Wagner v. Law*, 3 Wash. 500.

Wisconsin.—*Everett v. Gores*, 92 Wis. 527.

United States.—*Sibbald v. U. S.*, 12 Pet. (U. S.) 488; *U. S. Bank v. Moss*, 6 How. (U. S.) 31.

England.—*White v. Tommey*, 4 H. L. Cas. 333.

See generally articles OPENING, VACATING, AND AMENDING JUDGMENTS; RECORDS.

As to amendment of judgment on rehearing, see article APPEALS, vol. 2, p. 382.

Amendment of Judgment After Remand.—See article MANDATE AND PROCEEDINGS THEREON.

Power to Amend.—In *Drake v. Smythe*, 44 Iowa 410, there was a judgment of affirmance against the appellants and the sureties on the appeal bond. At a subsequent term the sureties moved to set aside the judgment against them on the ground that they had been released from liability. The Supreme Court, in passing upon the motion, said: "As there can be no review of judgments entered here, it appears that the protection of parties and the right administration of justice demand that jurisdiction should rest in this court to correct or cancel judgments improvidently entered through mistake or oversight, or procured in cases wherein the record, when inspected, fails to show jurisdiction in this court."

Misentry by Clerk.—A judgment of the Supreme Court, erroneous by reason of its misentry by the clerk, may be amended. *King v. Ruckman*, 22 N. J. Eq. 551.

Error in Computation.—A clerical error in the computation of a debt, though formulated in the decretal part of the judgment, may be corrected and the proper amount specified without

on a misconception of facts,¹ or may add such clause to its judgment as may be necessary to carry it out.²

(2) *Time of Amendment.* — The power to amend at a term subsequent to that in which the judgment was rendered has been doubted,³ and even denied.⁴

3. Affirmance — *a. ERROR NOT SHOWN.* — Where no error is shown on appeal and none appears, the judgment below will, of course, be affirmed.⁵

b. FAILURE TO PROSECUTE OR PERFECT APPEAL. — The judgment below will be affirmed, at the instance of the appellee, where the appellant fails or unreasonably delays to prosecute the appeal⁶ or to comply with the requisite steps for the perfection

granting a rehearing. *Mahony v. Mahony*, 41 La. Ann. 135.

Mistake in Judgment. — An order entered in the Court of Appeals on the decision of a cause, incorrectly stating the judgment pronounced, may be corrected though a remittitur has been sent to the court below. *Palmer v. Lawrence*, 5 N. Y. 455.

Mistake as to Interest. — So a judgment misstating the date at which interest should begin to run will be amended by the insertion of the correct date. *Crawford v. Osmun*, 90 Mich. 82.

Mistake in Order. — Where it is clear from the opinion filed on appeal that the court intended to reverse the judgment of the lower court, but the order made at the foot of the opinion was an affirmance of the judgment below, the court will direct the correct entry. *Cook v. Moore*, 100 N. Car. 294.

Modification of Judgment. — But where a judgment dismissing a complaint has been affirmed on appeal, the Supreme Court will not entertain a motion to modify its own judgment so as to remand the case to the lower court with leave to amend the complaint. *Wagner v. Law*, 3 Wash. 500, 28 Am. St. Rep. 56.

1. *Roberts v. Edmundson*, 4 Smed. & M. (Miss.) 730; *Cotten v. McGehee*, 54 Miss. 621; *Pringle v. Sizer*, 3 S. Car. 335; *Hartsfield v. Chamblin*, 44 S. Car. 110. See also article REHEARING.

2. *Chambers v. Hodges*, 3 Tex. 529; *Ximenes v. Ximenes*, 43 Tex. 458.

Insertion of Ground of Reversal. — An order reversing a judgment because the verdict on which the judgment was entered was against the evidence will not be resettled by the insertion of a recital of the grounds of reversal. *Kummer v. Christopher, etc.*, St. R. Co., 3 Misc. Rep. (N. Y. C. Pl.) 100.

3. *Wailles v. Johnson*, 25 Miss. 421; *Morrell v. Miller*, 28 Oregon 354; *Milam County v. Robertson*, 47 Tex. 224.

4. *Le Blanc v. Illinois Cent. R. Co.*, 73 Miss. 463; *Cook v. Moore*, 100 N. Car. 294; *Hill v. Walker*, 7 Baxt. (Tenn.) 310; *Everett v. Gores*, 92 Wis. 527.

At Subsequent Term. — In *Burke v. Mathews*, 37 Tex. 73, it is said that the only control which the Supreme Court has over its judgments after the close of the term is to correct clerical errors, mistakes, or defects of form, or matters necessary to carry out the jurisdiction of the court.

After Entry of Satisfaction. — Where the Supreme Court on its own motion orders a rehearing, and it appears that before the rehearing was ordered the procedendo had issued, and the appellee had filed the remittitur required by the first decision, and the appellant had performed the judgment by paying into court the amount thereof, and the appellee had received the same and entered satisfaction, the court, though it overrules its first judgment, is powerless to make any order affecting it. *Hasted v. Dodge*, (Iowa 1888) 39 N. W. Rep. 668.

After Issuance of Execution. — After execution has been issued on a judgment of the Supreme Court it is too late to change the form of the judgment entry. *Stoll v. Padley*, 100 Mich. 404.

5. *Hutchinson v. Bain*, 11 Kan. 234; *Du Bois v. Perkins*, 23 Oregon 144; *Clemensen v. Holcomb*, 24 Oregon 395; *Eby v. Guest*, 94 Pa. St. 160; *Brown v. Forrest*, 1 Wash. Ter. 201.

6. *Alabama.* — *Carleton v. Goodwin*, 41 Ala. 153.

Arkansas. — *Clay v. Notrebe*, 11 Ark. 631.

of the appeal.¹ And an appellee's right to an affirmance for the failure of the appellant to prosecute cannot be defeated by a motion by the appellant to dismiss the appeal.²

c. REMISSION OF PART OF RECOVERY. — See article REMITTITUR.

d. REVERSAL INEFFECTUAL OR NOT BENEFICIAL. — A judgment may be affirmed on appeal, though there is error therein, where a reversal would be ineffectual or not beneficial.³

Maine. — *Knox v. Lermond*, 3 Me. 377; *Cook v. Bennett*, 2 Me. 13.

Massachusetts. — *Campbell v. Howard*, 5 Mass. 376.

Missouri. — *Westpheling v. Enright*, 60 Mo. 279; *Bausman v. Kirtley*, 47 Mo. 28; *Bobb v. Comfort*, 47 Mo. 36; *Williams v. Kortsendorffer*, 47 Mo. 72; *Koenig v. Rohlfing*, 47 Mo. 163; *Barker v. Trumbo*, 42 Mo. 500.

New York. — *Stiles v. Burch*, 5 Paige (N. Y.) 132; *Smith v. Martin*, 3 Keyes (N. Y.) 373; *Oeters v. Groupe*, 9 Bosw. (N. Y.) 638, 15 Abb. Pr. (N. Y.) 263.

Oregon. — *McCarty v. Wintler*, 17 Oregon 391.

Tennessee. — *Bustard v. Cheatham*, 1 Overt. (Tenn.) 370; *Suggs v. Suggs*, 1 Overt. (Tenn.) 2; *Norwood v. Humphreys*, 2 Overt. (Tenn.) 188; *Freeman v. Henderson*, 5 Coldw. (Tenn.) 647; *Furber v. Carter*, 2 Sneed (Tenn.) 1.

Texas. — *Chambers v. Shaw*, 16 Tex. 143; *Loftin v. Nalley*, 28 Tex. 127; *Spann v. French*, 13 Tex. 91.

As to Dismissal for Failure to Prosecute, see article APPEALS, vol. 2, p. 340.

Rights of Joint Appellees. — Where, in an action of trespass, the defendants plead severally and have several judgments, and the plaintiff appeals but neglects to enter and prosecute the appeal, each defendant is entitled to the affirmance of his own judgment, independent of his codefendant. *Cook v. Bennett*, 2 Me. 13.

On the Failure of the Appellee to appear, the appellant, notwithstanding the default, must proceed to show error. *Stiles v. Burch*, 5 Paige (N. Y.) 132.

So where the defendant is the excepting party and the plaintiff fails to appear, the court will not treat the plaintiff as having become nonsuited, but will hear the cause on the defendant's exceptions. *Winn v. Sprague*, 35 Vt. 243.

Stay of Execution. — But it was held in *Tindall v. Jordan*, 8 Ark. 267, that a decree in chancery would not be affirmed for the failure of the appellant

to prosecute the appeal if the execution of the decree had not been stayed. See also *Clay v. Notrebe*, 11 Ark. 631.

Notice of Motion to Affirm. — A motion to affirm for failure to prosecute the appeal will only be allowed on notice to the appellant. *McCarty v. Wintler*, 17 Oregon 391. See also *Furber v. Carter*, 2 Sneed (Tenn.) 1; *Freeman v. Henderson*, 5 Coldw. (Tenn.) 647.

In Massachusetts, if the appellant be the original plaintiff, and enter his appeal and fail to prosecute, the court will enter judgment for the appellee for costs of both courts; but if the appellant be the original defendant, he will be defaulted on failing to prosecute his appeal after entering it, and the plaintiff will have judgment according to the justice of his case, without regard to the judgment below. *Campbell v. Howard*, 5 Mass. 376.

1. *McManus v. Humes*, 6 Iowa 159; *Heald v. House*, 39 Iowa 198; *Kelly v. McCormick*, 28 N. Y. 318; *Oeters v. Groupe*, 9 Bosw. (N. Y.) 639, 15 Abb. Pr. (N. Y.) 263.

Failure to Submit Points. — In *Kelly v. McCormick*, 28 N. Y. 318, it was held that where the appellant failed either to appear, or, after appearing, to submit points in accordance with a rule of court, the judgment would be affirmed as of course. See also, to the same effect, *Smith v. Martin*, 3 Keyes (N. Y.) 373.

Failure to Make or Serve Case. — In *Oeters v. Groupe*, 9 Bosw. (N. Y.) 638, 15 Abb. Pr. (N. Y.) 263, it was held that where on an appeal no case is made or served, the respondent is not bound, on the cause being regularly called on the calendar, to move to dismiss the appeal or to strike it from the calendar, but may have an affirmance.

As to Failure to File Briefs, see article BRIEFS, vol. 3, p. 726.

2. *Freeman v. Henderson*, 5 Coldw. (Tenn.) 647.

3. *Cline v. Miller*, 8 Md. 275. See also *Curtiss v. Brown*, 29 Ill. 201.

e. CONSENT TO AFFIRMANCE. — Where the parties to an appeal appear and consent to an affirmance, such an order may be entered.¹

f. WITHOUT PREJUDICE TO SUBSEQUENT PROCEEDINGS. — It is competent for an appellate court to affirm a judgment without prejudice to subsequent proceedings in the cause.²

g. DIRECTING FURTHER PROCEEDINGS. — An appellate court, though affirming the order or judgment appealed from, may remand the cause for further proceedings in the lower court.³

h. JUDGMENT ABSOLUTE PURSUANT TO STIPULATION. — A stipulation, sometimes required on appeal, that if the order or judgment appealed from is affirmed judgment absolute shall be rendered against the appellant, is obligatory upon the appellate court.⁴

1. *Sanborn v. Eads*, (Minn. 1888) 36 N. W. Rep. 463.

2. *Shafer v. Newlan*, 29 Ill. 44; *White v. Poorman*, 24 Iowa 108, wherein an affirmance was ordered, but without prejudice to the appellant's right to a new trial in the court below; *Barney v. Hartford*, 73 Wis. 95, wherein an order denying a motion to require the plaintiff to make his complaint more definite and certain, and for a bill of particulars, was affirmed on the ground that the complaint was sufficiently definite and certain, but without prejudice to the defendant's right to ask for the bill of particulars.

3. *Phillips v. Evans*, 64 Mo. 17; *Creager v. Hooper*, 83 Md. 490, which was an appeal from an order dismissing a petition, entered upon the refusal of the petitioner to plead after the overruling of his demurrer to the answer. The Court of Appeals affirmed the order and remanded the cause for a trial upon the merits.

In *Adams v. Castle*, 64 Minn. 505, the Supreme Court affirmed an order denying the defendant's motion for a new trial on the ground of a variance between the pleading and the proof, but remanded the cause with directions to the court below to permit the plaintiff to amend his complaint so as to conform to the facts proved.

In *Piper v. Hoard*, 107 N. Y. 73, the Court of Appeals affirmed an order of the general term affirming an order of the special term overruling a demurrer to the complaint, and granted leave to the defendant to apply below for leave to withdraw the demurrer and interpose an answer.

4. *Hitchings v. Van Brunt*, 38 N. Y.

335; *Godfrey v. Moser*, 66 N. Y. 250; *Mackay v. Lewis*, 73 N. Y. 382; *Sands v. Crooke*, 46 N. Y. 564; *Cobb v. Hatfield*, 46 N. Y. 533; *Wilber v. Sisson*, 54 N. Y. 121; *Jameson v. Brooklyn Skating Rink Assoc.*, 54 N. Y. 673; *Gray v. Tompkins County*, 93 N. Y. 603; *Conklin v. Snider*, 104 N. Y. 641, 5 N. Y. St. Rep. 556; *New York State Monitor Milk Pan Co. v. Remington*, 109 N. Y. 143; *Kennicutt v. Parmalee*, 109 N. Y. 650, 15 N. Y. St. Rep. 515; *Boyle v. New York, etc., R. Co.*, (Ct. App.) 23 N. Y. St. Rep. 731; *Holcombe v. Munson*, (Ct. App.) 4 N. Y. St. Rep. 250; *East River Bank v. Kennedy*, 4 Keyes (N. Y.) 279.

But it was held in *People v. Thacher*, 55 N. Y. 525, that judgment absolute pursuant to stipulation should not be entered on appeal in a proceeding to determine title to an office in which judgment has been rendered for the respondent.

And in *Talcott v. Salke*, 9 Daly (N. Y.) 154, the court affirmed an order but refrained from giving judgment absolute pursuant to the stipulation, as it appeared from the particular circumstances of the case that such disposition would work a hardship to the appellant.

Judgment Absolute. — The affirmance in the Court of Appeals of an order granting a new trial, and the simple direction for judgment absolute upon the right of the appellant, do not authorize the county clerk to enter an affirmative judgment against the appellant on a counterclaim which had not been the subject of adjudication below. *People v. Denison*, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 129.

4. Modification — *a*. **POWER TO MODIFY.** — An appellate court is vested with the amplest power to suit its judgment to the exigencies of each case that comes before it or to make its judgment effectively yield justice to the parties whose interests are involved.¹ Accordingly, an appellate court may modify or correct a judgment brought before it.²

Withdrawal of Appeal. — But an appellant who has taken an appeal with a stipulation for judgment absolute in cases of affirmance may be granted permission to withdraw the appeal. *Brown v. Simmons*, 14 Daly (N. Y.) 456; *Mackay v. Lewis*, 73 N. Y. 382.

Effect of Affirmance. — The affirmance of a judgment is an affirmance thereof with respect to all the issues decided thereby, though the opinion be based upon but one of such issues. *Finch v. Hollinger*, 46 Iowa 216.

But the affirmance of a void judgment upon grounds not touching, but overlooking, its invalidity, does not make it valid. *Pender v. Felts*, 2 Smed. & M. (Miss.) 540, cited in *Wilson v. Montgomery*, 14 Smed. & M. (Miss.) 205.

1. *California.* — *Coghill v. Boring*, 15 Cal. 213; *Argenti v. San Francisco*, 30 Cal. 458.

Colorado. — *Wehle v. Kerbs*, 6 Colo. 167.

Illinois. — *D'Wolf v. Haydn*, 24 Ill. 525.

Michigan. — *Hamilton v. Ames*, 74 Mich. 298; *Burnham v. Dillon*, 100 Mich. 359.

Montana. — *Palmer v. Murray*, 8 Mont. 312; *Quigley v. Birdseye*, 11 Mont. 451.

New York. — *Odell v. Metropolitan El. R. Co.*, 3 Misc. Rep. (N. Y. Super. Ct.) 335; *Blumenthal v. New York El. R. Co.*, 60 N. Y. Super. Ct. 95; *Bolger v. Metropolitan El. R. Co.*, (Super. Ct.) 20 N. Y. Supp. 430; *Gautier v. Douglass Mfg. Co.*, 13 Hun (N. Y.) 514; *Lore v. Dierkes*, 16 Abb. N. Cas. (N. Y. Supreme Ct.) 47; *Bradley v. Root*, 5 Paige (N. Y.) 632; *Williams v. Murray*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 292.

Texas. — *Helm v. Weaver*, 69 Tex. 143; *Wortham v. Harrison*, 8 Tex. 141.

Utah. — *Hailey First Nat. Bank v. Lewis*, 13 Utah 507.

Virginia. — *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; *Peters v. Neville*, 26 Gratt. (Va.) 549; *Stanard v. Brownlow*, 3 Munf. (Va.) 229.

Washington. — *Ankeny v. Clark*, 1 Wash. 549.

Wisconsin. — *Hays v. Lewis*, 21 Wis. 663; *Woodward v. Howard*, 13 Wis. 557.

United States. — *Appleton v. Smelzer*, 60 Fed. Rep. 137.

2. *Alabama.* — *Petree v. Wilson*, 104 Ala. 157; *Jones v. Williams*, 108 Ala. 282; *Jackson v. Shipman*, 28 Ala. 488.

California. — *Williams v. Santa Clara Min. Assoc.*, 66 Cal. 193; *Sanborn v. Cunningham*, (Cal. 1893) 33 Pac. Rep. 894; *Votan v. Reese*, 20 Cal. 89; *Ryan v. Fitzgerald*, 87 Cal. 345.

Colorado. — *McClair v. Huddart*, 6 Colo. App. 493.

Idaho. — *Betts v. Butler*, 1 Idaho 185.

Iowa. — *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601; *Walker v. Walker*, (Iowa 1895) 63 N. W. Rep. 331.

Louisiana. — *Smith v. W. J. Athens Lumber Co.*, 49 La. Ann. 663; *McCalop v. Fluker*, 12 La. Ann. 551.

Maryland. — *State v. Turner*, 8 Gill & J. (Md.) 125.

Michigan. — *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646.

Missouri. — *Hemelreich v. Carlos*, 24 Mo. App. 265; *Moberly v. Hogan*, 131 Mo. 19; *Page v. Arnold*, 51 Mo. 158.

Montana. — *Schuttler v. King*, 12 Mont. 149; *Cockrill v. Davie*, 14 Mont. 131.

New York. — *Born v. Schrenkeisen*, 110 N. Y. 55; *Casler v. Shipman*, 35 N. Y. 533; *Tillou v. Kingston Mut. Ins. Co.*, 5 N. Y. 405; *Fiedler v. Darrin*, 59 Barb. (N. Y.) 651; *Bradley v. Root*, 5 Paige (N. Y.) 632; *Forster v. Moore*, 73 Hun (N. Y.) 244.

Pennsylvania. — *Graham v. Marshall*, 52 Pa. St. 28; *Issett v. Caldwell*, 101 Pa. St. 35.

Texas. — *Willis v. Yates*, (Tex. 1889) 12 S. W. Rep. 482; *Wortham v. Harrison*, 8 Tex. 141; *Fowler v. Caldwell*, 35 Tex. 431; *European-American Colonization Soc. v. Reed*, 25 Tex. Supp. 343.

Virginia. — *Lewis v. Arnold*, 13 Gratt. (Va.) 454.

West Virginia. — *Linsey v. McGannon*, 9 W. Va. 154.

b. PARTICULAR MODIFICATIONS — Form of Entry of Judgment. — Thus the form of the entry of a judgment may be modified on appeal.¹

Clerical Errors or Mistakes. — And a clerical error or mistake in the entry of a judgment may be corrected.²

Error in Mathematical Computation. — So of an error in a mathematical computation in a judgment.³

Error in Taxation of Costs. — Or of an error in the taxation of costs embraced in the judgment.⁴

Error Apparent of Record. — Or an error apparent of record or the judgment roll.⁵

Wisconsin. — Schmidt *v.* Gilson, 14 Wis. 514; Durkee *v.* Stringham, 8 Wis. 1; Reed *v.* Jones, 15 Wis. 40; Bacon *v.* Bicknell, 17 Wis. 523; McCoy *v.* Quick, 30 Wis. 521; Deery *v.* McClintock, 31 Wis. 195.

United States. — Office Specialty Mfg. Co. *v.* Elbert County, 41 U. S. App. 294.

In Smith *v.* Platt, 96 N. Y. 635, there was an appeal by both parties from a judgment on an accounting. The successful party claimed that by erroneous rules of evidence his recovery was too small, and stated that he asked no new accounting, but desired an affirmation unless the court could modify the judgment. It was held that as the error, if there were one, affected the whole accounting, the judgment could not be corrected.

Offer to Modify. — The appellee's offer to permit a judgment to be modified in respect to an error therein, made after the perfection of the appeal, will not defeat the appellant's right to a reversal for such error. Leake *v.* Hayes, 13 Wash. 213.

1. Rambo *v.* Wyatt, 32 Ala. 363; Tierney *v.* Corbett, 2 Mackey (D. C.) 264; Lomax *v.* Gindele, 117 Ill. 527; Houston *v.* Woolley, 37 Mo. App. 15; Fitzhugh *v.* Wiman, 9 N. Y. 559; Cincinnati First Nat. Bank *v.* Kelly, 57 N. Y. 34; Burkitt *v.* Twyman, (Tex. Civ. App. 1896) 35 S. W. Rep. 421; Ashley *v.* Peterson, 25 Wis. 621.

2. *Alabama.* — Relfe *v.* Valentine, 45 Ala. 286; Russell *v.* Erwin, 41 Ala. 292.

California. — Zellerbach *v.* Allenberg, 99 Cal. 57; Matter of Thompson, 101 Cal. 349; Herman *v.* Paris, 81 Cal. 625; Hayward *v.* Rogers, 62 Cal. 349.

Florida. — Miller *v.* Hoc, 1 Fla. 221.

Illinois. — Covenant Mut. Ben. Assoc.

v. Baldwin, 49 Ill. App. 203; Pekin *v.* McMahon, 154 Ill. 141; Belford *v.* Woodward, 158 Ill. 122.

Mississippi. — Buckingham *v.* Nelson, 42 Miss. 417.

Nebraska. — Youngson *v.* Pollock, 25 Neb. 431.

New Mexico. — Romero *v.* Silva, 1 N. Mex. 157.

Texas. — Musselman *v.* Strohl, 83 Tex. 473; B. C. Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254; Morgan *v.* Turner, 4 Tex. Civ. App. 192; Hoffman *v.* Bowen, 17 Tex. 506.

West Virginia. — Bee *v.* Burdett, 23 W. Va. 744.

3. Matter of Thompson, 101 Cal. 349; Patrick *v.* Weston, 22 Colo. 45; Hall *v.* Jackson County, 5 Ill. App. 609; Moores *v.* McConnell, 17 La. Ann. 84; Newell *v.* West, 149 Mass. 520; Reynolds *v.* La Crosse, etc., Packet Co., 10 Minn. 178; Union Cent. L. Ins. Co. *v.* Pottker, 33 Ohio St. 459; Alamo F. Ins. Co. *v.* Schmitt, 10 Tex. Civ. App. 550; B. C. Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254; Durie *v.* Anderson, (Tex. App. 1891) 16 S. W. Rep. 345.

4. Commissioners Ct. *v.* Tarver, 25 Ala. 480; Sims *v.* Thompson, 30 Ala. 158; Stout *v.* Hopping, 6 N. J. L. 125; Sullivan *v.* Kindred, (Tex. Civ. App. 1894) 26 S. W. Rep. 150; Farmers' Bank *v.* Woodford, 34 W. Va. 480; Jones *v.* Cunningham, 7 W. Va. 707; Day *v.* Mertlock, 87 Wis. 577.

5. Wade *v.* Kelly, 2 Stew. (Ala.) 443; Mason *v.* Smith, 1 Stew. (Ala.) 275; Sellers *v.* Smith, 11 Ala. 264; Lucas *v.* Hamilton, 13 Ala. 447; Weatherford *v.* Weatherford, 8 Port. (Ala.) 171; Witherington *v.* Brantley, 18 Ala. 197; Gould *v.* Meyer, 36 Ala. 565; Jean *v.* Sandiford, 39 Ala. 317; Hicks *v.* Barrett, 40 Ala. 291; Davis *v.* Lamb, (Cal. 1893) 35 Pac. Rep. 306.

Striking Out Party. — A judgment may be modified on appeal by striking out the name of a party.¹

Striking Out Excessive Attorney's Fee. — Or by striking out an excessive attorney's fee.²

Judgments Affecting Decedent's Estate. — A judgment against an estate may be amended to run against the personal representative, or a judgment against the personal representative to run against the estate.³

Erroneous Disallowance of Credit. — And a judgment erroneously disallowing a credit or cross-demand may be modified on appeal by the allowance of such credit or cross-demand.⁴

Judgment of Nonsuit or Dismissal. — A judgment of nonsuit entered in the form of a judgment on the merits may be corrected to conform to the fact,⁵ and a judgment of dismissal may be modified so as to show the grounds of dismissal.⁶

Appeal with Stipulation for Judgment Absolute. — But the judgment cannot be modified on appeal from an order granting a new trial with a stipulation for judgment absolute in case of affirmance.⁷

Increasing Amount of Recovery. — And a judgment cannot be increased on appeal unless the opposite party consents thereto.⁸

Record Must Contain Data. — But to enable an appellate court to modify or correct a judgment the record must contain the necessary data.⁹

1. *Savage v. Walshe*, 26 Ala. 619; *Browner v. Davis*, 15 Cal. 9; *Orr v. Rode*, 101 Mo. 387; *Weil v. Simmons*, 66 Mo. 617; *Cruchon v. Brown*, 57 Mo. 38; *Snell v. Harrison*, 83 Mo. 651; *Crispen v. Hannovan*, 86 Mo. 160; *Mueller v. Kaessmann*, 84 Mo. 318; *Mansfield v. Allen*, 85 Mo. 502; *Mitchell v. Bridgers*, 113 N. Car. 63.

2. *Boyer v. Boyer*, 4 Wash. 80; *Mason v. McLean*, 6 Wash. 31.

3. *Yarborough v. Scott*, 5 Ala. 221; *Hicks v. Barrett*, 40 Ala. 291; *Oliver v. Hearne*, 4 Ala. 271; *Davis v. Lamb*, (Cal. 1893) 35 Pac. Rep. 306; *Myers v. Kendrick*, 13 Iowa 599; *Piper v. Goodwin*, 23 Me. 251; *Kent v. Lyles*, 7 Gill & J. (Md.) 73; *State v. Maulsby*, 53 Mo. 500; *Pitner v. Flanagan*, 17 Tex. 7; *Woodward v. Howard*, 13 Wis. 557. See also article EXECUTORS AND ADMINISTRATORS, vol. 8, p. 692.

4. *Woods v. Merrill*, 57 Cal. 435; *Matter of Gallagher*, 63 Hun (N. Y.) 624, 43 N. Y. St. Rep. 581; *Parker v. Denny*, 3 Wash. Ter. 598.

5. *Warren v. Sweeney*, 4 Nev. 101.

6. *Cox v. St. Louis*, etc., R. Co., 55 Ark. 454.

7. *Lake v. Nathans*, 67 N. Y. 589. And authorities cited *supra*, under XIV.

3. *h. Judgment Absolute Pursuant to Stipulation.*

8. *Richards v. Sandford*, 2 E. D. Smith (N. Y.) 349; *Murphy v. Long*, 1 Hilt. (N. Y.) 309; *Kingsley v. Brooklyn*, 5 Abb. N. Cas. (Brooklyn City Ct.) 1; *Brockman v. Buell*, 16 Daly (N. Y.) 90; *McHugh v. New York El. R. Co.*, (Supreme Ct.) 19 N. Y. Supp. 744; *West v. Milwaukee*, etc., R. Co., 56 Wis. 318.

9. *Alabama*. — *Kyle v. Caravello*, 103 Ala. 150; *Jean v. Sandiford*, 39 Ala. 317; *Faulks v. Heard*, 31 Ala. 516; *Morris v. Poillon*, 50 Ala. 403.

California. — *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *Foucault v. Pinet*, 43 Cal. 136; *Davis v. Lamb*, (Cal. 1893) 35 Pac. Rep. 306.

Dakota. — *Cady v. Chicago*, etc., R. Co., 5 Dakota 97.

Illinois. — *Boyle v. Carter*, 24 Ill. 49.

Iowa. — *State v. Baughman*, 20 Iowa 497.

Louisiana. — *Barrios v. Lacroix*, 44 La. Ann. 147.

Michigan. — *Whitney v. Hyde*, 91 Mich. 13.

Missouri. — *Eberle v. Curtis*, 8 Mo. App. 566.

Rendering Judgment Which Lower Court Should Have Rendered. — Where all the facts are before the appellate court it may render such judgment as the lower court should have rendered.¹

Montana. — Cockrill *v.* Davie, 14 Mont. 131.

New Jersey. — Robison *v.* Furman, 47 N. J. Eq. 307.

New York. — Hart *v.* Seixas, 21 Wend. (N. Y.) 40.

Pennsylvania. — Thomas *v.* Northern Liberties, 13 Pa. St. 117.

Texas. — Lewis *v.* Sellick, 69 Tex. 379; Peel *v.* Gary, 54 Tex. 253; Bettes *v.* Weir Plow Co., 84 Tex. 543; Ramsey *v.* McCauley, 9 Tex. 106.

Utah. — Paragoonah Field, etc., Co. *v.* Edwards, 9 Utah 477.

Vermont. — Chandler *v.* Spear, 22 Vt. 385; Sutton *v.* Burnett, 1 Aik. (Vt.) 209.

Wisconsin. — Ela *v.* Bankes, 37 Wis. 89.

1. *Alabama.* — Kyle *v.* Caravello, 103 Ala. 150; Wade *v.* Kelly, 2 Stew. (Ala.) 443; McClure *v.* Lay, 30 Ala. 208; Griffin *v.* Wall, 32 Ala. 149; Campbell *v.* May, 31 Ala. 567.

Arkansas. — Pennington *v.* Underwood, 56 Ark. 53.

California. — Gahan *v.* Neville, 2 Cal. 81.

Illinois. — Union Nat. Bank *v.* Manistee Lumber Co., 43 Ill. App. 525; Telfer *v.* Hoskins, 32 Ill. 165; Hadlock *v.* Hadlock, 22 Ill. 384; Commercial Ins. Co. *v.* Scammon, 123 Ill. 601.

Indiana. — Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 178.

Iowa. — Matter of Bresee, 82 Iowa 573; Gilmore *v.* Ferguson, 28 Iowa 422.

Kentucky. — Wigginton *v.* Moss, 2 Metc. (Ky.) 38.

Louisiana. — Emanuel *v.* Hatcher, 19 La. Ann. 525; Bloch *v.* His Creditors, 46 La. Ann. 1334; State *v.* Cannon, (La. 1894) 15 So. Rep. 626; Arnandez *v.* Lawes, 5 La. Ann. 127.

Maine. — Waldo County *v.* Moore, 33 Me. 511.

Maryland. — Wroth *v.* Johnson, 4 Har. & M. (Md.) 284; Gordon *v.* Downey, 1 Gill (Md.) 41.

Massachusetts. — Curran *v.* Burgess, 155 Mass. 86.

Missouri. — Burris *v.* Shrewsbury Park Land, etc., Co., 55 Mo. App. 381; Haegele *v.* Mallinckrodt, 3 Mo. App. 329; Hunt *v.* Missouri R. Co., 89 Mo. 607; Darrier *v.* Darrier, 58 Mo. 222; Ringo *v.* Richardson, 53 Mo. 385; Pfau *v.* Breitenburger, 17 Mo. App. 19; Fine

v. St. Louis Public Schools, 39 Mo. 59; State *v.* St. Louis Ct. App., 99 Mo. 216; Kinealy *v.* Macklin, 2 Mo. App. 241; Baldrige *v.* Dawson, 39 Mo. App. 527.

Nebraska. — McCann *v.* McLennan, 2 Neb. 286; Great Western Mfg. Co. *v.* Hunter, 15 Neb. 32; Spence *v.* Darrow, 32 Neb. 112.

New Hampshire. — Murray *v.* Emmons, 26 N. H. 523; Burt *v.* Stevens, 22 N. H. 229.

New Jersey. — Woodruff *v.* Badgley, 12 N. J. L. 367.

New York. — Andrews *v.* Brewster, 58 Hun (N. Y.) 603, 33 N. Y. St. Rep. 972; Van Slooten *v.* Wheeler, 66 Hun (N. Y.) 632, 50 N. Y. St. Rep. 873; Howard *v.* Freeman, 7 Robt. (N. Y.) 25; Curtis *v.* Ritzman, 7 Misc. Rep. (N. Y. City Ct.) 254; Griffin *v.* Helmbold, 72 N. Y. 437; Caldwell *v.* Croft, 54 N. Y. Super. Ct. 523; People *v.* Richmond County, 28 N. Y. 112; Andrew *v.* New Jersey Steamboat Co., 11 Hun (N. Y.) 490.

North Carolina. — Rush *v.* Halcyon Steamboat Co., 68 N. Car. 72; Bush *v.* Hall, 95 N. Car. 82.

Ohio. — Bunn *v.* Kinney, 15 Ohio St. 43.

Pennsylvania. — Wilson *v.* Gray, 8 Watts (Pa.) 25; Kennedy *v.* Lowry, 1 Binn. (Pa.) 393; Com. *v.* Haffey, 6 Pa. St. 348; Easton *v.* Worthington, 5 S. & R. (Pa.) 130; Flanagan *v.* Wetherill, 5 Whart. (Pa.) 280.

Tennessee. — Toomey *v.* Atyoe, 95 Tenn. 373.

Texas. — Warren *v.* Frederichs, 83 Tex. 380; Leer *v.* Sutherland, 36 Tex. 151; Meyer *v.* Orynski, (Tex. Civ. App. 1894) 25 S. W. Rep. 655; Sweeney *v.* Gulf, etc., R. Co., 84 Tex. 433; Trevino *v.* Fernandez, 13 Tex. 630; Kinsey *v.* Stewart, 14 Tex. 457; Good *v.* Galveston, etc., R. Co., (Tex. 1889) 11 S. W. Rep. 854.

Vermont. — Burton *v.* Norwich, 34 Vt. 345; Wires *v.* Farr, 24 Vt. 645; Porter *v.* Smith, 20 Vt. 344; Newbury Bank *v.* Richards, 35 Vt. 281.

Virginia. — Bowyer *v.* Hewitt, 2 Gratt. (Va.) 193; Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308; Darby *v.* Henderson, 3 Muf. (Va.) 115.

Washington. — Gaffney *v.* Megrath, 11 Wash. 456; Willey *v.* Morrow, 1 Wash. Ter. 474.

5. Reversal — a. TRIVIAL OR TECHNICAL DEFECTS OR ERRORS.

— A judgment will not be reversed on appeal for trivial or technical defects or errors.¹

b. ERROR AS TO GROUNDS OF DECISION. — Nor will a judgment correct on the merits be reversed, though based on erroneous grounds.²

c. COURT WITHOUT JURISDICTION. — A judgment will be reversed on appeal where the court below was without jurisdiction.³

Wisconsin. — *Cook v. Racine*, 49 Wis. 243.

United States. — *Walker v. Windsor Nat. Bank*, 56 Fed. Rep. 76; *Richmond v. Atwood*, 52 Fed. Rep. 10; *Potter v. Beal*, 50 Fed. Rep. 860.

Effect of Stipulation. — Where, after verdict, and pending a ruling of the court upon a motion for a new trial, it is stipulated, "that if the court shall grant a new trial herein, then that said plaintiff may review said order granting a new trial, by petition in error to the Supreme Court, and that if said Supreme Court shall affirm said order granting a new trial, that judgment absolute shall be rendered against the plaintiff, dismissing his action, with costs; but if the said Supreme Court reverses said order, then that judgment absolute shall be rendered against defendants for the amount of verdict and costs," the Supreme Court will be governed by the stipulation, review the case, and render such judgment as the District Court should have rendered. *Johnson v. Parrotte*, 23 Neb. 232.

1. *Payne v. Bruton*, 10 Ark. 53; *Weed v. Weed*, 25 Conn. 494; *Wright v. Freeman*, 46 Ill. App. 421; *Ray v. Dunn*, 38 Ind. 230; *Barnhard v. Coppess*, 59 Iowa 85; *Richardson v. McLaughlin*, 92 Iowa 393; *Suss v. Fuhrman*, 31 Mo. 470; *Cameron v. Hart*, 57 Mo. App. 142; *Brooks v. Curtis*, 50 N. Y. 639; *Warden v. Sweeney*, 86 Wis. 161.

Trivial Errors. — A judgment for seventeen cents too much will not be reversed on appeal, under the maxim *de minimis non curat lex*. *Caldwell v. Roberts*, 1 Dana (Ky.) 357. Nor will a judgment for eighty-two cents too much be reversed. *Palmer v. Degan*, 58 Minn. 505. But in *Thompson v. Thompson*, 5 Ark. 18, a judgment for \$1.34 too much was reversed.

Reversal by Consent. — A judgment fixing the amount of a bond cannot, if

correct, be reversed on appeal with directions to fix it at another amount, though all the parties stipulate therefor, where the rights of persons not parties may be prejudiced thereby. *Levy's Succession*, 48 La. Ann. 1520.

Premature Action. — A judgment in an action conceded by the appellee to be prematurely brought will be reversed and the cause dismissed without prejudice to another action. *Tacoma v. Dougan*, 4 Wash. 796.

Reversal Pro Forma. — In *Lassell v. Burton*, 16 Vt. 188, a judgment for the plaintiff was reversed *pro forma*, as it appeared that an affirmance would embarrass the plaintiff in pursuing his claim in a different form of action.

2. *Ledbetter v. Castles*, 11 Ala. 149; *Kidd v. Teeple*, 22 Cal. 255; *Bleven v. Freer*, 10 Cal. 172; *State v. Michaels*, 8 Blackf. (Ind.) 436; *Whiting v. Root*, 52 Iowa 292; *Jamison v. Perry*, 38 Iowa 14; *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278; *Christensen v. Colby*, 43 Hun (N. Y.) 362; *Arnot v. Erie R. Co.*, 67 N. Y. 315; *Monongahela Ins. Co. v. Chester*, 43 Pa. 521; and cases cited in article APPEALS, vol. 2, p. 372, note 5.

Error as to Grounds of Decision. — Thus a judgment dismissing a complaint on the ground that the action is barred may be sustained on the ground that the defendant had an equitable set-off. *Christensen v. Colby*, 43 Hun (N. Y.) 362.

But an erroneous reason for a right decision below is ground for reversal if it led the appellant to omit evidence which would have altered the case. *Wisser v. O'Brien*, 35 N. Y. Super. Ct. 149.

3. *Walker v. Banks*, 65 Ga. 20; *Worsham v. Murchison*, 66 Ga. 715; *Castleberry v. State*, 68 Ga. 49; *Pope v. Jones*, 79 Ga. 487; *Roeser v. Bellmer*, 7 Tex. 1.

d. REVERSAL OF PART OF JUDGMENT. — A judgment may be reversed in part and affirmed as to the residue.¹

e. REVERSAL AS TO ONE PARTY. — A judgment may be reversed as to some of the parties thereto and affirmed as to the others, if the interests of the parties can be severed.² But if the

1. 2 Bac. Abr., Error (M) 1.

Alabama. — *Patterson v. Blakeney*, 33 Ala. 338.

California. — *Murdock v. Clarke*, 90 Cal. 427; *Stockton, etc., R. Co. v. Galgiani*, 49 Cal. 139; *White v. White*, 86 Cal. 216.

Illinois. — *Mann v. Harrison*, 49 Ill. App. 403.

Indiana. — *Pratt v. Wallbridge*, 16 Ind. 147; *Develin v. Wood*, 2 Ind. 102; *Alexander v. Frary*, 9 Ind. 481.

Kentucky. — *Williams v. Murrell*, (Ky. 1890) 13 S. W. Rep. 1075; *Totten v. Cooke*, 2 Metc. (Ky.) 275.

Maryland. — *Mailhouse v. Inloes*, 18 Md. 328.

Massachusetts. — *Cummings v. Pruden*, 11 Mass. 206; *Boyd v. Brown*, 17 Pick. (Mass.) 453; *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 288.

New Hampshire. — *Eames v. Stevens*, 26 N. H. 117.

New York. — *Lawson v. Pinckney*, 40 N. Y. Super. Ct. 187; *Picard v. Lang*, 3 N. Y. App. Div. 51; *Crim v. Starkweather*, 88 N. Y. 339; *Whitehead v. Kennedy*, 69 N. Y. 462; *Story v. New York, etc., R. Co.*, 6 N. Y. 85; *Fields v. Moul*, 15 Abb. Pr. (N. Y. Supreme Ct.) 6; *Parker v. Van Houten*, 7 Wend. (N. Y.) 145; *Anonymous*, 12 Johns. (N. Y.) 340; *Bronson v. Mann*, 13 Johns. (N. Y.) 460; *Williams v. Sherman*, 15 Johns. (N. Y.) 195.

Pennsylvania. — *Miller v. Keene*, 5 Watts (Pa.) 348; *McMicken v. Com.*, 58 Pa. St. 213.

Texas. — *Beer v. Thomas*, (Tex. Civ. App. 1896) 34 S. W. Rep. 1000.

Wisconsin. — *Rogers v. Weil*, 12 Wis. 664; *Braunsdorf v. Fellner*, 76 Wis. 1; *Sherry v. Schraage*, 48 Wis. 93.

But see *Bond v. Wabash, etc., R. Co.*, 67 Iowa 712; *Nevada v. Hutchins*, 59 Iowa 506; *Riggs v. Tyson*, 1 N. J. L. 39; *Hay v. Imley*, 3 N. J. L. 401; *Mitchell v. Campbell*, 19 Oregon 198, where it was held that a judgment, if an entirety, must be affirmed or reversed *in toto*.

Reversal in Part — Law and Equity Counts. — A judgment may be reversed on a law count and affirmed on an equity count. *Boeckler v. Missouri Pac.*

R. Co., 10 Mo. App. 448; *Crowe v. Peters*, 63 Mo. 429.

Title to Two Tracts of Land. — A judgment in trespass to try title to two distinct tracts of land may be affirmed as to one tract and reversed as to the other for error relating only to it. *Mexia v. Lewis*, 12 Tex. Civ. App. 102; *Chamberlain v. Pybas*, 81 Tex. 511; *Schuster v. L. Bauman Jewelry Co.*, 79 Tex. 179.

Original and Cross Actions. — A cause may be remanded for a new trial as to a cross-action, with an order that such trial shall extend to that alone and that the judgment on the plaintiff's original action be undisturbed. *McAfferty v. Hale*, 24 Iowa 355.

Judgment in Solido — Two Counts. — But a judgment *in solido* on two counts must be reversed *in toto* if erroneous as to one count, *Little Rock, etc., R. Co. v. Perry*, 37 Ark. 164; or if it cannot be determined on which count the verdict was rendered, *Sioux City, etc., R. Co. v. Walker*, 49 Iowa 273.

Judgment for Gross Sum. — On appeal from a judgment for a gross sum of money against a single defendant, the court cannot affirm a part of the judgment and order a new trial as to the residue. *Goodsell v. Western Union Tel. Co.*, 109 N. Y. 147.

Items of Claim. — In an action at law on an account or for damages, the appellate court cannot affirm a judgment allowing one item of a claim interposed, and send it back for a new trial as to another. *Wolstenholme v. Wolstenholme File Mfg. Co.*, 64 N. Y. 272.

A judgment *in Partition* cannot be reversed in part and affirmed in part. *Kyle v. Kyle*, 55 Ind. 387.

A judgment *in Ejectment* for two tracts of land jointly cannot be affirmed as to one tract and reversed as to the other. *Herd v. Dew*, 8 Humph. (Tenn.) 501.

2. *Alabama.* — *Windham v. National Fertilizer Co.*, 99 Ala. 578; *Garrott v. Fuller*, 36 Ala. 179.

California. — *Ricketson v. Richardson*, 26 Cal. 149; *Nichols v. Dunphy*, 58 Cal. 605; *Wood v. Orford*, 56 Cal. 157.

judgment is an entirety, the appellate court must either totally reverse or affirm as to all the parties.¹

Connecticut.—Wilford *v.* Grant, Kirby (Conn.) 114.

Illinois.—Alling *v.* Wenzell, 35 Ill. App. 246.

Indiana.—Louisville, etc., R. Co. *v.* Treadway, 143 Ind. 689; Flora *v.* Russell, 138 Ind. 153; Steeple *v.* Downing, 60 Ind. 478; Kuntz *v.* Bright, 12 Ind. 313.

Michigan.—Powers *v.* Irish, 23 Mich. 429.

Mississippi.—Holman *v.* Murdock, 34 Miss. 275.

Missouri.—Hunt *v.* Missouri R. Co., 89 Mo. 607; Mansfield *v.* Allen, 85 Mo. 502.

New Mexico.—Union Trust Co. *v.* Atchison, etc., R. Co., (N. Mex. 1895) 42 Pac. Rep. 89; New Mexico, etc., R. Co. *v.* Madden, 7 N. Mex. 215.

New York.—Altman *v.* Hofeller, 152 N. Y. 498; McIntosh *v.* Ensign, 28 N. Y. 169; Bullis *v.* Montgomery, 50 N. Y. 352; Hubbell *v.* Meigs, 50 N. Y. 480; Campbell *v.* Perkins, 8 N. Y. 430; Van Slyck *v.* Snell, 6 Lans. (N. Y.) 299; Giraud *v.* Stagg, 4 E. D. Smith (N. Y.) 27; Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459; Geisler *v.* Acosta, 9 N. Y. 227; Frank *v.* Mutual L. Ins. Co., 102 N. Y. 266; Alexander *v.* Hoyt, 7 Wend. (N. Y.) 89.

Pennsylvania.—Jamison *v.* Pomeroy, 9 Pa. St. 230; Boaz *v.* Heister, 6 S. & R. (Pa.) 18; McCanna *v.* Johnston, 19 Pa. St. 434.

Tennessee.—Bently *v.* Hurxthal, 3 Head (Tenn.) 378.

Texas.—Boone *v.* Hulsey, 71 Tex. 176; Wylie *v.* Posey, 71 Tex. 34; Porter *v.* Martyn, (Tex. Civ. App. 1895) 32 S. W. Rep. 731; Hamilton *v.* Prescott, 73 Tex. 565; Bayless *v.* Daniels, 8 Tex. 140; Kauffman *v.* Wooters, 79 Tex. 205.

West Virginia.—Vance Shoe Co. *v.* Hought, 41 W. Va. 275.

Wisconsin.—Sutton *v.* McConnell, 46 Wis. 269; Cairns *v.* O'Brienness, 40 Wis. 469.

But see West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288; Chicago Public Library *v.* Arnold, 60 Ill. App. 328; McDonald *v.* Wilkie, 13 Ill. 22; Fuller *v.* Robb, 26 Ill. 246; Smith *v.* Byrd, 7 Ill. 412; Jansen *v.* Varnum, 89 Ill. 100; Claflin *v.* Dunne, 129 Ill. 241; Draper *v.* State, 1 Head (Tenn.) 262.

Reversal as to One Party.—If an order

confirming a foreclosure sale is reversed on the appeal of one defendant for errors which affect the regularity of the sale, it will be reversed as to all defendants. Kopmeier *v.* Larkin, 47 Wis. 598.

In an action on a note against the several makers thereof, a reversal as to one defendant requires a reversal as to all defendants. Nasworthy *v.* Draper, 9 Tex. Civ. App. 650; Washington *v.* Johnson, (Tex. Civ. App. 1896) 34 S. W. Rep. 1041.

A Judgment in Admiralty may be affirmed as against the claimant and reversed as against the stipulators. The Willamette, 72 Fed. Rep. 79.

Appeal by One Party.—If only one of two defendants appeals, the judgment may be reversed as to him and allowed to stand as to the other defendant. Minturn *v.* Baylis, 33 Cal. 129; Hall *v.* McCormick, 7 Tex. 269. But see Mohr *v.* McKenzie, 60 Ill. App. 575; Willie *v.* Thomas, 22 Tex. 175; Dickson *v.* Burke, 28 Tex. 117.

1. Bac. Abr., tit. Error (M).

Alabama.—Huckabee *v.* Nelson, 54 Ala. 12.

Georgia.—Tedlie *v.* Dill, 3 Ga. 104.

Iowa.—Cavender *v.* Smith, 5 Iowa 157.

Michigan.—Powers *v.* Irish, 23 Mich. 429.

Nevada.—Bullion Min. Co. *v.* Croesus Gold, etc., Min. Co., 3 Nev. 336.

New Hampshire.—Sargeant *v.* French, 10 N. H. 444; Murray *v.* Emmons, 26 N. H. 523.

New Jersey.—Wilson *v.* Moore, 26 N. J. L. 458.

New York.—Altman *v.* Hofeller, 152 N. Y. 498; Arnold *v.* Sandford, 14 Johns. (N. Y.) 417; Van Bokkelen *v.* Ingersoll, 5 Wend. (N. Y.) 315; Story *v.* New York, etc., R. Co., 6 N. Y. 85; Richards *v.* Walton, 12 Johns. (N. Y.) 434; Pollock *v.* Webster, 16 Hun (N. Y.) 104; Cruikshank *v.* Gardner, 2 Hill (N. Y.) 333; Sheldon *v.* Quinlen, 5 Hill (N. Y.) 441; Harman *v.* Brother-son, 1 Den. (N. Y.) 537; Moulton *v.* Norton, 5 Barb. (N. Y.) 286; Farrell *v.* Calkins, 10 Barb. (N. Y.) 348; Pretzfelder *v.* Strobel, 17 Misc. Rep. (N. Y. Supreme Ct.) 152; Goodsell *v.* Western Union Tel. Co., 109 N. Y. 147; Board of Underwriters *v.* National Bank of Republic, 146 N. Y. 64.

f. DISPOSITION OF CASE ON REVERSAL. — An appellate court, on reversing a judgment, may send the cause back for a new trial,¹ or direct the proceedings to be had or the judgment to be rendered in the trial court,² or the appellate court

North Carolina. — Ramsour *v.* Raper, 7 Ired. L. (N. Car.) 346.

Texas. — Bradford *v.* Taylor, 64 Tex. 169; Hamilton *v.* Prescott, 73 Tex. 565; Robinson *v.* Schmidt, 48 Tex. 13; Acklin *v.* Paschal, 48 Tex. 147; Wood *v.* Smith, 11 Tex. 367; Burleson *v.* Henderson, 4 Tex. 49.

Virginia. — Jones *v.* Raine, 4 Rand. (Va.) 386; Gray *v.* Stuart, 33 Gratt. (Va.) 351.

Wisconsin. — Kobmeier *v.* Larkin, 47 Wis. 598.

But see Wood *v.* Olney, 7 Nev. 109.

In Dickerson *v.* Chrisman, 28 Mo. 134, it was said that "the rule that a judgment is an entire thing, and if reversed as to one must be reversed as to all, is one only applicable to judgments in courts of common-law jurisdiction, or, in other words, to judgments at law." And see Belkin *v.* Hill, 53 Mo. 492.

1. *Alabama.* — Edmonds *v.* Edmonds, 1 Ala. 401; Tennessee, etc., R. Co. *v.* Moore, 36 Ala. 371; Rawls *v.* Kennedy, 23 Ala. 240; Townsend *v.* Harwell, 18 Ala. 301.

Arkansas. — Niemeyer *v.* Hudspeth, 54 Ark. 88.

California. — Wise *v.* Williams, 88 Cal. 30.

Illinois. — Neer *v.* Illinois Cent. R. Co., 138 Ill. 29.

Indiana. — Buchanan *v.* Milligan, 108 Ind. 433.

Iowa. — Mendell *v.* Chicago, etc., R. Co., 20 Iowa 9; Payne *v.* Chicago, etc., R. Co., 47 Iowa 605; Doolittle *v.* Shelton, 1 Greene (Iowa) 272.

Kansas. — Wilkins *v.* Tourtellott, 29 Kan. 513.

Montana. — Lebcher *v.* Custer County, 9 Mont. 315.

New York. — Thomas *v.* New York L. Ins. Co., 99 N. Y. 250; Guernsey *v.* Miller, 80 N. Y. 184; Cythe *v.* La Fontaine, 51 Barb. (N. Y.) 186; Marquat *v.* Marquat, 12 N. Y. 336; Cobb *v.* Cornish, 6 Abb. Pr. (N. Y. Ct. App.) 129; Meyer *v.* Louisville, 7 Abb. Pr. (N. Y. Supreme Ct.) 6.

North Carolina. — State *v.* Powers, 3 Hawks (N. Car.) 376.

Ohio. — Gay *v.* Davey, 47 Ohio St. 396.

Tennessee. — Settle *v.* Marlow, 12 Lea (Tenn.) 472.

Vermont. — Moore *v.* Campbell, 36 Vt. 361.

² *Wisconsin.* — McWilliams *v.* Bannister, 40 Wis. 489; Hawes *v.* Woolcock, 30 Wis. 213; Conroe *v.* Case, 74 Wis. 85.

If a judgment on appeal is simply reversed, the effect is to remand the cause for a new trial. Heidt *v.* Minor, 113 Cal. 385; Falkner *v.* Hendy, 107 Cal. 49.

Necessity of New Trial. — In actions at law it is only where the facts in issue are settled, either by agreement of the parties, a finding of the court or referee, or by the special verdict of a jury, that a reversal of the judgment in the Supreme Court is final and precludes a new trial in the court below. Artz *v.* Chicago, etc., R. Co., 38 Iowa 293.

As to Necessity of Remand, see article MANDATE AND PROCEEDINGS THEREON.

2. *Alabama.* — Sprague *v.* Daniels, 31 Ala. 444.

Arkansas. — Powell *v.* Holman, 50 Ark. 85.

California. — Love *v.* Shartzer, 31 Cal. 488; Evans *v.* Jacob, 59 Cal. 628.

Colorado. — Tucker *v.* Parks, 7 Colo. 298.

Georgia. — Summerville *v.* Reid, 35 Ga. 47.

Illinois. — Ogilvie *v.* Copeland, 145 Ill. 98; Storing *v.* Onley, 44 Ill. 123.

Indiana. — McCole *v.* Loehr, 79 Ind. 430; McAfee *v.* Reynolds, 130 Ind. 33.

Iowa. — Hait *v.* Ensign, 61 Iowa 724; Gray *v.* Regan, 37 Iowa 688; Ware *v.* Thompson, 29 Iowa 65; Boyce *v.* Wabash R. Co., 63 Iowa 70; Roberts *v.* Corbin, 28 Iowa 355; Drefahl *v.* Tuttle, 42 Iowa 177.

Kansas. — Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759; Crockett *v.* Gray, 31 Kan. 346.

Missouri. — Suddoth *v.* Bryan, 39 Mo. App. 652; Jones *v.* Hart, 60 Mo. 351.

Oregon. — Fisk *v.* Henarie, 14 Oregon 29.

Texas. — Cotton *v.* Coit, 88 Tex. 414.

Washington. — Bernhard *v.* Reeves, 6 Wash. 424.

Wisconsin. — Finney *v.* Ford, 22 Wis.

itself may render final judgment.¹

g. EFFECT OF REVERSAL. — A reversal on appeal effects a

173; *Fintel v. Cook*, 88 Wis. 485; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; *Garbutt v. Prairie Du Chien Bank*, 22 Wis. 384; *Pike v. Vaughn*, 45 Wis. 660; *Jones v. Chicago, etc., R. Co.*, 49 Wis. 352; *Stowell v. Eldred*, 39 Wis. 614; *Pickett v. School Dist. No. One*, 25 Wis. 551; *Hegar v. Chicago, etc., R. Co.*, 26 Wis. 624; *Elderkin v. Wiswell*, 61 Wis. 498; *Boland v. Benson*, 50 Wis. 225; *Atkinson v. Hewitt*, 51 Wis. 275; *Crichton v. Crichton*, 73 Wis. 59; *Stewart v. Everts*, 76 Wis. 35; *Combs v. Scott*, 76 Wis. 662; *Burke v. Birchard*, 47 Wis. 35.

United States. — *Grant v. Phoenix L. Ins. Co.*, 121 U. S. 105; *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. Rep. 899.

1. *Alabama*. — *Reid v. McLeod*, 20 Ala. 576.

Arkansas. — *De Yampert v. Johnson*, 54 Ark. 165.

Illinois. — *Commercial Ins. Co. v. Scammon*, 123 Ill. 601; *Pearsons v. Hamilton*, 2 Ill. 415; *Linder v. Monroe*, 33 Ill. 388; *Schneider v. Seeley*, 40 Ill. 257; *Everts v. Lawther*, 165 Ill. 487.

Iowa. — *Searles v. Lux*, 91 Iowa 754.

Kentucky. — *Rosenfeld v. Goldsmith*, (Ky. 1890) 13 S. W. Rep. 3.

Maryland. — *Howard v. Carpenter*, 22 Md. 249.

Mississippi. — *Rigby v. Hardy*, (Miss. 1888) 4 So. Rep. 114.

Missouri. — *Carroll v. Campbell*, 25 Mo. App. 630; *Davis v. Krum*, 12 Mo. App. 279; *Brown v. Home Sav. Bank*, 5 Mo. App. 1; *Quay v. Lucas*, 25 Mo. App. 4.

Montana. — *Barkley v. Tieleke*, 2 Mont. 435.

Nebraska. — *Furbush v. Barker*, 38 Neb. 1.

New Jersey. — *Shotwell v. Dennman*, 1 N. J. L. 342.

New York. — *Price v. Price*, 33 Hun (N. Y.) 432; *Marquat v. Marquat*, 12 N. Y. 336; *Newell v. Wheeler*, 4 Robt. (N. Y.) 247; *Wood v. Baker*, 60 Hun (N. Y.) 337.

Pennsylvania. — *Henry v. Heilman*, 114 Pa. St. 499; *Chandler v. Commerce F. Ins. Co.*, 88 Pa. St. 223.

Texas. — *Galveston, etc., R. Co. v. Drew*, 59 Tex. 10; *Williams v. Jones*, (Tex. Civ. App. 1896) 33 S. W. Rep. 1092; *Maverick v. Routh*, 7 Tex. Civ.

App. 669; *Durrell v. Farwell*, 88 Tex. 98; *Connor v. Paris*, 87 Tex. 32; *Harris v. Ellis*, 30 Tex. 4.

Vermont. — *Smith v. Hill*, 45 Vt. 90; *Miltimore v. Bottom*, 66 Vt. 168.

Virginia. — *Willard v. Overseers of Poor*, 9 Gratt. (Va.) 139.

Washington. — *Winsor v. Johnson*, 5 Wash. 429.

Rendering Final Judgment. — Final judgment should not be entered on reversal where it appears that the appellee was misled as to the sufficiency of his pleading by an erroneous ruling in his favor, and thus failed to amend as he might have done. *International Bridge, etc., Co. v. McLane*, 8 Tex. Civ. App. 665.

In *New York* the general term has no power on reversal of a judgment to render a judgment in favor of the appellant unless the facts on which its judgment is founded are agreed to by the parties, or were found by the court or jury on trial, *Cuff v. Dorland*, 57 N. Y. 560; *Peterson v. Walsh*, 1 Daly (N. Y.) 182; or unless it is evident that the respondent cannot better his condition on a new trial, *Patterson v. Robinson*, 37 Hun (N. Y.) 341. But where no possible state of proof applicable to the issues raised will entitle the appellee to a verdict, the judgment will be reversed without ordering a new trial. *Burkhardt v. McClennan*, 15 Abb. Pr. (N. Y. Ct. App.) 243, note; *Edmonston v. McLoud*, 16 N. Y. 545.

Judgment on Cross-complaint. — In an action to compel the specific performance of a contract to surrender certain notes executed by the plaintiff, the appellate court will not, in reversing a judgment for the plaintiff, render judgment for the defendant on his cross-complaint seeking a recovery on the notes where the right of recovery was not clearly established in the trial court. *Libbey v. Packwood*, 11 Wash. 176.

Issuance of Procedendo. — No procedendo will be ordered on the reversal of a judgment for the defendant if it is clear that the plaintiff cannot succeed in a second trial. *Mudd v. Harper*, 1 Md. 110; *Berry v. Pierson*, 1 Gill (Md.) 234; *Nesbit v. Manro*, 11 Gill & J. (Md.) 261; *Commercial, etc., Nat. Bank v. Baltimore First Nat. Bank*, 30 Md. 11; *Deutsch v. Bond*, 46 Md. 164.

vacation or annulment of the judgment appealed from; ¹ and this without any action on the part of the trial court.²

6. Award of Damages — *a.* IN GENERAL. — An appellate court, on affirming a judgment or dismissing an appeal, is usually invested by statute with authority to award damages against the appellant to compensate the respondent for the delay in his recovery caused him by the appeal.³

Nor will procedendo issue if the amount to be recovered is not within the jurisdiction of the court below. *Kimberly v. Henderson*, 29 Md. 512.

1. *Heidt v. Minor*, 113 Cal. 385; *Allen v. Adams*, 17 Conn. 67; *Cox v. Pruitt*, 25 Ind. 90; *Crispen v. Hannovan*, 86 Mo. 160; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; *Zanesville Gas-Light Co. v. Zanesville*, 47 Ohio St. 35; *French v. Edwards*, 4 Sawy. (U. S.) 125.

Judgment of Intermediate Court. — The effect of the reversal of a judgment of an intermediate court is to restore the judgment of the trial court. *Rankin v. Perry*, 5 Mo. 501; *Strouse v. Drennan*, 41 Mo. 289; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; *Coalfield Coal Co. v. Peck*, 105 Ill. 529.

A Second Judgment reversing a first, being itself reversed, reinstates the first. *Ragan v. Cuyler*, 24 Ga. 397.

Error Subsequent to Trial. — The effect of the reversal of a judgment for an error occurring subsequent to the trial is to put the parties back to the stage of the case where the error occurred. *Ervin v. Collier*, 3 Mont. 189.

Reversal of Interlocutory Judgment. — A final judgment based on an interlocutory judgment falls with the reversal of the interlocutory judgment. *Agate v. House*, 69 Hun (N. Y.) 616, 53 N. Y. St. Rep. 890.

The Reversal of an Order Denying a New Trial vacates the judgment as effectually as the reversal of the judgment upon a direct appeal therefrom. *Fulton v. Hanna*, 40 Cal. 278.

As to the Effect of Reversal on Judicial Sale, see article JUDICIAL SALES, vol. 12, p. 91.

As to Restitution on Reversal, see article RESTITUTION.

2. *Cox v. Pruitt*, 25 Ind. 90.

3. See the statutes of the several states, and the following cases:

Alabama. — *Clements v. Crawford*, 1 Ala. 531; *McConnell v. White, Minor (Ala.)* 112.

Arkansas. — *Bass v. Haney*, 27 Ark. 105.

California. — *Matter of Sharp*, 92 Cal. 577; *Meyers v. Trujillo*, (Cal. 1892) 30 Pac. Rep. 579.

Florida. — *Redmond v. Donaldson*, 35 Fla. 167.

Georgia. — *Garrison v. Wilcoxson*, 11 Ga. 157; *Gunnels v. Deavours*, 57 Ga. 177.

Idaho. — *Cady v. Scaniker*, 1 Idaho 168.

Illinois. — *Woolley v. Lyon*, 115 Ill. 296; *Garrick v. Chamberlain*, 97 Ill. 620; *Neagle v. Dawson*, 64 Ill. App. 538.

Indiana. — *Allen v. Northwestern Mut. L. Ins. Co.*, 136 Ind. 608. But see *Meikel v. German Sav. Fund Soc.*, 24 Ind. 78, where it was held that damages should not be awarded on the dismissal of an appeal.

Iowa. — *Berryhill v. Keilmeyer*, 33 Iowa 20.

Kentucky. — *Madison, etc., R. Co. v. Briscoe*, 18 B. Mon. (Ky.) 570; *Evans v. Com.*, 3 Bush (Ky.) 161.

Louisiana. — *Lusse v. Mische*, 22 La. Ann. 256.

Massachusetts. — *Howland v. Rooke*, 158 Mass. 590.

Michigan. — *Storey v. Bird*, 8 Mich. 316; *Maywood v. Logan*, 78 Mich. 135.

Minnesota. — *Burr v. Crichton*, 51 Minn. 343.

Mississippi. — *Redd v. Thompson*, 56 Miss. 230; *Tigter v. McGehee*, 60 Miss. 242.

Missouri. — *Cordell v. Kansas City First Nat. Bank*, 64 Mo. 600; *Rose v. Cobb*, 64 Mo. 464; *State v. Brooke*, 29 Mo. App. 286; *Haley v. Scott*, 18 Mo. 202; *Easley v. Missouri Pac. R. Co.*, 113 Mo. 236.

Montana. — *Burns v. Paulsen*, 16 Mont. 333.

Nevada. — *Lehane v. Keyes*, 2 Nev. 361; *Table Mountain Gold, etc., Min. Co. v. Waller's Defeat Silver Min. Co.*, 4 Nev. 218.

New Mexico. — *Shafer v. New Mexico Second Nat. Bank*, 4 N. Mex. 141.

b. DISCRETION OF COURT. — The imposition of damages, however, does not necessarily follow on affirmance or dismissal, but is within the discretion of the appellate court, to be exercised in cases where there is no reasonable cause for taking the appeal.¹

c. EXPRESS AUTHORIZATION. — It is only on the affirmance of the kinds of judgment enumerated in the statute that damages will be awarded.²

d. MONEY JUDGMENTS. — As a general rule, it is only on money judgments that the statutes authorize damages to be awarded.³

New York. — *Cohen v. New York*, 128 N. Y. 594, 38 N. Y. St. Rep. 846; *Utica Bank v. Finch*, 3 Barb. Ch. (N. Y.) 293.

North Dakota. — *Sigmund v. Minot Bank*, 4 N. Dak. 164.

Oregon. — *Hawkins v. Jones*, 21 Oregon 502.

Pennsylvania. — *Wolf v. Philadelphia Traction Co.*, 181 Pa. St. 399.

South Dakota. — *Himebaugh v. Crouch*, 3 S. Dak. 409.

Tennessee. — *Betts v. Demumbrune, Cooke (Tenn.)* 39.

Texas. — *Chambers v. Hodges*, 3 Tex. 517.

Vermont. — *Bellamy v. Corban*, 1 Tyler (Vt.) 372.

Virginia. — *Abrahams v. Com.*, 1 Rob. (Va.) 711.

Washington. — *Seattle, etc., R. Co. v. Joergenson*, 3 Wash. 622.

Wisconsin. — *Tourville v. Nemadji Boom Co.*, 70 Wis. 81.

Wyoming. — *Syndicate Imp. Co. v. Bradley*, (Wyoming 1896) 44 Pac. Rep. 60.

Effect of Statute on Pending Cases. — A statute awarding damages on affirmance does not apply to cases pending when the statute went into effect. *Beatty v. Smith*, 2 Hen. & M. (Va.) 395.

Discouragement of Appeal. — Damages will not be awarded on affirmance where the respondent, by the exercise of proper care, could have discouraged the appeal. *Harrison v. St. Louis, etc., R. Co.*, 58 Mo. App. 463.

Void Judgment. — Nor will damages be awarded on the dismissal of an appeal from a void judgment of a justice. *Fuller Watchman's Electrical Detector Co. v. Louis*, 50 Ill. App. 428.

Interest on Damages. — Damages given on the affirmance of a judgment bear interest. *Sanders v. Rives*, 3 Stew. (Ala.) 109.

As to Damage on Appeal Bond, see arti-

cle APPEAL BONDS AND UNDERTAKINGS, vol. 1, p. 1016.

As to Costs in Appellate Court, see article COSTS, vol. 5, p. 192.

As to Costs on Dismissal of Appeal, see article APPEALS, vol. 2, p. 354.

1. *Egyptian Levee Co. v. Jester*, 42 Mo. App. 322; *Cohen v. New York*, 128 N. Y. 594, 38 N. Y. St. Rep. 846; *Blazy v. McLean*, 146 N. Y. 390, 40 N. E. Rep. 733; *Stagg v. Jackson*, 1 N. Y. 206; *Phoenix Assur. Co. v. McDermott*, (N. Dak. 1897) 73 N. W. Rep. 91; *Coffin v. Hanner*, 1 Oregon 236; *Tourville v. Nemadji Boom Co.*, 70 Wis. 81; *Syndicate Imp. Co. v. Bradley*, (Wyoming 1896) 44 Pac. Rep. 60. But see *Anonymous*, 11 Ill. 487, where it was held that the statute authorizing damages on failure to file the record was peremptory.

2. *Clark v. German Security Bank*, 61 Miss. 614; *Abrahams v. Com.*, 1 Rob. (Va.) 711; *Doak v. Ridley*, 2 Yerg. (Tenn.) 495, where it was held that a statute authorizing an award of damages on the affirmance of a "judgment" did not apply to a decree in equity; *Redd v. Thompson*, 56 Miss. 230; *Vicksburg Bank v. Adams*, 74 Miss. 179.

3. *Hooks v. Branch Bank*, 18 Ala. 451, where damages were refused on the affirmance of a judgment of condemnation in a statutory claim suit; *Berryhill v. Keilmeyer*, 33 Iowa 20; *Branscomb v. Gillian*, 55 Iowa 235; *Arentz v. Reilly*, 67 Ill. App. 307; *Arrowsmith v. Rappelge*, 19 La. Ann. 327; *Long v. Robinson*, 13 La. Ann. 465; *Girouard v. Broussard*, 28 La. Ann. 626; *Boal v. Morgner*, 46 Mo. 48; *Hodge v. McDonald*, 5 Hayw. (Tenn.) 112.

Judgment in Personam. — In *Redd v. Thompson*, 56 Miss. 230, it was held that there must be a judgment *in personam* to authorize an allowance of

e. RECOVERY SUSPENDED BY APPEAL. — And to authorize an assessment of damages by an appellate court the collection of the judgment must be suspended by the appeal.¹

f. APPEAL FRIVOLOUS OR TAKEN FOR DELAY. — Damages will be awarded on affirmance where the appeal is frivolous or without merit,² or is manifestly vexatious or taken for

damages. But see *Colby v. Small*, 40 Ill. 42, where damages were allowed on dismissing, for want of prosecution, an appeal taken from a decree of foreclosure of a mortgage, which found the amount due and directed a sale of the premises, though there was no decree *in personam* against the defendants for the payment of the money.

Judgment for Sum Declared to Be Due. — A judgment declaring the appellant's property assessable for certain back taxes and fixing the valuation of the property is not such a judgment for a sum of money declared to be due as would authorize damages on affirmance. *Vicksburg Bank v. Adams*, 74 Miss. 179.

1. *Clements v. Crawford*, 1 Ala. 531; *Indianapolis, etc., R. Co. v. Ferguson*, 42 Ind. 243; *Berryhill v. Keilmeyer*, 33 Iowa 20; *Crofts v. Moynihan*, 26 La. Ann. 727; *Haley v. Scott*, 18 Mo. 202; *Benson v. Phipps*, (Tex. Civ. App. 1894) 28 S. W. Rep. 359.

Stay of Judgment. — In *Tigner v. McGehee*, 60 Miss. 242, it was held that the right of the appellee to damages on affirmance was independent of whether or not the judgment appealed from was stayed by supersedeas.

Payment of Judgment. — Damages will not be awarded to the respondent on affirmance of a judgment fully paid and satisfied before the appeal was taken, *Northwestern Mut. L. Ins. Co. v. Starkweather*, 40 Wis. 341; nor in case of an abandoned appeal where the appellant, before the time for appeal had expired, offered to pay the judgment, *Lester v. Elwert*, 25 Oregon 102.

2. *Arkansas.* — *Feimster v. Smith*, 10 Ark. 494.

California. — *Adler v. Winkle*, 53 Cal. 187; *Kincaid v. Johnson*, 47 Cal. 618; *Russell v. Hill*, 59 Cal. 21; *Dougherty v. Ward*, 89 Cal. 81; *Long v. Saufley*, 89 Cal. 437; *Gannon v. Dougherty*, 41 Cal. 661; *Bates v. Vischer*, 2 Cal. 355; *Goodcell v. Davis*, 62 Cal. 617; *Gross v. Kelleher*, 80 Cal. 519; *Perkins v. Patrick*, 45 Cal. 393;

Younglove v. Cunningham, (Cal. 1896) 43 Pac. Rep. 755; *Foot v. Hayes*, (Cal. 1895) 39 Pac. Rep. 601; *Rountree v. I. X. L. Lime Co.*, 106 Cal. 62; *Meyers v. Trujillo*, (Cal. 1892) 30 Pac. Rep. 579; *Pinkham v. Wemple*, 12 Cal. 449; *Magruder v. Melvin*, 12 Cal. 559; *Hutchinson v. Ryan*, 11 Cal. 142.

Florida. — *Redmond v. Donaldson*, 35 Fla. 167.

Georgia. — *Phillips v. Behn*, 19 Ga. 298; *Clark v. Fee*, 86 Ga. 9.

Illinois. — *West Chicago St. R. Co. v. Nash*, 166 Ill. 528.

Indiana. — *Robinson v. Starley*, 29 Ind. 298.

Kentucky. — *Woolson v. Brigham*, 6 B. Mon. (Ky.) 274.

Louisiana. — *Lusse v. Mische*, 22 La. Ann. 256; *Spencer v. Bloomfield*, 20 La. Ann. 225; *Mithoff v. Weiss*, 20 La. Ann. 376; *Williams v. Woodman*, 21 La. Ann. 50; *Steamer Gen. Quitman v. Packard*, 22 La. Ann. 70; *Uter v. Dumonteil*, 22 La. Ann. 197.

Massachusetts. — *Howland v. Rooke*, 158 Mass. 590.

Missouri. — *Rose v. Cobb*, 64 Mo. 464; *Owens v. McBride*, 32 Mo. 221; *Whittelsey v. Sullivan*, 33 Mo. 405; *Lindenschmidt v. Vallee*, 23 Mo. App. 594; *Osborne v. Oliver*, 23 Mo. App. 667; *Schwaner v. Winn Boiler Compound Co.*, 19 Mo. App. 534; *De Buele v. Labadie*, 7 Mo. App. 578; *President Min., etc., Co. v. Coquard*, 40 Mo. App. 40; *American Ins. Co. v. Kuhlman*, 9 Mo. App. 587; *Williams v. Sinclair*, 11 Mo. App. 593; *State v. Gibbons*, 12 Mo. App. 565; *Hillebrand v. Drienhoefer*, 13 Mo. App. 586; *State v. Weinle*, 13 Mo. App. 583; *Covey v. Yarnall*, 14 Mo. App. 598; *Smith v. Smith*, 14 Mo. App. 575; *Smith v. White*, 17 Mo. App. 443; *Morrison v. Lehw*, 17 Mo. App. 633; *Utz v. Hoerr*, 20 Mo. App. 36; *Taylor v. Scott*, 26 Mo. App. 249; *Adler v. Lang*, 28 Mo. App. 440; *Yeoman v. Mueller*, 33 Mo. App. 343.

Montana. — *Clark v. Nichols*, 3 Mont. 372.

New York. — *Warner v. Lessler*, 33

delay.¹ And a dismissal of an appeal is an affirmance for the

N. Y. 296; *Jackson v. Rochester*, 124 N. Y. 624, 35 N. Y. St. Rep. 73.

Oregon. — *Hawkins v. Jones*, 21 Oregon 502.

Pennsylvania. — *Smith v. Times Pub. Co.*, 178 Pa. St. 481; *O'Donnell v. Broad*, 149 Pa. St. 24; *Bachman v. Gross*, 150 Pa. St. 516.

Texas. — *Chambers v. Hodges*, 3 Tex. 517; *Langholz v. C. Z. Kroh Co.*, (Tex. Civ. App. 1895) 29 S. W. Rep. 831.

Wisconsin. — *Sweet v. Davis*, 90 Wis. 409.

Wyoming. — *Syndicate Imp. Co. v. Bradley*, (Wyoming 1896) 44 Pac. Rep. 60.

United States. — *Nelson v. Flint*, 166 U. S. 276.

In the following cases damages were refused on the ground that there was merit in the appeal, or that it was taken in good faith. *Ragan v. Day*, 46 Iowa 239; *Austin v. Moore*, 16 La. Ann. 218; *Simons v. Burrows*, 6 La. Ann. 358; *Storey v. Bird*, 8 Mich. 316; *Easley v. Missouri Pac. R. Co.*, 113 Mo. 236; *Crecelius v. Bierman*, 68 Mo. App. 34; *Doyle v. Wurdeman*, 35 Mo. App. 330; *Tobin v. Missouri Pac. R. Co.*, (Mo. 1891) 18 S. W. Rep. 996; *Blazy v. McLean*, 146 N. Y. 390, 40 N. E. Rep. 733; *Nelson v. Oregon R., etc., Co.*, 13 Oregon 141; *Coffin v. Hanner*, 1 Oregon 236; *Wolf v. Philadelphia Traction Co.*, 181 Pa. St. 399. And see *Harris v. Peel*, 17 La. Ann. 140; *Saloy v. Gubernator*, 17 La. Ann. 169, where damages were refused on the ground that the note sued on bore interest.

In *Georgia*, on the trial of appeals from inferior courts, the jury is authorized to award damages if the appeal is frivolous and intended for delay only. *Cobb*, Dig. 495; *McMillan v. Lawrence*, 25 Ga. 189.

And an appeal is frivolous within the meaning of the statute when there is manifestly nothing in the evidence to sustain the cause of the appellant. *Garrison v. Wilcoxson*, 11 Ga. 157; *Gilmore v. Wright*, 20 Ga. 198; *Clark v. Fee*, 86 Ga. 9.

And the appeal must not only be frivolous, but intended for delay, to authorize a judgment for damages. *Hartridge v. McDaniel*, 20 Ga. 398; *Gunnels v. Deavours*, 57 Ga. 177. To the same effect is *Tourville v. Nemadji Boom Co.*, 70 Wis. 81. And see *Hull v. Tommy*, 30 Ga. 762, where the dam-

ages awarded by the jury were held to be excessive.

In *Louisiana*, under the provisions of the statute authorizing damages for a frivolous appeal, the appellee must claim damages in his answer to the appeal. Code Pro., § 907. And see *Beatty v. Schwartz*, 17 La. Ann. 10; *Cockburn v. Groves*, 17 La. Ann. 18; *Verges v. Noel*, 17 La. Ann. 67; *Pecoul v. De Mahy*, 17 La. Ann. 126; *Frost v. Garrett*, 17 La. Ann. 134. And no damages will be allowed if the appellee joins in the appeal. *Wheatstone v. Rawlins*, 26 La. Ann. 476; *Thomas v. Fuller*, 26 La. Ann. 626; *Mahan v. Michel*, 27 La. Ann. 96.

1. *Arkansas*. — *Bumpass v. Taggart*, 26 Ark. 398; *Jackson v. Giles*, 26 Ark. 656; *Lester v. Hoskins*, 26 Ark. 63; *Yell v. Outlaw*, 14 Ark. 164; *Bass v. Haney*, 27 Ark. 105.

California. — *Matter of Sharp*, 92 Cal. 577; *Russell v. Williams*, 2 Cal. 158; *Dreyfuss v. Giles*, 79 Cal. 409; *Bateman v. Blumenthal*, 61 Cal. 628; *Gieske v. Anderson*, 77 Cal. 247; *Buckley v. Stebbins*, 2 Cal. 149; *Van Slyke v. Miller*, 60 Cal. 411; *Boehm v. Gibson*, (Cal. 1894) 35 Pac. Rep. 1014; *Whitby v. Rowell*, 82 Cal. 635; *Lemon v. Rucker*, 80 Cal. 609, where damages were awarded though the appellant's counsel acted in good faith in prosecuting the appeal.

Georgia. — *Burnett v. Fouché*, 77 Ga. 550; *Eagle Mfg. Co. v. Wise*, 48 Ga. 630; *Clark v. Fee*, 86 Ga. 9.

Idaho. — *Cady v. Scaniker*, 1 Idaho 168.

Illinois. — *Colby v. Small*, 40 Ill. 42; *Calumet Electric St. R. Co. v. Lewis*, 168 Ill. 249. But see *Toles v. Montague*, 53 Ill. 384, where it was said: "The statute allows this court to give damages only in cases where the appeal is not prosecuted, and not because we may think it is prosecuted for delay."

Indiana. — *Allen v. Northwestern Mut. L. Ins. Co.*, 136 Ind. 608.

Louisiana. — *Beatty v. Schwartz*, 17 La. Ann. 10.

Michigan. — *Maywood v. Logan*, 78 Mich. 135; *Meyerfield v. Stettheimer*, 20 Mich. 418; *Heath v. Waters*, 40 Mich. 457.

Minnesota. — *Burr v. Crichton*, 51 Minn. 343.

Missouri. — *State v. Brooke*, 29 Mo. App. 286; *Londener v. Lichtenheim*, 11

purpose of giving damages for delay.¹

g. FAILURE TO FILE RECORD OR PROSECUTE APPEAL. — On the failure of the appellant to file the record or transcript, or prosecute the appeal, damages may be awarded² unless it be shown that the appeal was taken in good faith.³

h. AMOUNT OF DAMAGES. — The amount of damages to be awarded is, as a general rule, prescribed by the statute authorizing the assessment, and is usually a certain per centum of the recovery, together with costs.⁴

Mo. App. 385; *Simmons v. Missouri Pac. R. Co.*, 19 Mo. App. 542.

Montana. — *Wykoff v. Loeber*, 5 Mont. 535; *Ramsey v. Cortland Cattle Co.*, 6 Mont. 498; *Helena Second Nat. Bank v. Kleinschmidt*, 7 Mont. 146; *Burns v. Paulsen*, 16 Mont. 333.

Nevada. — *Kercheval v. McKenny*, 4 Nev. 294; *Table Mountain Gold, etc., Min. Co. v. Waller's Defeat Silver Min. Co.*, 4 Nev. 218; *Allen v. Mayberry*, 14 Nev. 115; *Gammans v. Rousell*, 14 Nev. 171; *Escere v. Torre*, 14 Nev. 51; *Wheeler v. Floral Mill, etc., Co.*, 10 Nev. 200; *Lehane v. Keyes*, 2 Nev. 361.

New Mexico. — *Dold v. Robertson*, 3 N. Mex. 313; *Shafer v. New Mexico Second Nat. Bank*, 4 N. Mex. 141.

New York. — *Van Valkenburgh v. Fuller*, 6 Paige (N. Y.) 10; *Murray v. Mumford*, 2 Cow. (N. Y.) 400.

North Dakota. — *Phoenix Assur. Co. v. McDermott*, (N. Dak. 1897) 73 N. W. Rep. 91; *Sigmund v. Minot Bank*, 4 N. Dak. 164.

Oregon. — *Hawkins v. Jones*, 21 Ore. 502.

Pennsylvania. — *Martin v. Rider*, 181 Pa. St. 265; *Pennypacker v. Dear*, 166 Pa. St. 284.

South Dakota. — *Himebaugh v. Crouch*, 3 S. Dak. 409.

Texas. — *International, etc., R. Co. v. Neira*, (Tex. Civ. App. 1894) 28 S. W. Rep. 95; *Casey v. Chaytor*, 5 Tex. Civ. App. 385; *Anderson v. Goodwin*, (Tex. 1889) 13 S. W. Rep. 31.

Wisconsin. — *Ramsay v. Davis*, 20 Wis. 31.

United States. — *Gregory Consol. Min. Co. v. Starr*, 141 U. S. 222; *Sire v. Ellithorpe Air Brake Co.*, 137 U. S. 579.

Dissenting Opinion. — A writ of error cannot be said to have been taken for delay when there is a dissent on the part of one of the appellate court judges. *Ferry Co. v. Monaghan*, 10 W. N. C. (Pa.) 48.

1. *Neagle v. Dawson*, 64 Ill. App.

538. And see *American Acc. Co. v. Slaughter*, (Ky. 1897) 40 S. W. Rep. 675. But see *Vaughn v. Werley*, 62 Cal. 181, where it was held that damages could not be imposed on the dismissal of an appeal for failure to file the transcript. And see *Duncan v. Grady*, 99 Cal. 552; *Koelling v. Rutz*, 108 Cal. 664; *McFadden v. Dietz*, 115 Cal. 697, where it was held that damages should be awarded on the dismissal of an appeal where the contradicted affidavit of the respondent shows that the appeal was taken for delay.

2. *Pacheco v. Bemal*, 2 Cal. 150; *Duncan v. Grady*, 99 Cal. 552; *Toles v. Montague*, 53 Ill. 384; *Anonymous*, 11 Ill. 487; *Rice v. McElhannon*, 48 Mo. 224; *Nelson v. Oregon R., etc., Co.*, 13 Oregon 141; *Himebaugh v. Crouch*, 3 S. Dak. 409; *Anderson v. Goodwin*, (Tex. 1889) 13 S. W. Rep. 31; *Seattle, etc., R. Co. v. Joergenson*, 3 Wash. 622; *Chehalis Flume, etc., Co. v. Reinhart*, 3 Wash. 428. But see *Estey v. Post*, 76 Mo. 411; *Treadway v. Parker*, 37 Mo. App. 453; *Vaughn v. Werley*, 62 Cal. 181; *Walter v. Maresch*, 3 Wash. 624, where it was held that it is only in cases where the record is examined and the appeal found to be without merit that damages should be awarded. And see *Rowan v. Pope*, 14 B. Mon. (Ky.) 83; *Pearse v. Goddard*, 1 Tyler (Vt.) 373.

The Failure to File the Transcript in time is not ground for an award of damages where it appears that the appeal raised a question of law fairly debatable. *Bobb v. Pennsylvania Ins. Co.*, 32 Mo. App. 256.

The Withdrawal of the Record is a failure to prosecute the appeal and authorizes an assessment of damages. *Woolley v. Lyon*, 115 Ill. 296.

3. *Northwestern Mut. L. Ins. Co. v. Irish*, 38 Wis. 361; *Loucheine v. Strouse*, 46 Wis. 487.

4. See the statutes of the several

i. ENFORCEMENT OF AWARD. — The clerk of the trial court may issue execution for the collection of the damages awarded on appeal.¹

XV. JUDGMENTS IN CRIMINAL CASES. — See article SENTENCE.

XVI. PAYMENT, SATISFACTION, AND DISCHARGE. — See article SATISFACTION OF JUDGMENTS.

XVII. ENFORCEMENT OF JUDGMENTS — In General. — Every Court Has Inherent Power to enforce its judgments and decrees,² and the finality of a decree will not prevent any proceedings by the court necessary and proper to carry it into complete execution.³

The *Lex Fori* Determines the Mode of enforcing a judgment,⁴ and as such law refers only to the remedy, all judgments and decrees are taken subject to such changes as before execution thereof the legislature may make in the procedure for their enforcement.⁵

Enforcement by Execution. — The ordinary and appropriate method of enforcing judgments in actions at law is by writ of execution or *fi. fa.*⁶ This subject has already been fully considered in the

states, and the following cases: *Crump v. Battles*, 49 Ala. 223; *Bateman v. Blumenthal*, 61 Cal. 628; *Lamothe v. Lamarque*, 17 La. Ann. 77; *Wheeler v. Floral Mill, etc., Co.*, 10 Nev. 200; *Stagg v. Jackson*, 2 Barb. Ch. (N. Y.) 86; *Still v. Boon*, 5 Sneed (Tenn.) 380; *Mulliday v. Machir*, 4 Gratt. (Va.) 1. And see *Whitby v. Rowell*, 82 Cal. 635, where a gross sum was awarded. See also *Guerrant v. Tayloe*, 2 Call (Va.) 208.

Assessment of Damages. — The damages should be estimated on the amount of the judgment at the time it was superseded. *Popp v. Louisville, etc., R. Co.*, (Ky. 1897) 40 S. W. Rep. 254; *Lawrence v. Jones*, 37 Ala. 388; *Dearman v. Radcliffe*, 5 Ala. 192; *Hudson v. Johnson*, 1 Wash. (Va.) 10.

Property Subject to Damages. — Property alienated pending an appeal is bound for the payment of damages for a frivolous appeal. *Phillips v. Behn*, 19 Ga. 298.

1. *McMillan v. Vischer*, 14 Cal. 232.

2. *Deaderick v. Smith*, 6 Humph. (Tenn.) 138; *Planters' Bank v. Fowlkes*, 4 Sneed. (Tenn.) 461; *Underwood's Case*, 2 Humph. (Tenn.) 46.

Where the chancellor has decreed a conveyance and relinquishment of title he may properly put the successful party in possession. *Waller v. Logan*, 5 B. Mon. (Ky.) 515.

Express Reservation in Judgment. — A judgment for possession of real property, with leave to apply for an account of the rents and profits, retains

by necessary implication jurisdiction in the court to enforce payment of the same so found due, and to be satisfied only *pro tanto* by a delivery and possession of the lands. *Madison Ave. Baptist Church v. Baptist Church*, 43 N. Y. Super. Ct. 151.

A Lower Court Has Power to direct as to its judgment in process so as to carry out the intention of the appellate tribunal. *Wilde v. New York Cent., etc., R. Co.*, 1 Sheld. (N. Y.) 269.

3. *Baltimore, etc., R. Co. v. Vanderwerker*, 33 W. Va. 191.

When a judgment declares the rights of the respective parties, the court may subsequently direct such process or make such orders as may be necessary to carry its judgment into execution. *Smith v. Miller*, 66 Tex. 74.

4. *Adams v. Wait*, 42 Vt. 16.

"Now a judgment is merely a record contract. Being such, its meaning and effect must be determined by the laws of the state where rendered. The interpretation of that contract affects the question of right and not the question of remedy. The remedy is determined by the laws of the state where the judgment is sued upon. But a judgment which is special by the laws of the state where rendered cannot be turned into a general judgment by being sued upon in the courts of another state." *Smith v. Moore*, 53 Mo. App. 531.

5. *Williams v. Waldo*, 4 Ill. 264.

6. **Enforcement of Judgment In Personam and In Rem at the Same Time.** — An

articles EXECUTIONS AGAINST PROPERTY, vol. 8, p. 303, and EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 8, p. 584.

Collateral and Auxiliary Remedies.—In addition to the remedy by writ of execution, various other collateral or auxiliary remedies are recognized or established by statute in various states,¹ such as attachment,² creditors' bills,³ garnishment,⁴ and supplementary proceedings.⁵ It seems, however, that a court of one state cannot give effect to the judgments of the courts of another state by enforcing any of the collateral remedies provided in the state where the judgment was rendered.⁶

assignee who has a personal judgment and also a judgment to sell property on which he has a lien may proceed at the same time by *fi. fa.* on the personal judgment and by sale under the judgment *in rem.* *Chambers v. Keene*, 1 Metc. (Ky.) 294.

Mandamus Is the Appropriate Remedy Against a Municipality for neglect to collect the tax to pay a judgment against it. *Knox County v. Aspinwall*, 24 How. (U. S.) 376; *Rogers v. Burlington*, 3 Wall. (U. S.) 654; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Galena v. Amy*, 5 Wall. (U. S.) 705; *Riggs v. Johnson County*, 6 Wall. (U. S.) 166; *Weber v. Lee County*, 6 Wall. (U. S.) 210; *Walkley v. Muscatine*, 6 Wall. (U. S.) 481; *U. S. v. Keokuk*, 6 Wall. (U. S.) 514; *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Heine v. Levee Com's*, 19 Wall. (U. S.) 655; *Lower v. U. S.*, 91 U. S. 536; *Cass County v. Johnston*, 95 U. S. 360; *Cass County v. Jordan*, 95 U. S. 373; *U. S. v. Clark County*, 95 U. S. 769; *U. S. v. New Orleans*, 98 U. S. 381; *Nelson v. Police Jury*, 111 U. S. 716; *Labette County v. Moulton*, 112 U. S. 217; *Clay County v. McAleer*, 115 U. S. 616; *New Orleans Board of Liquidation v. Hart*, 118 U. S. 136; *Cape Girardeau County Ct. v. Hill*, 118 U. S. 68.

A bill in equity and an injunction cannot be substituted for a writ of mandamus to compel the satisfaction of judgments against the municipality. *Walkley v. Muscatine*, 6 Wall. (U. S.) 481. See also article MANDAMUS.

1. Proceedings to Enforce—What May Be Gone Into.—Where the enforcement of a judgment is sought by proceedings which were authorized by legislation existing at its date, but subsequently repealed, the court may inquire whether the judgment was founded

upon a contract the obligation of which the state was prohibited from impairing, but cannot re-examine the validity of the contract or the propriety of the judgment. *Nelson v. Police Jury*, 111 U. S. 716.

Remedies of Assignee.—The assignee for value of a judgment has all the legal remedies for enforcing it which the original judgment creditor had. *Lionberger v. Baker*, 14 Mo. App. 353. Thus he may enforce the judgment by supplementary proceedings. *Burns v. Bangert*, 16 Mo. App. 22. See also *Bobb v. Taylor*, 56 Mo. 311; *Julian v. Calkins*, 85 Mo. 202. As to the rights of an assignee of a judgment, see generally tit. *Judgments*, Am. and Eng. Encyc. of Law (2d ed.).

2. See article ATTACHMENT, vol. 3, p. 1.

3. See article CREDITORS' BILLS AND FRAUDULENT CONVEYANCES, vol. 5, p. 388.

4. See article GARNISHMENT, vol. 9, p. 805.

Garnishment Proceedings by a judgment creditor of the city of New Orleans against a street railroad corporation as a debtor of the city, being authorized by the laws of Louisiana in force when U. S. Rev. Stat., § 916, was enacted, may properly be employed to enforce a judgment of the Circuit Court. *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 654.

5. See article SUPPLEMENTARY PROCEEDINGS.

6. See *Dimick v. Brooks*, 21 Vt. 569. And see *Pickering v. Fisk*, 6 Vt. 102; *Probate Judge v. Hibbard*, 44 Vt. 597.

Foreign Judgment for Alimony—Remedies of Forum.—A foreign judgment of divorce providing for alimony is not enforceable by sequestration and security under N. Y. Code Civ. Pro., § 1772, which provides such remedies

Equitable Remedies.—A court of equity has general power to appoint a receiver, and to exercise further incidental equitable powers for the enforcement of a judgment, independently of any statutory provisions.¹ Thus a bill in equity lies to enforce a judgment lien,² and creditors' bills are of this nature.³

Enforcement by Contempt Proceedings.—As a general rule, mere nonpayment of a money judgment or decree does not constitute contempt of court, and payment can only be enforced by a writ of execution and not by proceedings and imprisonment for contempt.⁴ Where, however, a judgment requires of a party the

only to aid in execution of New York judgments of divorce. *Wood v. Wood*, 7 Misc. Rep. (N. Y. C. Pl.) 579.

1. *King v. Barnes*, 51 Hun (N. Y.) 550, affirmed in 113 N. Y. 476. See also *Burton v. Smith*, 13 Pet. (U. S.) 464.

Chancery Will Lend Its Aid to Enforce the Judgment of a Justice's Court, although not a court of record. *Bailey v. Burton*, 8 Wend. (N. Y.) 339.

Presumption of Regularity.—When a party has to go into equity to enforce a judgment obtained by him at law, that judgment must be presumed to have been regularly obtained, upon due proof of every allegation necessary to entitle the plaintiff to recover. *Schley v. Dixon*, 24 Ga. 273.

Bills to Enforce Decrees.—See that title, vol. 3, p. 601.

Equity will not sustain a bill to enforce a decree by the ordinary for the payment of money. *M'Cullough v. Daniel*, Harp. Eq. (S. Car.) 255.

2. Enforcing Judgment Lien in Equity.—*Enslin v. Wheeler*, 98 Ala. 200, holding that as no remedy is provided by Alabama Act of Feb. 28, 1887, making judgments a lien upon real property for the enforcement of such lien, it may be done by bill in equity.

The lien of a judgment is not enforceable in equity after it ceases to be enforceable at law. *Sutton v. McKenney*, 82 Va. 46. See also article LIENS.

3. See article CREDITORS' BILLS AND FRAUDULENT CONVEYANCES, vol. 5, p. 388.

In Virginia, under Code 1873, c. 182, § 9, a judgment lien may be enforced by a creditor's bill in equity without a *fi. fa.* *Moore v. Bruce*, 85 Va. 139. See also *Price v. Thrash*, 30 Gratt. (Va.) 515.

In Florida the rule is the same as in Virginia. See *Howe v. Robinson*, 20 Fla. 352.

In Michigan, *Howell's Statutes*,

§§ 8107-8121, provided a remedy at law in lieu of suits in equity by a judgment creditor's bill. The defects of this statute were pointed out, and a resort to it deprecated, in *Reed v. Baker*, 42 Mich. 272. Further, as to the construction of this statute, see *Ehlers v. Stoeckle*, 37 Mich. 261.

4. *Hill v. Walker*, 7 Baxt. (Tenn.) 310.

Judgment for Costs in Mandamus Cases can only be collected by execution in the same way as other judgments. A respondent failing to pay such judgments is not in contempt and cannot be proceeded against therefor. *State v. Jaynes*, 19 Neb. 697.

An Order Allowing Alimony is a judgment, and a nonpayment is not such resistance of an order of the court as to render the party liable to imprisonment. *Segear v. Segear*, 23 Neb. 306.

In Replevin the judgment can only be enforced by execution, and not by punishment for contempt. *Hammond v. Morgan*, 101 N. Y. 179, reversing 51 N. Y. Super. Ct. 472.

Rule under New York Code.—In *Gray v. Cook*, 24 How. Pr. (N. Y. Super. Ct.) 432, an order or decree of the court was entered after trial on a reference providing that the plaintiff have judgment for a certain amount against the defendant as administrator, and that he pay such money into court to await the further order of the court, and to be distributed according to law. It was held that this constituted a final judgment against the defendant as between the parties which could be enforced by execution under section 285 of the code, but that a proceeding by an order as for contempt and attachment against the defendant was unauthorized. In this case the court said: "Proceedings cannot be had under 2 Rev. Stat. (5th ed.), 849, § 1, sub. 3, because that, in terms, excludes all cases where

performance of any other act than the payment of money or delivery of real or personal property, it seems that a performance of such act may be enforced by proceedings as for contempt.¹

Enforcement Against Property in Forum. — The judgment of a court of one state declaring the existence of a lien on real estate situated in another state,² or ordering the conveyance or mortgage of such real estate,³ will not be enforced by the courts of the latter state.⁴

XVIII. ACTIONS ON JUDGMENTS — 1. **When Action Lies** — *a.* **JUDGMENTS AS CAUSES OF ACTION** — (1) *Domestic Judgments* — (a) **Statement of Rule.** — A judgment for a sum certain in money⁵ is

by law execution can be awarded for the collection of the sum ordered to be paid. It excludes them because this remedy 'for the nonpayment of any sum of money ordered by such court' is authorized only 'in cases where by law execution cannot be awarded for the collection of such sum.' No authority for this proceeding is found in section 4 (id. 850), for that applies only to a 'rule or order of court.' Another fatal objection is, that no demand has been made of the defendant to pay the money to the plaintiff or into court. Under section 4 of 3 Rev. Stat. (5th ed.), and section 285 of the code, there must have been a refusal to comply with the order to justify a conviction as for a contempt. *Lorton v. Seaman*, 9 Paige (N. Y.) 609."

1. *Fero v. Van Evra*, 9 How. Pr. (N. Y. Supreme Ct.) 148; *McBrair v. Hanson*, 16 Abb. Pr. (N. Y. Supreme Ct.) 399, note; *Morris v. Walsh*, 14 Abb. Pr. (N. Y. Super. Ct.) 387, 9 Bosw. (N. Y.) 636; *Underwood's Case*, 2 Humph. (Tenn.) 46.

A Judgment Requiring Performance of an Act other than payment of money or delivery of property — *e. g.*, giving a satisfaction of mortgage — is not to be enforced by motion for an order to perform. The judgment itself should embrace such order, and the party should proceed by serving on defendant personally a copy of the judgment requiring such act, after which, if he refuse to perform, he may be punished for contempt. (Code, § 285.) Refusal to comply after personal demand, and after serving on the attorney a transcript of the docket of judgment for costs with notice that performance is required, is no ground for a motion to compel performance. *Fero v. Van Evra*, 9 How. Pr. (N. Y. Supreme Ct.) 148.

A decree ordering the sheriff to commit to prison a defendant, in case

he fail to deliver up certain personal property as directed therein, is erroneous. It is indispensable that, in such a case, a positive finding should be made by the court that a respondent has, in fact, disobeyed the order of the court before an order of committal can be made, and that the committal should be only on a mittimus setting forth such finding. *Sherwood v. Sherwood*, 32 Conn. 1.

A Distringas against the plaintiff is not the proper mode of executing a judgment that a dam erected by him shall be torn down. As no other person is ordered by the judgment to do the work it must be done by the sheriff, as executive officer of the court. *Avery v. Police Jury*, 15 La. Ann. 223. But see *Leonard v. Kleinpetre*, 7 La. Ann. 44.

Attachment and Sequestration. — "If judgment of ouster and exclusion be given against the defendants, execution shall be had by writ of injunction, and obedience thereto may be compelled by attachment and sequestration." *Com. v. Dieffenbach*, 3 Grant's Cas. (Pa.) 368.

2. *Short v. Galway*, 83 Ky. 501.

3. *Bullock v. Bullock*, 51 N. J. Eq. 444.

4. *Napier v. Davis*, 7 J. J. Marsh. (Ky.) 283.

A bill will not lie to subject land in another county to a judgment where the judgment has not been made a lien on the land by filing a transcript. *Barnes v. Beighly*, 9 Colo. 475.

Enforcing Mortgage in Action on Foreign Judgment. — Where the judgment in one state is for a debt secured by a mortgage of lands in another state, in an action in the latter state upon such judgment the court may order a sale of the mortgaged property to pay such debt. *Brown v. Todd*, (Ky. 1895) 29 S. W. Rep. 621.

5. **Judgment for Sum Certain.** — In a final judgment against a garnishee,

a debt of record, and as such may be made the foundation of a new action.¹ Thus it has been held that an action will lie upon a judgment for costs,² and upon a judgment for money in a criminal case,³ and upon a judgment *nisi*,⁴ and upon a *quasi*

entered after a judgment conditioned upon his showing cause why it should not be made final, the words "interest thereon from" the date of the conditional judgment are mere surplusage and do not make the judgment one for an uncertain sum upon which an action cannot be maintained. *Washington Park Club v. Baldwin*, 59 Ill. App. 61.

1. An Action Lies on a Domestic Judgment.—*Ames v. Hoy*, 12 Cal. 11; *Burnes v. Simpson*, 9 Kan. 658; *Merchants' Nat. Bank v. Gaslin*, 41 Minn. 552; *Eldredge v. Aultman*, 35 Neb. 884; *Columbia Bank v. Newcomb*, 6 Johns. (N. Y.) 98.

It Is a Common-law Right to sue upon a judgment as soon as it is rendered. *Hale v. Angel*, 20 Johns. (N. Y.) 342; *Smith v. Mumford*, 9 Cow. (N. Y.) 26.

As a general rule the creditor may, if he chooses, sue upon a judgment or decree, and have a new recovery, and especially so if his rights or remedies are broadened under the new judgment or decree. *Boyd v. Mann*, 9 Baxt. (Tenn.) 349; *Pigue v. McFerrin*, 12 Lea (Tenn.) 645; *Gardner v. Henry*, 5 Coldw. (Tenn.) 458; *Webb v. Jones*, 13 Lea (Tenn.) 200.

In Kentucky the only action that can be maintained on a domestic judgment is the equitable action to enforce its satisfaction under Code 1875, § 474. *Davidson v. Simmons*, 11 Bush (Ky.) 331. So where a claim already reduced to judgment becomes the property in equity of another, by assignment, the assignee will not be entitled to a second judgment, but can only enforce the first by the remedies provided by law for the enforcement of the satisfaction of judgments. *Smith v. Belmont, etc., Iron Co.*, 11 Bush (Ky.) 390. But in *Snoddy v. Maupin*, 7 T. B. Mon. (Ky.) 51, an action of debt upon a judgment was maintained.

A Judgment Against a County should ordinarily be enforced by mandamus and not by action thereon. *Alden v. Alameda County*, 43 Cal. 270. But an assignee of such a judgment is entitled to maintain an action thereon against the county, so as to secure a judgment in his own name against the

county and to enable him to invoke the power of the court in granting and enforcing the mandamus proceeding. *Buchanan County First Nat. Bank v. Duel County*, 74 Fed. Rep. 373.

An Enjoined Judgment will not support an action, whether it be foreign or domestic. *Blair v. Caldwell*, 3 Mo. 353; *Palmer v. Palmer*, 2 Miles (Pa.) 373.

2. Philpott v. Lehain, 35 L. T. 855; *Richardson v. Willis*, L. R. 8 Exch. 69; *Hutchinson v. Gillespie*, 11 Exch. 798.

An Interlocutory or Collateral Order for Costs will not support an action; the mode of enforcing payment is by attachment in the court in which the order is made. *Sheehy v. Professional L. Assur. Co.*, 2 C. B. N. S. 211, 89 E. C. L. 211.

A Judgment on Appeal for Costs will support an action. *Marbella Iron Ore Co. v. Allen*, 47 L. J. C. P. 601, 38 L. T. 815.

A judgment rendered for costs in favor of the prevailing party on a writ of error or motion in error is a final and unconditional judgment, on which the party in whose favor it is rendered has an immediate right of action, and which is not affected by the entry of the original action in the Superior Court for further proceedings. *Ives v. Finch*, 28 Conn. 112.

3. A Judgment in a Criminal Action, so far as it requires the payment of money, whether the same be a fine, or costs and disbursements of the action, or both, may be enforced as a judgment in a civil action. *Whitley v. Murphy*, 5 Oregon 328. But see *infra*, XVIII. 1. a. (2) c. *Judgments in Penal Actions*, as to the rule in such cases in actions on foreign judgments.

4. Judgment Nisi.—The proper method of enforcing a judgment nisi is by action or special proceeding commenced by summons, and not by *scire facias*. *Thompson v. Berry*, 64 N. Car. 79. In this case the court said: "We think a proceeding to make a judgment nisi absolute must be commenced by summons. But it was contended that this *sci. fa.* was in substance a summons, and we might, perhaps, so regard it; but that could not

judgment,¹ and upon a decree in admiralty,² and upon a judgment against an executor or administrator conditioned upon the existence of assets,³ and upon a judgment in foreclosure.⁴

More than One Action Lies on the original judgment. Thus, where in an action on a judgment the creditor recovers a second judgment for the amount of the first, and which is of no higher nature than the first, as where both are justices' judgments, the latter is no bar to a new action on the former, for it works no extinguishment.⁵

help the plaintiff, as it would still be irregular by reason of its being returnable before the court in term time, and not as prescribed by the code. *Johnson v. Judd*, 63 N. Car. 498."

1. Debt May Be Brought on a Quasi Judgment, as a forfeited delivery bond taken by a collecting officer after levy upon execution. *Fossett v. Turnage*, 9 Humph. (Tenn.) 686; *Gardner v. Henry*, 5 Coldw. (Tenn.) 458.

2. A Decree on a Libel in Admiralty of a District Court of the United States, that the libellants recover against the respondents salvage to the amounts set opposite their respective names, is a decree on which one of the libellants may maintain an action in a state court against a respondent for the amount set against his name. *Brown v. Bridge*, 106 Mass. 563.

3. Judgment Conditioned on Existence of Assets.—An action of debt or *scire facias* may be brought upon a judgment "when assets," or "if assets;" and if, upon the plea of *plene administravit*, the issue is found for the executor or administrator, the plaintiff may take another judgment when assets. *Braxton v. Wood*, 4 Gratt. (Va.) 25. In this case the court said: "The plaintiff, in thus proceeding upon his judgment *quando acciderint*, accomplishes one of two objects, both of which are perfectly legitimate. If he can show that further assets unadministered have come to the defendant's hands since the former judgment, or rather since the former plea of fully administered, he converts his qualified judgment *quando acciderint* into an absolute judgment *de bonis testatoris*, and thereby obtains priority over other creditors in equal degree who have not recovered judgment. If he fails in this, still he revives and keeps alive his former judgment, so as to enable him to subject any assets which may yet accrue after the second judgment.

There is express authority to prove that in a *scire facias* upon a judgment *quando acciderint*, where assets are found as to part, judgment shall be given to recover so much immediately, and the residue of assets *in futuro*. *Perryman v. Westwood*, cited in *Noell v. Nelson*, 1 Vent. 95, Sid. 448; 2 Williams Ex'ors 1231; 2 Tidd's Pr. 1019. I have seen no case where, upon such proceeding and no assets whatever found, judgment has been given for satisfaction out of future assets; and I have seen none to the contrary. But there is no reason for a distinction between a partial and a total failure of assets. If the *scire facias* ought to be barred or abated as to the whole where it is found there are no present assets, the same result ought to follow in regard to any part as to which there is the same finding; and if it is proper to take judgment *quando acciderint* as to part where there are not present assets to satisfy that part, it is equally proper, the like state of things existing, to take such judgment in regard to the whole."

4. *Rowe v. Blake*, 99 Cal. 167.

On a foreclosure where there is no order or judgment for any deficiency that may remain unpaid after the sale of the mortgaged premises, there is no personal judgment upon which an action may be maintained. *Buckinghouse v. Gregg*, 19 Ind. 401; *Hanover F. Ins. Co. v. Tomlinson*, 3 Hun (N. Y.) 630.

5. *Millard v. Whitaker*, 5 Hill (N. Y.) 408; *Mumford v. Stocker*, 1 Cow. (N. Y.) 178; *Andrews v. Smith*, 9 Wend. (N. Y.) 53; *Jackson v. Shaffer*, 11 Johns. (N. Y.) 513.

Where the plaintiff, having recovered judgment in New Hampshire, brought suit thereon in another state, and had judgment there, and afterwards brought a suit upon the first judgment, a plea in bar of the judgment in the second state is not an answer, since

After Payment or Satisfaction of a judgment an action cannot, of course, be maintained thereon.¹

After Affirmance on Appeal an action may be maintained upon the original judgment.²

Scire Facias and Debt Concurrent Remedies. — A remedy by *scire facias* upon a judgment given by statute does not take away the common-law remedy by action of debt on the judgment.³

In Pennsylvania a common-law action will not lie on a decree of the Orphans' Court for the payment of a legacy, it being held that the Orphans' Court has exclusive jurisdiction to enforce its decree.⁴

Action Postponed by Statute. — It is sometimes provided by statute that an action shall not be maintained upon a judgment within a limited time.⁵

A Decree in Equity by which a specific sum of money is found to

one judgment is of as high a nature as another. *Weeks v. Pearson*, 5 N. H. 324.

"It is suggested that the plaintiff cannot have, at the same time and for the same debt, two different judgments, both in force, with concurrent right to issue execution on both; and that, therefore, by recovering a second judgment, he therein merges his first judgment; that if he recovers in the state courts, he by this act deprives himself of the right to process from the federal court to enforce the judgment rendered in that court, and must be content with such rights as the state courts recognize the laws as giving to him. These propositions may be true; but no such questions are made in the record, and we pass them without further notice." *Thomson v. Lee County*, 22 Iowa 206.

1. A Satisfied Judgment cannot be assigned so as to be made the foundation of an action by the assignee; it is extinguished. *Simpson v. Mercer*, 144 Mass. 413.

A judgment conclusively presumed to be paid will not support an action. *Baker v. Stonebraker*, 36 Mo. 338.

An action cannot be maintained upon a judgment for the benefit of one of the joint debtors who has paid the full amount thereof, for by such payment the judgment is wholly discharged. *Hammatt v. Wyman*, 9 Mass. 138. Compare *Allen v. Holden*, 9 Mass. 133.

2. *Snoddy v. Maupin*, 7 T. B. Mon. (Ky.) 51.

Debt lies upon the original judgment although the result has been partially

changed on review. *Hart v. Little, Smith* (N. H.) 52.

3. *Haven v. Baldwin*, 5 Iowa 503.

In *Garibaldi v. Carroll*, 33 Ark. 568, it was held that at common law a plaintiff had a right of action on a judgment as soon as it was recovered; that the remedy by *Gantt's Digest*, § 3774, to revive or restore a lost judgment, was but cumulative; and that a plaintiff might at the same time prosecute an action on the judgment, and a *scire facias* to revive it and have judgment in both.

4. *Black v. Black*, 34 Pa. St. 354. So an action of debt will not lie upon a judgment of the Supreme Court affirming the decree of the Orphans' Court upon the statement of a guardian's account. *Eichelberger v. Smyser*, 8 Watts (Pa.) 181.

5. The provision in the *New York Code* that no action shall be brought on a judgment within two years after its rendition does not apply to a justice's judgment recovered before the code went into effect. *M'Guire v. Gallagher*, 2 Sandf. (N. Y.) 402.

The Superior Court of Cook county is not a court of like jurisdiction with that of a justice of the peace, within the meaning of the Act of 1891, § 2 (Laws 1891, p. 151), providing that no suit shall be brought upon a judgment of a justice of the peace in a court of like jurisdiction within the same county where such judgment was rendered until the expiration of seven years next after its rendition. *Barbee Wire, etc., Works v. Malinowski*, 58 Ill. App. 395.

be due and absolutely ordered to be paid will, by the weight of authority, support an action at law.¹

(b) **Remedy by Execution — Election of Remedies** — *aa.* ACTION AND EXECUTION CONCURRENT AND CUMULATIVE. — At common law, and by the overwhelming weight of authority in this country, the right to maintain an action upon a domestic judgment is not at all dependent upon the right to issue an execution thereon.² Thus an action may be maintained upon a dormant judgment,³ and it may equally well be maintained upon a judgment which is not dormant,⁴ and upon which execution might issue.⁵

1. See article DECREES, vol. 5, p. 1069.

2. **Even Before Execution Can Issue** an action may be maintained upon the judgment. *Church v. Cole*, 1 Hill (N. Y.) 645, holding that Laws of New York (1840) 334, § 24, giving thirty days after judgment before execution can issue, does not prevent the plaintiff from suing immediately upon his judgment.

Execution Stayed. — An action of debt lies on a judgment recovered before a justice of the peace immediately on its rendition, notwithstanding execution upon it has been stayed pursuant to the statute. *McDonald v. Butler*, 3 Mich. 558; *Smith v. Mumford*, 9 Cow. (N. Y.) 26.

3. **Action Lies on Dormant Judgment** — *California.* — *Stuart v. Lander*, 16 Cal. 372.

Georgia. — *Lockwood v. Barefield*, 7 Ga. 393.

Minnesota. — *Dole v. Wilson*, 39 Minn. 330.

North Carolina. — *Carter v. Colman*, 12 Ired. L. (N. Car.) 274; *Woodard v. Paxton*, 101 N. Car. 26.

South Carolina. — *Copeland v. Todd*, 30 S. Car. 419; *Lawton v. Perry*, 40 S. Car. 255.

Texas. — *Bridges v. Samuelson*, 73 Tex. 522.

Revivor Unnecessary. — Where it is not sought to maintain the lien of the former judgment which has become dormant, an action may be maintained thereon without first reviving it. *Lawton v. Perry*, 40 S. Car. 255; *Copeland v. Todd*, 30 S. Car. 419.

Both Scire Facias to Revive and an Action of Debt to recover the amount of the judgment may be pending at the same time, and a judgment on the *scire facias* cannot be pleaded in bar of the action of debt. *Carter v. Colman*, 12 Ired. L. (N. Car.) 274.

A New Action Is Necessary to restore

the vitality of a dormant judgment of a justice of the peace, and a mere transfer to the docket of the Superior Court is insufficient. *Woodard v. Paxton*, 101 N. Car. 26.

4. **Action Lies on Judgment Not Dormant.** — *Williams v. Bradley*, 5 Ohio Cir. Ct. Rep. 114, holding that a judgment creditor of an insolvent partnership may maintain an action on its judgment, although such judgment has not become dormant, against the administrator of a deceased partner's estate which is also insolvent, to recover a balance due from the judgment on such estate.

In *Texas*, a judgment which, though not dormant, has lost its lien, may be made the basis of an action to restore the lien, either by *scire facias* or by an action of debt, *Anderson v. Boyd*, 64 Tex. 108; although the general rule in this state is that a second action cannot be maintained upon a judgment which is not dormant, *Parks v. Young*, 75 Tex. 278.

5. **Action Lies Though Execution Might Issue** — *Alabama.* — *Field v. Sims*, 96 Ala. 540; *Kingsland v. Forrest*, 18 Ala. 519; *Elliott v. Holbrook*, 33 Ala. 659; *McConnico v. Stallworth*, 43 Ala. 389; *Calhoun v. Whittle*, 56 Ala. 142; *Wilson v. Taylor*, 89 Ala. 371.

California. — *Ames v. Hoy*, 12 Cal. 11; *Stuart v. Lander*, 16 Cal. 372; *Rowe v. Blake*, 99 Cal. 167.

Connecticut. — *Denison v. Williams*, 4 Conn. 402; *Ives v. Finch*, 28 Conn. 112; *Fisher v. Fielding*, 67 Conn. 91. But see, for the early doctrine in this state, *Welles v. Dexter*, 1 Root (Conn.) 253; *Sterne v. Spalding*, Kirby (Conn.) 177.

Illinois. — *Greathouse v. Smith*, 4 Ill. 541; *Albin v. People*, 46 Ill. 372.

Indiana. — *Becknell v. Becknell*, 110 Ind. 42; *Palmer v. Glover*, 73 Ind. 529; *Hansford v. Van Auker*, 79 Ind. 157;

Execution a Cumulative Remedy. — The decisions in support of the doctrine under consideration are based upon the ground that an

Campbell v. Martin, 87 Ind. 577; *Gould v. Hayden*, 63 Ind. 443; *Davidson v. Nebaker*, 21 Ind. 334.

Iowa. — *Haven v. Baldwin*, 5 Iowa 503; *Thomson v. Lee County*, 22 Iowa 206; *Simpson v. Cochran*, 23 Iowa 81.

Kansas. — *Hummer v. Lamphear*, 32 Kan. 439; *Burnes v. Simpson*, 9 Kan. 658.

Massachusetts. — *Clark v. Goodwin*, 14 Mass. 237; *O'Neal v. Kittredge*, 3 Allen (Mass.) 470; *Linton v. Hurley*, 114 Mass. 76; *Wilson v. Hatfield*, 121 Mass. 551.

Michigan. — *Whelpley v. Nash*, 46 Mich. 25; *McDonald v. Butler*, 3 Mich. 558.

Missouri. — *Sheehan, etc., Transp. Co. v. Sims*, 28 Mo. App. 64.

New Hampshire. — *Whittemore v. Carkin*, 58 N. H. 576.

New York. — *Hale v. Angel*, 20 Johns. (N. Y.) 342; *Merritt v. Fowler*, 76 Hun (N. Y.) 424; *Smith v. Mumford*, 9 Cow. (N. Y.) 26; *Church v. Cole*, 1 Hill (N. Y.) 645; *Goodrich v. Colvin*, 6 Cow. (N. Y.) 397; *Tufts v. Braisted*, 4 Duer (N. Y.) 607; *Jackson v. Shaffer*, 11 Johns. (N. Y.) 513; *Millard v. Whitaker*, 5 Hill (N. Y.) 408; *Andrews v. Smith*, 9 Wend. (N. Y.) 53; *Houghton v. Raymond*, 1 Sandf. (N. Y.) 682; *M'Guire v. Gallagher*, 2 Sandf. (N. Y.) 402.

Ohio. — *Brooks v. Todd*, 1 Handy (Ohio) 169; *Headley v. Roby*, 6 Ohio 521; *Fox v. Burns*, 2 West. L. M. (Ohio) 387.

Pennsylvania. — *Harter v. Harter*, 4 Pa. Dist. Rep. 211; *Stewart v. Peterson*, 63 Pa. St. 230.

Tennessee. — *Gardner v. Henry*, 5 Coldw. (Tenn.) 458.

Vermont. — *White River Bank v. Downer*, 29 Vt. 332; *Chandler v. Warren*, 30 Vt. 510.

United States. — *Hickman v. Macon County*, 42 Fed. Rep. 759; *Denton v. Baker*, 79 Fed. Rep. 189; *Pennington v. Gibson*, 16 How. (U. S.) 65.

By common law, an action could be maintained within a year and a day on a domestic judgment, that being the life of a judgment without issuance of execution. "Debt lies upon a judgment within or after the year after recovery." 3 Com. Dig., Debt, A. 2; 43 Edw. III. 3, 2b; *Wheat. Selw. Nisi Prius* 600.

In *New York*, prior to the code, a plaintiff in a judgment could bring an action upon it as a matter of course and of strict right. An assignee of a judgment could do the same, only he was obliged to sue in the name of the assignor. The only way in which a judgment debtor could arrest such a proceeding was by paying the judgment. *Tufts v. Braisted*, 4 Duer (N. Y.) 607.

"It is a matter of history that, prior to the inhibition of the statute requiring leave to sue upon a judgment in this state, immediately upon the recovery of a judgment an action might be maintained thereon, and another judgment recovered, and so on *ad infinitum*, and thus costs be heaped up to an extortionate extent; and, to prevent this abuse, legislation was had by which, in respect to a domestic judgment, a suit could not be brought thereon except by leave of the court." *Merritt v. Fowler*, 76 Hun (N. Y.) 424.

Reasons for Rule. — In *Greathouse v. Smith*, 4 Ill. 541, *Treat, J.*, in delivering the opinion of the court, said: "No rule of law is better settled than the one that an action of debt is maintainable on a judgment of a court of record. The judgment is a good cause of action, it being as between the parties the most conclusive evidence of indebtedness. We know of no principle which inhibits the creditor, on a judgment which is in force and unsatisfied, from recovering in an action brought on it, although he may, at the time of bringing the suit, be entitled to an execution on his judgment. He is at liberty to proceed by execution to collect the judgment, or institute a new action on it. Notwithstanding the second suit may be unnecessary, he has the clear legal right to recover, and the courts have no power to prevent him or impose terms on him for so doing." The propriety of this decision has never been questioned. *Young v. Cooper*, 59 Ill. 121.

Costs. — "This doctrine would probably have to be accepted with the qualification that, in case of more than one judgment being recovered on the same demand, a payment of either in full, with costs, would render the judgment creditor responsible for the costs made in the other proceedings."

execution upon a judgment is merely a cumulative remedy,¹ and does not deprive the judgment debtor of his common-law right to enforce the judgment by action, if he so elects.²

No Reason for Bringing the Suit, other than that the judgment remains unpaid, need be alleged.³

bb. CONTRARY VIEW. — Actions upon judgments are not favored,⁴ and in a few states it is held that a judgment creditor cannot claim a strict right to sue upon his judgment as often as he may choose, without showing any necessity for such course.⁵ A party

Hickman v. Macon County, 42 Fed. Rep. 759.

1. Simpson v. Cochran, 23 Iowa 81; Hickman v. Macon County, 42 Fed. Rep. 759.

"It is one of the first principles we learn in relation to the action of debt that it may be sustained on a record of a judgment, and when the judgment is obtained, and the record made up, the right of action is complete. It may be brought not only on the judgments of our own courts, but those of our sister states. The right to issue execution on a judgment is a remedy cumulative only; and I know of no law which would deny to the party a right of action on a judgment, if he chose that remedy, because he could issue an execution." Headley v. Roby, 6 Ohio 522.

The provision of Cal. Code Civ. Pro., § 681, limiting the issuance of an execution for the enforcement of a judgment to the term of five years, is but a limitation upon a certain mode for its enforcement, and does not purport to limit or qualify the right to its enforcement in any other mode, as by action thereon. Rowe v. Blake, 99 Cal. 167. To the same effect, see Field v. Sims, 96 Ala. 540.

2. In Gould v. Hayden, 63 Ind. 443, the court said: "He may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he may elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment." In Hansford v. Van Auker, 79 Ind. 157, this was said to be the settled law in *Indiana*. See also Palmer v. Glover, 73 Ind. 529; Davidson v. Nebaker, 21 Ind. 334.

3. Denison v. Williams, 4 Conn. 402; Ives v. Finch, 28 Conn. 114.

4. Actions on Judgments Not Favored. — Biddleston v. Whitel, 1 W. Bl. 507.

In Hummer v. Lamphear, 32 Kan. 439, it was held that an action on a judgment might be maintained although execution might have issued on the original judgment. This decision was controlled by the earlier case of Burnes v. Simpson, 9 Kan. 658, but the writer of the opinion said he would have preferred to follow the cases holding the contrary view, if the question had been open in that state. In Denison v. Williams, 4 Conn. 402, Brainard, J., dissenting, said: "Although, as I have before stated, there is no question that in England debt on judgment will lie at any time until satisfaction, yet I believe, were not the principle originally established as part of their common law, that their courts would now reject it. Mischiefs resulting from it they certainly have experienced. Actions of debt on judgment they now discourage, as far as they are authorized, which is by the exercise of their discretionary power over costs." In *Texas* it seems that the District Court has power to prevent the harassment of the defendant by vexatious repetition of suits. Lander v. Rounsaville, 12 Tex. 195.

5. Action Must Be Necessary. — "Neither the common law nor the practice in the various states of the republic, nor anything inherent in the subject, based on sound reason, gives to a judgment creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment." Pitzer v. Russel 4 Oregon, 124. This decision is the leading case in support of this view. See also Solen v. Virginia, etc., R. Co., 15 Nev. 313, where the whole subject is elaborately discussed and the cases reviewed in the dissenting

is not entitled to maintain an action which, if successful, would result in a personal judgment against the defendant of no more binding force than the one which he already has.¹ The cases maintaining the view under discussion take the position that the reason an action could always be maintained at common law upon a judgment was that an action was always necessary at common law to enable the judgment creditor to obtain all that he was entitled to receive, inasmuch as interest upon a judgment could not be collected by execution. Interest upon judgments, in this country, is now very generally collectible by execution, and the reason of the common-law rule failing, it is held that the rule itself also fails.²

The Necessity of a Separate Action to enforce a judgment has been said to exist in two cases: the first, when the judgment is a foreign one;³ the second, when it is a domestic judgment, but when the judgment debtor has died and his estate is under administration.⁴

opinion of Beatty, C. J., and the concurring opinion of Leonard, J.

In *Texas* it is held that a second action cannot be maintained upon a judgment which is not dormant. *Parks v. Young*, 75 Tex. 278. In order to sustain a suit on a judgment in the District Court, if objection be taken, it must appear that the judgment, by reason of failure to issue execution or other cause, is not in a condition to be enforced without such suit. *Johnson v. Murphy*, 17 Tex. 216.

In *South Carolina* it has been held that as execution might be sued out upon a judgment in a magistrate's court at any time within a year and a day, a new action could not be brought within that period. *Lee v. Giles*, 1 Bailey L. (S. Car.) 449, a leading case in support of this view.

To the effect that an action will not lie during the time within which execution might issue, see, in addition to the cases above cited, *Vandiver v. Hammet*, 4 Rich. L. (S. Car.) 509; *Ligon v. McNeil*, 6 Rich. (S. Car.) 377; *Shooter v. McDuffie*, 5 Rich. L. (S. Car.) 61.

In *Alabama*, in an early case, it was held to be a good defense to an action on a judgment to show that execution thereon was still available. *White v. Hadnot*, 1 Port. (Ala.) 419. But this case was in effect overruled by *Kingsland v. Forrest*, 18 Ala. 519, where it was held that debt would lie on a judgment after a year and a day, although an execution could legally issue upon it; that the remedy by execution is cumulative merely, and the statute giv-

ing it does not take away the common-law right of suing on judgment. See also *Alabama* cases cited *supra*, p. 1089, note 5.

1. *Shepherd v. Bridenstine*, 80 Iowa 225; *Solen v. Virginia*, etc., R. Co., 15 Nev. 313. See also *Harrison v. Union Trust Co.*, 144 N. Y. 326, holding that where a decree of foreclosure requires the trustee to convey the mortgaged property to the purchaser, and the trustee refuses to do so, an action cannot be maintained against such trustee to compel a conveyance, since the decree in such action would be merely a repetition of the decree already made.

2. **Reason for Common-law Rule Inapplicable.** — "But I insist that if, under the common law, there was always a necessity for the action, which was the reason why the rule was adopted, it then follows that the common-law rule in fact was and is that this action may be maintained when a necessity, not caused by the fault of the creditor, exists therefor, and in that case only; and adopting the language of the court in *Pitzer v. Russel*, 4 Oregon 130, that 'the common-law reason for the practice is inapplicable in a state where every judgment bears interest collectible by execution, and where interest can be obtained equally well without an action. It is a part of the common law that where the reason of the rule fails, the rule fails with it.' " *Per Leonard, J., concurring*, in *Solen v. Virginia*, etc., R. Co., 15 Nev. 313.

3. See *infra*. XVIII. 1. a. (2) *Foreign and Sister State Judgments*.

4. *Beckham's Succession*, 16 La.

Various other illustrations of actions held to be necessarily brought will be found in the note.¹

Necessity Caused by Plaintiff's Default. — A necessity caused by the judgment creditor's own act or default will not, of course, be sufficient to entitle him to maintain an action.²

(c) **Leave of Court to Sue** — *aa.* STATEMENT OF RULE. — In a number of states statutes exist providing that actions upon domestic judgments cannot be maintained without first obtaining an order of court granting leave to sue.³ Under such a statute prior leave

Ann. 352. See also *infra*, XVIII. 1. a.
(1) (c) *Leave of Court to Sue.*

1. Actions Supported by Necessity — Illustrations. — In *Whelpley v. Nash*, 46 Mich. 25, it was held that where excessive costs have been awarded by a justice in giving judgment, and the judgment debtor does not appeal, the party recovering judgment is entitled to rectify the error by remitting the costs and suing again upon the judgment for damages.

"When, however, circumstances have occurred since the judgment was rendered, such, for example, as a discharge in bankruptcy, or a release by act of the creditor, or a constructive payment, about the truth or effect of which circumstances a dispute exists, a formal action to try the newly arisen issues would not only be proper, but some proceeding of the kind may be necessary. For such reasons, actions upon judgments continue to be brought; and there is no doubt they have been permitted, from the earliest times of which we have knowledge, for other equally valid reasons. Our statutory proceedings in the nature of *scire facias* (Civ. Code, § 292) are proceedings in the nature of an action which afford means of disposing of many, if not all, such newly arisen issues; and these proceedings have the advantage over an ordinary action of retaining the entire record in the same court, and of preventing unnecessary cost and inconvenience to the defendants. Whether they are intended as a substitute for all other actions upon a domestic judgment, as is claimed by the respondent, it is not necessary now to attempt to decide." *Pitzer v. Russel*, 4 Oregon 128.

In *Buchanan County First Nat. Bank v. Duel County*, 74 Fed. Rep. 373, it was held that the assignee of a judgment against a county could maintain an action thereon although the original judgment remained in force. This was

upon the ground that the assignee had a right to have judicially determined its right to enforce payment of the indebtedness, and that therefore the action could not be considered as merely vexatious.

In *Hull v. Naumberg*, 1 Tex. Civ. App. 132, it was held that a judgment creditor without execution, levy, or sale could maintain an action in equity to foreclose a judgment lien, although the judgment had not lost its lien under the statute, where land was fraudulently claimed as a business homestead by the debtor, such claim being an impediment to the enforcement of the judgment.

2. *Pitzer v. Russel*, 4 Oregon 124, holding that where the plaintiff, by his own unexplained negligence in failing to file a transcript with the county clerk, as required by statute, has lost the right to levy on real property, he cannot, for that reason alone, maintain a new action upon the judgment. The complaint in such case must allege a sufficient excuse for the neglect. So, in *Solen v. Virginia*, etc., R. Co., 15 Nev. 313, it was held that the neglect of the plaintiff's attorneys, in drawing the judgment, to insert therein a provision for interest, whereby the plaintiff lost the right to collect interest on his judgment by execution, was not a sufficient cause to entitle the plaintiff to maintain a new action upon the judgment.

3. *Iowa.* — *Watts v. Everett*, 47 Iowa 269; *Matthews v. Davis*, 61 Iowa 225.

New York. — *Farish v. Austin*, 25 Hun (N. Y.) 430; *Carpenter v. Butler*, 29 Hun (N. Y.) 251.

North Carolina. — *McDonald v. Dickson*, 85 N. Car. 248; *Warren v. Warren*, 84 N. Car. 614; *Kendall v. Briley*, 86 N. Car. 56. But see *Dunlap v. Hendley*, 92 N. Car. 115. See also cases cited more specifically *infra* in this section.

to sue has been held to be a jurisdictional requisite.¹ In *Minnesota* the statute provides that costs shall not be allowed in an action on a judgment unless the action was brought with previous leave of the court.²

Retroactive Operation. — These statutes, affecting merely the remedy, apply to judgments rendered before as well as after their passage.³

Discretion of Court. — Where leave is granted by the judge below to bring an action on a judgment, his decision upon the question whether "good cause" is shown is conclusive,⁴ and it is equally so when leave to sue is refused.⁵

Leave Must Be "Previous." — Under *New York* Code Civ. Pro., § 1913, an action on a judgment cannot be maintained unless leave to sue has been granted prior to the bringing of the suit. *Cook v. Thurston*, 18 Misc. Rep. (N. Y. Supreme Ct.) 506.

Nunc Pro Tunc. — Where the defendant in an action on a judgment moves to set aside the summons and complaint for the reason that the action was commenced without leave of the court, such leave should not be granted *nunc pro tunc*, upon the motion to vacate the proceedings, but the plaintiff should be left to his direct motion for such leave. *Finch v. Carpenter*, 5 Abb. Pr. (N. Y. Supreme Ct.) 225.

In the following cases it is held that an order granting leave to sue may be granted *nunc pro tunc* after suit is brought. *Burrough v. Smith*, cited in *Voorhies Code* (ed. 1855), § 71, note d; *Church v. Van Buren*, 55 How. Pr. (N. Y. Supreme Ct.) 489; *McKernan v. Robinson*, 84 N. Y. 105; *Lane v. Salter*, 4 Robt. (N. Y.) 239.

Costs. — "But the defendant must be saved all costs he has incurred in defending this action, prior to granting such leave to sue *nunc pro tunc*, as he was justified in making an objection that would have defeated the plaintiff's recovery." *Church v. Van Buren*, 55 How. Pr. (N. Y. Supreme Ct.) 489.

1. Leave to Sue Is Jurisdictional. — "The question whether the bringing of a suit on a judgment without such leave is a mere irregularity which may be waived by the defendant's not objecting in time or otherwise, or whether such leave is a substantive right which must be shown to exist, is one much in conflict in the authorities. In *Lane v. Salter*, 4 Robt. (N. Y.) 239, it is held to be a mere irregularity, and in *Finch v. Carpenter*, 5 Abb. Pr. (N. Y. Supreme Ct.) 225, that the proper remedy is by

motion to set aside the complaint, and on such motion leave to sue *nunc pro tunc* should not be granted, but the plaintiff should be left to his direct motion for such leave. And in *Goodyear Dental Vulcanite Co. v. Frisselle*, 57 How. Pr. (N. Y. Supreme Ct.) 255; *Thompson v. Sutphen*, 2 E. D. Smith (N. Y.) 527, and *Mills v. Winslow*, 2 E. D. Smith (N. Y.) 18, it was held that the question was a jurisdictional one, and the absence of the order granting leave was fatal to the maintenance of the action." *Farish v. Austin*, 25 Hun (N. Y.) 430. See also *Cook v. Thurston*, 18 Misc. Rep. (N. Y. Supreme Ct.) 506.

2. Merchants' Nat. Bank v. Gaslin, 41 Minn. 552, construing Gen. Stat. Minn. (1878), c. 67, § 6.

3. Watts v. Everett, 47 Iowa 269; *Finch v. Carpenter*, 5 Abb. Pr. (N. Y. Supreme Ct.) 225. *Contra*, *M'Guire v. Gallagher*, 2 Sandf. (N. Y.) 402.

4. Warren v. Warren, 84 N. Car. 614.

5. Distinction Between Granting and Refusing Leave as to Conclusiveness. — *Kendall v. Briley*, 86 N. Car. 56. In this case the original judgment was rendered on the 18th of October, 1871, and the motion for leave to sue was made on the 10th day of October, 1881, just ten days before the bar of the statute of limitation would attach to it, and the effect of the ruling was, not to shield the defendant from vexatious litigation, but to give him an absolute discharge from a debt not one cent of which had ever been paid. There was accordingly much point in the distinction made by *Ruffin, J.*, in a vigorous dissenting opinion, between cases where the finding was that good cause for a new action was shown, and cases where the finding was that good cause was not shown, and leave, therefore, refused. In the former case the granting of leave to sue might well be sustained as a conclusive exercise of

Review on Appeal. — The granting of leave to sue, being discretionary with the lower court, will not be reviewed on appeal.¹

The Purpose of These Statutes is to prevent the reduplication of costs and the vexation of the defendant, by piling judgment upon judgment, which results in nothing but increased costs, without increasing the remedies or altering the position of the plaintiff in the original judgment.²

Designating Place of Suit. — The leave need not require the suit to be brought in the court in which the judgment was recovered.³

bb. **CASES NOT WITHIN RULE.** — There are several well-defined classes of cases to which the statutes under consideration have no application.⁴ Thus they do not apply to judgments pleaded as a counterclaim,⁵ nor to an action to foreclose a mortgage,⁶ nor to a proceeding in the Probate Court to compel the payment of a judgment by a guardian.⁷

discretionary power, inasmuch as it impairs no legal right of the debtor, and every just defense may still be set up when the action is brought. But in cases where leave to sue is refused, substantial legal rights may be impaired, as in this instance, and in such cases the discretion of the court should be held to be a sound legal one, subject to review, and not an arbitrary one.

1. *Warren v. Warren*, 84 N. Car. 614; *Kendall v. Briley*, 86 N. Car. 56.

A Motion to Vacate an Order Granting Leave to Sue on a judgment is properly denied where it is not made until more than three years after the granting of such order. *Van Arsdale v. King*, (Supreme Ct.) 33 N. Y. Supp. 858.

2. *Dean v. Eldridge*, 29 How. Pr. (N. Y. Supreme Ct.) 218; *Wheeler v. Dakin*, 12 How. Pr. (N. Y. Supreme Ct.) 541; *Graham v. Scripture*, 26 How. Pr. (N. Y. Supreme Ct.) 501; *Pitzer v. Russel*, 4 Oregon 129.

3. *National Mechanics' Banking Assoc. v. Usher*, 1 Sweeny (N. Y.) 403.

4. Actions Not Technically on Judgment.

— Where a judgment in an attachment suit ordered that the plaintiff therein should return the attached property, or, in case it could not be returned, then that the defendant should recover of the plaintiff its value, fixed at a certain sum, an action to recover the value so fixed, on the plaintiff's failure to return the property, is not an action on a judgment, within the meaning of the code, § 2521, prohibiting any action on a judgment within fifteen years without leave of the court. *Morrison v. Springfield Engine, etc., Co.*, 84 Iowa 637.

Where a judgment has been obtained against two defendants upon a joint contract, but process has been served only on one of them, and judgment taken to be collected out of the joint property of both or the separate property of the defendant served, a second action may be brought against both defendants, alleging the recovery of the former judgment, and serving process only on the defendant not served in the former action, and a like judgment obtained against the latter defendant. This second action is not an action upon a judgment within the meaning of the code, § 71, requiring leave of court as a condition precedent to its maintenance. *Dean v. Eldridge*, 29 How. Pr. (N. Y. Supreme Ct.) 218.

A Sci. Fa. upon a Judgment more than thirty years old may be brought without the previous leave of court. *Chambers v. Carson*, 2 Whart. (Pa.) 365; *Lesley v. Nones*, 7 S. & R. (Pa.) 410.

5. Judgment as Counterclaim. — *Wells v. Henshaw*, 3 Bosw. (N. Y.) 625.

6. An Action to Foreclose a Mortgage given to secure a note which is already reduced to judgment may be brought without prior leave of court. *Matthews v. Davis*, 61 Iowa 225.

7. An Application to the Probate Court for an order to compel a guardian to pay the amount of a judgment against him as garnishee in a suit against his ward is in the nature of a special proceeding auxiliary to the judgment, and is not such an action upon a judgment that it cannot be brought within fifteen years without leave of court. *Coffin v. Eisiminger*, 75 Iowa 30.

Justices' Judgments. — Where a statute is by its terms limited to judgments of courts of record, an action may be brought upon a justice's judgment without leave, even though it has been docketed in the County Court.¹

Assigned Judgments. — The prohibition is usually confined to actions between the same parties, and therefore a *bona fide* assignee of the judgment may sue without leave.²

Executors and Administrators. — On the same principle, an executor or administrator may maintain an action without leave upon a judgment recovered by a decedent.³

Judgments of Foreign and Sister States. — An action may be maintained in one state without leave upon the judgment of a foreign or a sister state, even though such judgment is based upon a prior domestic judgment;⁴ and this is true notwithstanding a statute of such foreign or sister state requires leave to sue upon judgments obtained in its courts.⁵

Federal Courts. — So, also, a suit upon a judgment rendered in a federal court may be maintained in a state court without first

1. Justices' Judgments. — *New York* Code Civ. Pro., § 1913, prohibiting actions upon judgments for money rendered in courts of record, except in cases where leave to sue is first obtained, does not apply to an action on a judgment rendered in a justice's court and docketed in the office of the county clerk under section 3017, which provides that thenceforth such judgment is to be deemed the judgment of the County Court and enforced accordingly. *Harris v. Clark*, 65 Hun (N. Y.) 361, *disapproving* *Lyon v. Manly*, 10 Abb. Pr. (N. Y. Supreme Ct.) 337, and *Baldwin v. Roberts*, 30 Hun (N. Y.) 163, and *following* *Dieffenbach v. Roch*, 112 N. Y. 621.

2. Assignees May Sue Without Leave. — *Knapp v. Valentine*, 24 Civ. Pro. Rep. (N. Y. Supreme Ct.) 331; *McButt v. Hirsch*, 4 Abb. Pr. (N. Y. C. Pl.) 441; *Kopper v. Howe*, 2 Hilt. (N. Y.) 69; *McGrath v. Maxwell*, 17 N. Y. App. Div. 246.

Section 71 of the code does not prohibit the *bona fide* assignee of a judgment from commencing an action upon it without first obtaining leave of the court. It is so obviously for the interest of an assignee, in many cases which can be suggested, to sue upon an assigned judgment and obtain a recovery in his own name, that the natural meaning of the words, "between the same parties," found in section 71, should not be enlarged by judicial construction so as to deprive an assignee

of that right. *Tufts v. Braisted*, 4 Duer (N. Y.) 607.

3. Executors and Administrators. — *Smith v. Britton*, 2 Thomp. & C. (N. Y.) 498. See also *Smith v. Britton*, 45 How. Pr. (N. Y. Supreme Ct.) 428.

Where a plaintiff dies after judgment, there is no party left who can make a motion for leave to issue execution on the judgment; and the only remedy is an action by his legal representatives to obtain the relief formerly reached by the writ of *scire facias quare executionem non*. Such a proceeding is not an action on the judgment; it may, therefore, be brought without leave of the court. "An action on a judgment" (Code, § 71) is an action to recover of the defendant the amount due on the judgment, as any other money demand would be recovered, using the judgment only as evidence of the amount of the debt — such as actions of debt on judgment under the former system. *Wheeler v. Dakin*, 12 How. Pr. (N. Y. Supreme Ct.) 537.

4. Merritt v. Fowler, 76 Hun (N. Y.) 424.

5. A Statute of One State prohibiting an action on a judgment obtained in one of its courts, unless leave of court is first obtained, affects the remedy merely, and does not apply to an action on such judgment in a court of another state. *Weber v. Yancy*, 7 Wash. 84. Compare *McClean v. Keener*, 8 Lanc. L. Rev. (Pa.) 313, where it is held that a suit cannot be maintained in *Pennsyl-*

obtaining leave to sue;¹ and, *vice versa*, a judgment of a state court may be sued upon in a federal court without leave, notwithstanding leave is required by a statute of the state where the judgment was rendered.²

cc. APPLICATION FOR ORDER — In What Court Made. — Application for leave to sue upon a judgment must be made in the court where the action is to be brought, or in the court where the judgment was rendered, according to the wording of the statute.³

Notice of a motion for leave to sue upon a judgment is usually required.⁴

vania upon a foreign judgment where the provisions of the statute of the state in which it was rendered, requiring leave of the court before action brought, have not been complied with.

1. The judgment of a federal court, although docketed in a county clerk's office, still remains a judgment of the federal court, and an action lies thereon without leave. *Goodyear Dental Vulcanite Co. v. Frisselle*, 22 Hun (N. Y.) 174, reversing 57 How. Pr. (N. Y.) 255. See also *Morton v. Palmer*, 60 Hun (N. Y.) 583, 39 N. Y. St. Rep. 236, where it is said that a judgment rendered in a federal court sitting in New York might be sued upon in the courts of New York without leave, just as if it were a foreign judgment.

2. State Statute Inapplicable in Federal Court. — In *Union Trust Co. v. Rochester, etc., R. Co.*, 29 Fed. Rep. 609, it was held that "the New York statutory provisions forbidding suit to be brought upon a judgment rendered in a court of record of that state without the previous order of the court in which the original action was brought, granting leave to bring the new suit, must be held as intended only to regulate the course of procedure in the New York state courts," and were therefore inapplicable to an action on a New York judgment in a federal court. See also *Phelps v. O'Brien County*, 2 Dill. (U. S.) 518, where it was said that a person who, under the Constitution and laws of the United States, has the right to bring his action in the federal court upon a judgment cannot be compelled first to obtain leave of a state court to do so.

3. In New York, under Code Civ. Pro., § 1913, the order granting leave to bring such an action must be made by the court in which the action is to be brought. *Baldwin v. Roberts*, 30 Hun (N. Y.) 163. Under the former statute (code, § 71) it was held that leave to

prosecute should be obtained from the court in which the judgment was rendered, and that, perhaps, a fair construction of the language of such section would, in some cases, extend its application, so as to permit a motion for leave to prosecute to be made in the court which had control of the judgment and execution. *Graham v. Scripture*, 26 How. Pr. (N. Y. Supreme Ct.) 501. The court in this case said: "It is not necessary to decide that in all cases the order must be obtained from the court having control of the judgment on which suit is desired to be instituted. Perhaps there may be cases when it would be appropriate and necessary to the attainment of justice to obtain leave to prosecute from the court in which the action on the judgment is brought."

4. In Wisconsin an order granting leave to bring an action upon a judgment is not void for want of jurisdiction although notice of the motion therefor was served less than eight days before the order was made, in violation of the statute and rules of court. "It is at most merely irregular. It is sufficient that the defendants had notice of it, and were apprised of what was going on against them, and were afforded an opportunity to defend against it. This gave the court jurisdiction over them." *Cole v. Mitchell*, 77 Wis. 131.

An Order Granting Leave to Sue on a Judgment Will Not Be Vacated for a mere irregularity in allowing notice of the application for leave to sue to be served by mail, while the defendant could have been served personally, and because such service was permitted to be made in less than sixteen days. *Van Arsdale v. King*, (Supreme Ct.) 33 N. Y. Supp. 858.

Sufficiency of Notice. — When the notice states the amount of the judgment unpaid, the want of service of any affidavit or other paper on which the

dd. OBJECTIONS TO WANT OF LEAVE — **Motion or Answer.** — The objection that a suit upon a judgment is brought without leave may be raised by motion or answer.¹

Demurrer. — And it has been held that where the petition does not allege that leave to sue has been obtained it is open to a demurrer.² But this is disputed, and there are cases in which a contrary view is taken.³

On Appeal. — The objection cannot be taken for the first time on appeal.⁴

(2) *Foreign and Sister State Judgments* — (a) **Statement of Rule.** — An action lies in a domestic court upon a judgment rendered in the courts of a foreign or a sister state,⁵ and the action will lie

motion was founded is not a jurisdictional defect. *Cole v. Mitchell*, 77 Wis. 131.

1. *Dunlap v. Hendley*, 92 N. Car. 115.

The Proper Remedy for an action which is brought upon a judgment without the leave of court required by the *New York* Code Civ. Pro., § 71, is by motion to set aside the summons and complaint. *Finch v. Carpenter*, 5 Abb. Pr. (N. Y. Supreme Ct.) 225.

Sufficiency of Answer. — An answer claiming that the action cannot be maintained because "under the provisions of the code no action can be maintained on a judgment of the County Court," has been held a sufficient statement of the objection that leave of court was necessary. *Lyon v. Manly*, 10 Abb. Pr. (N. Y. Supreme Ct.) 337.

2. *Watts v. Everett*, 47 Iowa 269; *Graham v. Scripture*, 26 How. Pr. (N. Y. Supreme Ct.) 501.

3. **Contrary View.** — "The proper method, of course, for raising the objection is by motion. The complaint is not defective. It sets forth, *prima facie*, sufficient facts to show the liability of the party sued. But the action is brought in plain violation of the statute, and the court may, on a motion, interfere to prevent the act which the law thus forbids." *Finch v. Carpenter*, 5 Abb. Pr. (N. Y. Supreme Ct.) 225.

"Besides, if it were within the prohibition of section 71, I do not think that a ground of demurrer. This section prohibits the bringing of an action upon a judgment in a court of record between the same parties, without leave of the court. As a matter of pleading, I do not think it necessary to aver such leave in the complaint. That is no part of the cause of action; this

exists independently of the leave to sue, so that if there is any defect in the proceedings from want of such leave, the demurrer does not reach it. So far, therefore, as the demurrer rests on the ground that the action is prohibited by section 71, I have no difficulty in holding that it was properly overruled." *Dean v. Eldridge*, 29 How. Pr. (N. Y. Supreme Ct.) 218. Compare *Graham v. Scripture*, 26 How. Pr. (N. Y. Supreme Ct.) 501, quoted *supra*, p. —, note —.

4. *Dunlap v. Hendley*, 92 N. Car. 115.

The objection is waived unless raised by demurrer or answer. *Brush v. Hoar*, 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 297.

But see cases cited *supra* in this section, to the effect that the requirement of leave is jurisdictional.

5. **Judgment for Alimony.** — An action at law may be maintained in one state upon a judgment or decree for alimony rendered by a court of competent jurisdiction in another state. *Dow v. Blake*, 148 Ill. 76; *Brisbane v. Dobson*, 50 Mo. App. 170; *Bullock v. Bullock*, 57 N. J. L. 508; *Wood v. Wood*, 31 Abb. N. Cas. (N. Y. C. Pl.) 235.

The action lies on a judgment upon petition for a further sum in gross as a final allowance for the wife, in division and distribution of the property of the husband, though it orders that, except as therein modified or superseded, the original judgment for a gross sum which has been paid shall remain in force. *Dow v. Blake*, 46 Ill. App. 329, *affirmed* in 148 Ill. 76.

An order of a court of another state directing the payment of alimony by giving a mortgage upon land in New Jersey will not be enforced in the latter state on a bill for that purpose, but the judgment of divorce directing payment of alimony can be enforced only by

notwithstanding the pendency of proceedings in the original forum for its enforcement¹ or for its vacation.² So, also, an action will lie although the judgment is dormant.³

Alternative Judgment. — An action will not lie, however, upon an alternative judgment in replevin for the return of the goods or their value.⁴

another suit in New Jersey; although such order may be enforced by the court rendering it so long as the defendant is within its jurisdiction, by compelling him to execute the mortgage. *Bullock v. Bullock*, 57 N. J. L. 508.

In *Allen v. Allen*, 100 Mass. 373, it was held that, as a necessary consequence of all the legislative provisions on the subject of divorce in that state, a decree for alimony rendered in that state could only be enforced by the court making the decree, and not by an action on the decree in the Superior Court. The court said, however, that, by a clear preponderance of authority, such an action might be maintained upon a decree for alimony rendered in another state. The court also enumerated some very strong reasons against allowing a common-law action to recover arrears of alimony. See also *Van Buskirk v. Mulock*, 18 N. J. L. 184; *Battey v. Holbrook*, 11 Gray (Mass.) 212; *Barber v. Barber*, 1 Chand. (Wis.) 280.

Judgment on Bond. — In an action brought in New Hampshire on a bond conditioned for the payment of certain notes, judgment was rendered for the penalty and execution issued for the sum then due. The remedy for enforcing such bonds was prescribed by the statute of New Hampshire, and by such statute the judgment stood as security for any damages resulting from future breaches of the condition, to be liquidated upon a *scire facias*. It was held that an action of debt on such judgment could not be sustained in Vermont, either by declaring upon it directly and simply as a judgment or by setting forth all the facts in the case and averring further breaches of the condition. *Dimick v. Brooks*, 21 Vt. 569.

An Action at Law in a Federal Court lies to recover arrears of alimony due upon a judgment rendered in a state court. *Knapp v. Knapp*, 59 Fed. Rep. 641.

In Texas, prior to its annexation to the United States, an action could not

be maintained on a foreign judgment, but the action was brought upon the original cause of action. *Wilson v. Tunstall*, 6 Tex. 221. Now, however, actions may be brought upon foreign judgments the same as in other states. *Harper v. Nichol*, 13 Tex. 151; *Clay v. Clay*, 13 Tex. 195; *Field v. Gantier*, 8 Tex. 74.

And, generally, as to the right to maintain an action upon a judgment of a foreign or a sister state, see the cases cited to specific propositions in this section.

1. *Hogg v. Charlton*, 25 Pa. St. 200.

2. **Pending Proceedings to Vacate.** — The mere pendency of equitable proceedings in the courts of Alabama, whether state or federal, to set aside a judgment rendered by the Alabama court, presents no obstacle to the rendition of a judgment upon such judgment by a court of the state of Georgia. *Tompkins v. Cooper*, 97 Ga. 631.

3. **Dormant Judgment.** — *David v. Porter*, 51 Iowa 254. But see *St. Louis Type Foundry Co. v. Jackson*, 128 Mo. 119.

4. **Alternative Judgment in Replevin.** — *Thorner v. Batory*, 41 Md. 593, where the opinion filed by the trial court was as follows: "After careful consideration of this case, I am of opinion that the judgment ought to be arrested, the judgment sued upon not being such an one as this court can carry into effect by a like judgment to be rendered here. Any other judgment than one presenting the same alternative would be transcending the power of this court, which must be limited to precisely the same measure of relief which the plaintiff was entitled to in the state of Tennessee. The only case known to the law of Maryland in which an alternative judgment, such as this, can be entered is in the action of detinue, long disused, but still, perhaps, in force. But the action brought on this Tennessee judgment is the action of debt, in which the only judgment is for a certain sum of money. It must be apparent that such an unconditional judgment would take from the defendant the right which

New Trial Pending. — Nor will it lie after the filing of a bond which, under the *lex fori*, entitles the defendant to a new trial.¹

(b) **Exclusive Remedy.** — A judgment recovered in one state will not be enforced either at law or in equity in another state until judgment has been recovered thereon in the latter state.²

Distinction Between Domestic and Foreign Judgments. — In other words, an action upon a foreign judgment is always necessary, and therefore the question already discussed in connection with domestic judgments, as to whether or not an action will lie upon a judgment in the absence of any ground of necessity therefor, cannot arise.³

he had under the Tennessee judgment to satisfy it by returning the property, and to that extent would be more exacting than the Tennessee judgment. Such a change of rights is not within the powers conferred by the Constitution of the United States, which extend only to the same measure of right. This view is, I think, fully sustained by *C. J. Redfield*, in *Dimick v. Brooks*, 21 *Vt.* 569. The clerk will, therefore, enter the arrest of judgment." The judgment of the trial court was *affirmed* on appeal.

1. *Gilpin v. Baltimore, etc., R. Co.*, (C. Pl.) 17 *N. Y. Supp.* 520.

2. *Weaver v. Cressman*, 21 *Neb.* 675; *McLure v. Benceni*, 2 *Ired. Eq. (N. Car.)* 513; *Needles v. Frost*, 2 *Okla.* 19; *Waddill v. Cabell*, 21 *Wash. L. Rep. (D. C.)* 265; *Cole v. Cunningham*, 133 *U. S.* 107.

A judgment recovered in one state, as was said by Mr. Justice Wayne in *M'Elmoyle v. Cohen*, 13 *Pet. (U. S.)* 312, "does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit." *Quoted in Wisconsin v. Pelican Ins. Co.*, 127 *U. S.* 265.

Federal Courts. — Even a judgment of a federal court rendered in Indian Territory will not be enforced in the courts of Oklahoma Territory before it is reduced to judgment there. *Needles v. Frost*, 2 *Okla.* 19.

Creditor's Bills. — In *Watkins v. Wortman*, 19 *W. Va.* 78, it was held, under Code 1868, c. 133, § 2, that a foreign judgment was a debt upon which a suit in equity could be maintained in West Virginia to avoid a fraudulent or volun-

tary conveyance without first reducing it to judgment in that state.

Constitutional Law — Remedy on Foreign Judgments. — The United States Constitution, requiring full faith and credit to be given in every state to the judicial records and proceedings of every other state, does not prevent any state from legislating as to the remedy in actions on judgments of sister states, provided they do not interfere with the merits. *Harper v. Nichol*, 13 *Tex.* 151.

3. *Abbot v. Knight*, 1 *Root (Conn.)* 406; *Solen v. Virginia, etc., R. Co.*, 15 *Nev.* 313, *per Leonard, J.*

The reasons which would not permit an action on a domestic judgment upon which execution might issue have no application to judgments of sister states. *Knapp v. Knapp*, 59 *Fed. Rep.* 641, *distinguishing Pitzer v. Russel*, 4 *Oregon* 124.

The principle that a defendant should not be vexed by a rendition of a second judgment, if there is in existence upon the records of the court a judgment which may be enforced for the benefit of the plaintiff to the same extent as the second judgment, does not apply when the second action is brought in another jurisdiction. *Buchanan County First Nat. Bank v. Duel County*, 74 *Fed. Rep.* 373.

"At the common law, courts discouraged the bringing second suits upon the judgment record where no reason therefor existed, and to that end refused costs, although giving judgment for the plaintiff in the case. Ultimately courts, upon a proper showing, refused to entertain a second action when the original judgment remained in force, and the plaintiff gained no advantage by the rendition of a second judgment. These cases, however, are generally those wherein the second judgment is sought in the same court

(c) **Judgments in Penal Actions.** — The penal laws of a state have no extraterritorial force, and will not be enforced by the courts of another state. Accordingly, no action lies upon a judgment rendered in another state for a penalty incurred by a violation of the municipal laws of such state.¹ The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it;² and the court to which such judgment is presented for enforcement, while it cannot go behind the judgment for the purpose of examining into the validity of the claim, may ascertain whether the claim is really a claim for a penalty, and therefore one which the court is not authorized to enforce.³ And the judgment is not thereby denied the full faith, credit, and effect to which it is entitled under the constitution.⁴

Whether a Statute Is a Penal Law which cannot be enforced in another state is to be determined by the court which is called upon to enforce it.⁵

Exceptional Rule. — In a few cases actions of debt upon judgments

wherein the original judgment was rendered, and relief is denied upon the theory that, there being already in existence a judgment upon which the court can give the plaintiff all the relief that would be open to him in case he obtained a second judgment, the institution and maintenance of a second action is clearly vexatious." *Buchanan County First Nat. Bank v. Duel County*, 74 Fed. Rep. 373.

1. *Arkansas v. Bowen*, 20 D. C. 291; *Attrill v. Huntington*, 70 Md. 191, on appeal 146 U. S. 657; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

2. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265; *Attrill v. Huntington*, 70 Md. 191.

3. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, citing *Louisiana v. New Orleans*, 109 U. S. 285; *Nelson v. Police Jury*, 111 U. S. 716; *Chase v. Curtis*, 113 U. S. 452; *Boynton v. Ball*, 121 U. S. 457.

4. *Arkansas v. Bowen*, 20 D. C. 291.

If a state court declines to enforce the judgment of a sister state because of an erroneous opinion that the original liability was a penalty, the judgment is thereby denied the full faith and credit to which it is entitled under the constitution. *Huntington v. Attrill*, 146 U. S. 657.

5. *Huntington v. Attrill*, 146 U. S. 657.

What Are Penal Actions. — The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the interna-

tional sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state or to afford a private remedy to a person injured by the wrongful act. *Huntington v. Attrill*, 146 U. S. 657.

Illustrations of Penal Actions. — A statute imposing a penalty of twenty-five per cent. upon the sureties upon a tax collector's bond for his nonpayment of moneys due from him, and providing that the whole amount shall bear interest until paid at fifty per cent. per annum, is a penal statute in aid of the revenue laws of the state, and the judgment founded thereon cannot be enforced in another jurisdiction. *Arkansas v. Bowen*, 20 D. C. 291.

A statute making the officers of a corporation who sign and record a false certificate of the amount of its capital stock liable for all its debts is not a penal law in the international sense, and therefore an action may be maintained upon a judgment founded on such liability. *Huntington v. Attrill*, 146 U. S. 657, reversing 70 Md. 191, where a contrary conclusion had been reached.

A judgment for a penalty imposed by statute for failing to make a report to an insurance commissioner of a state will not support an action in another jurisdiction. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, approved in *Sparf v. U. S.*, 156 U. S. 157. And see in general article PENALTIES AND

PENAL ACTIONS.

under foreign penal statutes have been sustained upon the principle that after judgment the transaction no longer retained its penal character.¹ These cases, however, have been disapproved by the United States Supreme Court.²

b. JUDGMENTS OF JUSTICES OF THE PEACE. — An action will lie upon a judgment of a justice of the peace, and it is immaterial whether the judgment is a domestic³ or a foreign judgment.⁴

Where the Jurisdictional Facts Do Not Appear on the face of the proceedings before a justice, it has been held that no action will lie upon the judgment.⁵

1. *Spencer v. Brockway*, 1 Ohio 259; *Wright v. Munger*, 5 Ohio 443.

In *State v. Helmer*, 21 Iowa 370, it was held that while statutes prescribing proceedings to compel the fathers of bastard children to support them are merely local police regulations, enforceable alone by the state enacting them, yet where the local jurisdiction has attached, and the courts of the state have taken cognizance of the case and rendered judgment for the penalty in such statutes, the judgment is entitled to full faith and credit in every other state.

In *Healy v. Root*, 11 Pick. (Mass.) 389, it was held that an action of debt would lie in Massachusetts upon a judgment recovered in Pennsylvania in a *qui tam* action upon a penal statute for usury.

2. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

3. **Domestic Justices' Judgment.** — *Fravel v. Springfield Tp.*, 34 Ind. 296; *Harris v. Clark*, 65 Hun (N. Y.) 361; *Brooks v. Todd*, 1 Handy (Ohio) 175; *Alexander v. Arters*, 17 Pa. Co. Ct. Rep. 379; *Shannon v. Woollard*, 12 Lea (Tenn.) 663; *Boyd v. Mann*, 9 Baxt. (Tenn.) 349.

It is not necessary to issue executions on the justice's judgment before suing on it in the District Court. *Lander v. Rounsaville*, 12 Tex. 195.

In *Delaware*, under Dig. 347, § 28, providing a remedy by *sci. fa.* upon a justice's judgment, an action of debt will not lie before a justice of one county upon a judgment recovered before a justice in another county. The remedy is by *sci. fa.* and is exclusive. *Johnston v. Hayes*, 3 Harr. (Del.) 486.

In *Wisconsin* a statute providing that "no action on a judgment rendered by a justice of the peace shall be brought in the same county within two years after its rendition" except in

certain specified cases, was held to forbid the bringing of such actions in justices' courts, as well as in any other court. *Diederich v. Nachtsheim*, 33 Wis. 225. In this case it was also insisted that the statute was not intended to apply to a judgment where the damages were less than ten dollars, and where the transcript thereof could not be filed, but the court refused to see any merit in the distinction.

4. **Foreign Justices' Judgments.** — Action lies on a judgment of another state. *Cone v. Cotton*, 2 Blackf. (Ind.) 82; *Case v. Huey*, 26 Kan. 553.

5. **Jurisdictional Facts Must Appear in Record.** — *Rossiter v. Peck*, 3 Gray (Mass.) 538; *Wise v. Loring*, 54 Mo. App. 258. But see *Gray v. McNeal*, 12 Ga. 424.

Contra. — "In our view, the rule which makes the judgment of a court of record binding upon the parties until reversed by proper proceedings therefor, although jurisdiction of the person was not properly obtained, is applicable as well to a judgment of a justice of the peace as to one of a court of general jurisdiction. It was so applied in *Hawes v. Hathaway*, 14 Mass. 233, and that decision is cited with approval in *Crockett v. Drew*, 5 Gray (Mass.) 399. A contrary decision, however, is found in *Rossiter v. Peck*, 3 Gray (Mass.) 538. This decision was manifestly made without much consideration. The case of *Hawes v. Hathaway*, 14 Mass. 233, was not referred to; and the decision seems to have been based upon *Piper v. Pearson*, 2 Gray (Mass.) 120. But in *Piper v. Pearson* the justice assumed to exercise a judicial power, when, in fact, he was clothed with no judicial authority in the premises. The whole proceeding was *coram non judice*; and he was a mere trespasser. There is a broad distinction between that case

c. JUDGMENTS IN REM AND IN PERSONAM. — An action will not lie upon a judgment purely *in rem*,¹ but only upon a valid judgment *in personam*.²

Judgment in Attachment. — Accordingly, a judgment in attachment will not sustain an action where the defendant was not personally served and did not appear;³ and this rule applies equally to both foreign and domestic judgments.⁴

and one where the magistrate possesses the requisite judicial authority, but, in the exercise of that authority, fails to secure, by proper proceedings, jurisdiction of the person of the defendant. The case of *Brown v. Cady*, 19 Wend. (N. Y.) 477, also cited by the court in *Rossiter v. Peck*, 3 Gray (Mass.) 538, does not support that decision, and is in direct conflict with *Hawes v. Hathaway*, 14 Mass. 233. But the only question discussed in *Brown v. Cady*, 19 Wend. (N. Y.) 477, was the sufficiency of the proof that there was service of process upon the defendant, in the original suit; and it is to that point that the case seems to have been cited. The judgment of a justice of the peace was held to be invalid without showing such service, and insufficient to support an action of debt or contract for the amount due upon it. But the propriety of impeaching such a judgment without proceeding to reverse it directly by writ of error does not appear to have received the consideration of the court." *Hendrick v. Whittemore*, 105 Mass. 29.

Where a transcript of such a judgment does not show that the defendant had been served, or that he did not appear, the judgment is not conclusive, nor is it absolutely void, but it is *prima facie* evidence of the debt, and *per se* a cause of action. *Holt v. Alloway*, 2 Blackf. (Ind.) 108.

Jurisdiction may be proved by parol evidence when the jurisdictional facts do not appear in the justice's docket. *Roberts v. Burrell*, 3 Thomp. & C. (N. Y.) 30.

1. *Lippard v. Edwards*, 39 Ind. 165.

2. *Scovil v. Fisher*, 77 Iowa 97; *Seligman v. Kalkman*, 17 Cal. 152.

3. Attachment Will Not Support Action. — *Henrie v. Sweasey*, 5 Blackf. (Ind.) 335; *Roose v. McDonald*, 23 Ind. 157.

Against Nonresidents. — A judgment in a proceeding by attachment against a nonresident debtor who does not appear to such suit will not form a legal foundation for an action. *Miller v. Dungan*, 36 N. J. L. 21.

A judgment by default, without personal notice, against a nonresident whose property within the jurisdiction of the court has been attached is void except as to the property attached, and an action of debt cannot be maintained upon it for the unsatisfied balance. *Eastman v. Dearborn*, 63 N. H. 364, overruling *Kendrick v. Kimball*, 33 N. H. 482.

Contra. — In *North Carolina*, in an early case, it was held, under the special wording of the statute, that a final judgment in an original attachment where the service was by publication was equivalent to a final judgment in any other case and would sustain an action of debt. *English v. Reynolds*, Term (N. Car.) 92. See also *Armstrong v. Harshaw*, 1 Dev. L. (N. Car.) 187; *Skinner v. Moore*, 2 Dev. & B. L. (N. Car.) 138.

A similar ruling was made in *Kendrick v. Kimball*, 33 N. H. 482. But this case was subsequently overruled in *Eastman v. Dearborn*, 63 N. H. 364.

4. Domestic Judgments. — See cases cited in the preceding note.

Foreign Judgments. — A judgment *in rem* obtained in one state in attachment cannot sustain an action in another state. *Chamberlain v. Faris*, 1 Mo. 517; *Feltus v. Starke*, 12 La. Ann. 798.

A judgment in an action where jurisdiction is obtained only by attachment of defendant's property, although in form against the debtor, can be enforced only against the property attached, and will not sustain an action in another state. *Nagel v. Loomis*, 33 Neb. 499.

Appearance. — Where, in an action of debt on a judgment rendered in Georgia, it appeared that the action was commenced by attachment, and that the defendant had appeared and made his defense on the merits of the case, it was held that the action ceased to be *in rem*, and became an action *in personam*. *Arnold v. Frazier*, 5 Strobb. L. (S. Car.) 33.

Where the Proceedings Are Both In Personam and In Rem, an action of debt may be sustained upon the judgment *in personam*.¹

d. FINAL AND INTERLOCUTORY JUDGMENTS. — An action will not lie upon an interlocutory judgment or order.² The judgment must be final in order to sustain the action,³ and this rule applies equally well to actions upon domestic judgments and upon foreign judgments.⁴

e. EFFECT OF PENDING APPEAL. — A judgment is none the less a final judgment, within the meaning of the rule requiring

1. *Whiting v. Johnson*, 5 Dana (Ky.) 390, holding that a petition, in a court of Louisiana, which, beside praying for a sequestration and sale of the property of absent defendants, prays also for a judgment for the debt, must be deemed a proceeding *in personam* as well as *in rem*.

Where the Proceedings Are Altogether In Rem, the court has no jurisdiction to render any judgment *in personam*, and therefore an action of debt cannot be sustained in one state upon a judgment rendered in such a case in another state. *Whiting v. Johnson*, 5 Dana (Ky.) 390.

2. *Browder v. Faulkner*, 82 Ala. 257; *Ledyard v. Brown*, 27 Tex. 393; *Ledyard v. Brown*, 39 Tex. 402; *Fry v. Malcolm*, 4 Taunt. 705; *Biddell v. Dowse*, 9 D. & R. 404, 6 B. & C. 255, 13 E. C. L. 164.

3. *Ives v. Finch*, 28 Conn. 112; *Hanover F. Ins. Co. v. Tomlinson*,³ 3 Hun (N. Y.) 630.

What Are Final Judgments. — Whenever a party becomes entitled by law to take execution, although it be by special leave of the court granted during a term, the judgment is final for all purposes, and action on such judgment may be brought at once. *White River Bank v. Downer*, 29 Vt. 332.

In *Hanover F. Ins. Co. v. Tomlinson*, 3 Hun (N. Y.) 630, it was held that a judgment upon which an action may be brought must be not only final in the technical sense of that term, but one which has been duly docketed and upon which execution might issue, and that therefore in foreclosure, where the last proceeding was the filing of the report of a referee to sell, showing a deficiency, but which report had not been confirmed nor judgment docketed thereon, no action could be maintained thereon, even with leave.

A judgment rendered for costs in favor of the prevailing party on a writ of error or motion in error is a final

and unconditional judgment, on which the party in whose favor it is rendered has an immediate right of action, and which is not affected by the entry of the original action in the Superior Court for further proceedings under the provisions of the statute on that subject (Rev. Stat., tit. 1, § 167) or by the result of such proceedings. *Ives v. Finch*, 28 Conn. 112.

A judgment in favor of a divorced wife against her husband for a specific sum of money is a final judgment upon which an action may be maintained, notwithstanding the judgment of the appellate court affirming it gives the defendant leave to apply to the trial court for a modification of the judgment as to the time of its payment. Such a modification is directed only to the matter of carrying the judgment into effect. *Dow v. Blake*, 148 Ill. 76.

The general rule is that a judgment or decree is final if after it has been entered no further questions can come before the court except such as are necessary to be determined in carrying it into effect. *Dow v. Blake*, 148 Ill. 76. See also article APPEALS, vol. 2, p. 53, for a full consideration of what constitutes a final judgment.

4. Domestic Judgments. — See cases cited in preceding note.

Foreign Judgments. — *Dow v. Blake*, 148 Ill. 76; *Baugh v. Baugh*, 4 Bibb (Ky.) 556; *Munn v. Cook*, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 314.

An action will not lie unless the judgment conclusively (subject to an appeal) settles the existence of the debt so as to become *res judicata* between the parties. *Nouvion v. Freeman*, L. R. 15 App. 1.

"A foreign judgment, or judgment of a sister state, cannot be sued upon unless it is final and conclusive in the country or state where it was rendered, according to the law of that place. It should be complete and definitive in its nature, and a valid and subsisting

judgments to be final in order to sustain an action thereon, because an appeal is pending therefrom,¹ and it is a general rule that an action will lie upon a judgment, either foreign or domestic, although an appeal therefrom is pending in the courts of the state where it was rendered.²

Effect of Supersedeas. — Especially is this true where, by reason of a failure to file an appeal bond, or for other cause, the appeal or writ of error does not operate as a supersedeas or stay.³ It has often been held, however, that such an action would lie pending appeal or error notwithstanding the fact that such proceedings operated as a supersedeas or stay.⁴ But the contrary has been

obligation.' It must be 'certain or capable of being made so.' " *Dow v. Blake*, 148 Ill. 76, citing 12 Am. and Eng. Encyc. of Law (1st ed.), pp. 148m, 149⁷.

The mere pendency of equitable proceedings in the courts of the state where the judgment sued on was rendered is no bar to the suit. *Tompkins v. Cooper*, 97 Ga. 631.

1. *Howland v. Codd*, 9 Manitoba L. Rep. 437.

2. **Domestic Judgments.** — *Burton v. Reeds*, 20 Ind. 87; *Suydam v. Hoyt*, 25 N. J. L. 230; *Campbell v. Howard*, 5 Mass. 376. See also cases cited to specific propositions *infra*, in this section.

In *Woodward v. Carson*, 86 Pa. St. 176, it was held that an attachment might be sustained upon a domestic judgment pending an appeal therefrom.

Application to Reduce Alimony. — An action on a judgment for alimony cannot be affected by an application pending the action pursuant to leave granted upon an appeal to reduce the amount of the judgment. *Dow v. Blake*, 46 Ill. App. 329, *affirming* 148 Ill. 76.

Foreign or Sister State Judgments. — *California.* — *Taylor v. Shew*, 39 Cal. 536.

Connecticut. — *Bank of North America v. Wheeler*, 28 Conn. 433.

Illinois. — *Dow v. Blake*, 148 Ill. 76.

Massachusetts. — *Faber v. Hovey*, 117 Mass. 107.

Pennsylvania. — *Merchants' Ins. Co. v. De Wolf*, 33 Pa. St. 45.

Virginia. — *Piedmont, etc., L. Ins. Co. v. Ray*, 75 Va. 821.

United States. — *Union Trust Co. v. Rochester, etc., R. Co.*, 29 Fed. Rep. 609.

Manitoba. — *Howland v. Codd*, 9 Manitoba L. Rep. 435.

Unauthorized Appeal. — An action will lie on a judgment although an appeal has been claimed and allowed, if the law did not authorize such appeal. *Campbell v. Howard*, 5 Mass. 376.

3. *Massachusetts.* — *Clark v. Child*, 136 Mass. 344; *Faber v. Hovey*, 117 Mass. 107.

Nevada. — *Rogers v. Hatch*, 8 Nev. 35.

New York. — *Matson v. Burt*, 9 Hun (N. Y.) 470.

Vermont. — *Tarbell v. Downer*, 29 Vt. 339.

Virginia. — *Piedmont, etc., L. Ins. Co. v. Ray*, 75 Va. 821.

Judgment of Sister State. — Under art. 4, § 1, of the Constitution of the United States and the Act of Congress of May 26, 1790, a writ of error, not operating as a supersedeas, from the appellate court of Texas to a judgment of a District Court of that state, will be regarded as having the same effect in Virginia as in Texas. *Piedmont, etc., L. Ins. Co. v. Ray*, 75 Va. 821.

Judgment in Federal Court. — The right of action in a state court upon a judgment rendered in a federal court is not suspended by an appeal therefrom without security to the United States Supreme Court. *Matson v. Burt*, 9 Hun (N. Y.) 470.

4. *Alabama.* — *Cole v. Connolly*, 16 Ala. 271.

Indiana. — *Nill v. Camparet*, 16 Ind. 107; *Burton v. Reeds*, 20 Ind. 87; *Line v. State*, 131 Ind. 468.

New Jersey. — *Suydam v. Hoyt*, 25 N. J. L. 231.

Pennsylvania. — *Wood Mowing, etc., Mach. Co. v. Berry Harvester Co.*, 4 Pa. Dist. Rep. 141; *Falkner v. Franklin Ins. Co.*, 1 Phila. (Pa.) 183.

England. — *Scott v. Pilkington*, 2 B. & S. 11, 110 E. C. L. 11.

The filing of a petition for a review

directly held in an action on a domestic judgment,¹ and in many cases where actions have been sustained on judgments of sister states pending appeal, the decisions have been expressly limited to cases where it did not appear that the appeal or writ of error suspended the judgment in the state where it was rendered.²

Staying Execution. — In an action upon a judgment execution may be stayed pending the final determination of the appeal from the original judgment whenever it is made to appear that, by the laws of the state where the judgment was rendered, such appeal or writ of error operates as a supersedeas.³

and the awarding of a supersedeas on the execution issued on the judgment in the action sought to be reviewed are no bar to maintaining an action on such judgment. *Gifford v. Whalon*, 8 Cush. (Mass.) 428.

Summary Statement of Doctrine. — The only effect of an appeal, even where a full undertaking is filed, is to suspend execution on the original judgment in the court below pending the appeal. An undertaking to pay the judgment operates solely as a supersedeas of execution. The judgment remains a valid and binding contract and estoppel of record. The process of the court below for its enforcement is indeed withheld pending the appeal, but that is all, and an action can still be maintained on it, either within the state where it was rendered or in a sister or foreign state. The cases cited *supra* in this note fully establish these propositions. See also *Taylor v. Shew*, 39 Cal. 538, where it was held that an action would lie on the judgment of a sister state pending appeal without supersedeas. This was as far as the facts of that case made it necessary to go. The court said: "Whether, by an appeal from a judgment in which appellant had given an undertaking on appeal in form and amount sufficient to stay proceedings for its enforcement, the effect of the record of the judgment as evidence is thereby suspended or nullified, is a question not involved in this case."

"An appeal, where a supersedeas is obtained, stays proceedings on the judgment from which the appeal is prosecuted, but it does not preclude parties from suing on the judgment or from prosecuting collateral or independent proceedings." *Line v. State*, 131 Ind. 468 [citing *Burton v. Burton*, 28 Ind. 342; *Burton v. Reeds*, 20 Ind. 87; *Randles v. Randles*, 67 Ind. 438;

Nil v. Camparet, 16 Ind. 107; *State v. Krug*, 94 Ind. 366].

1. *Sublette v. St. Louis, etc., R. Co.*, 66 Mo. App. 331.

2. *Taylor v. Shew*, 39 Cal. 536, wherein the court declined to express an opinion as to the rule in cases where appeal operated as a supersedeas; *Dow v. Blake*, 148 Ill. 76; *Clark v. Child*, 136 Mass. 344; *Faber v. Hovey*, 117 Mass. 107; *Rogers v. Hatch*, 8 Nev. 35. These cases by fair implication hold that an action cannot be maintained where the appeal or writ of error operates as a supersedeas. See, for example, *Dow v. Blake*, 148 Ill. 76, wherein the court said: "Hence, where suit is brought in this state upon a judgment rendered in another state, such judgment will here be given the same force and effect as it has in the state where rendered. If it be shown that, by the law of the state where the judgment was rendered, an appeal has the effect of suspending the judgment appealed from, or of staying the execution thereof, the pendency of such appeal is a material fact to be proven in a suit upon the judgment in this state. But unless it appear that the appeal or writ of error suspends the judgment in the state where it was rendered, its pendency is no bar to an action in another state on the judgment."

3. *Wood Mowing, etc., Mach. Co. v. Berry Harvester Co.*, 4 Pa. Dist. Rep. 141; *Benwell v. Black*, 3 T. R. 643.

Terms May Be Imposed as a condition of staying execution. *Howland v. Codd*, 9 Manitoba L. Rep. 435. Thus it has been held in *Virginia* that the court may order that no execution shall be issued on a judgment obtained in such an action, provided the defendant give bond and security conditioned to satisfy the judgment and pay all damages, costs, and fees, etc., in case the writ of error pending in another state

The Action Will Not Lie, however, where the appeal transfers the case to the appellate court to be tried *de novo*, irrespective of the judgment below.¹

f. VOID JUDGMENTS—(1) *In General*.—No action can be maintained upon a void judgment.²

What Law Governs.—As a general rule, if a judgment is valid by the laws and practice of the state where it is rendered, an action may be maintained upon it in the courts of another state.³

shall be determined adversely to the defendant. *Piedmont, etc., L. Ins. Co. v. Ray*, 75 Va. 821.

Other Remedies.—"Here the action of debt on a foreign judgment is an original and independent action, and no judgment that we may render on it can be affected by any proceedings elsewhere; for those proceedings cannot set aside or confirm what we may do. Our judgment is final, and a writ of error to it does not bring up the proceedings elsewhere on an appeal or writ of error to the first judgment. If, then, we enter judgment, it must be conclusive, unless we leave it to be set aside, or stayed, or enforced at the discretion of the court below, on which proceeding a party has no right of review; or unless we say that on a reversal of the first judgment the defendant shall have a right to *audita querela*; or, perhaps, to a writ of error *coram nobis*, to have the court below reverse its own proceedings and award restitution, as the case may require. Both of these forms of proceeding are allowed in our practice, though seldom used, and therefore the parties may resort to them if they do not think proper to abide by the discretion of the court below. Perhaps the new fact might be put upon the record without this form." *Merchants' Ins. Co. v. De Wolf*, 33 Pa. St. 45.

1. *Evans v. Taylor*, 28 W. Va. 184.

A Judgment of a Justice of the Peace from which an appeal has been prayed and granted remains no longer a judgment, and cannot be sued on as such. *Marshal v. Lester*, 2 Murph. (N. Car.) 227, 1 Law Repos. (N. Car.) 100. See also *Curtiss v. Beardsley*, 15 Conn. 518.

2. *Pennywit v. Kellogg*, 1 Cinc. Super. Ct. Rep. 17.

No action can be maintained on a judgment void on its face. *Needham v. Thayer*, 147 Mass. 536; *Ellis v. Connecticut Mut. L. Ins. Co.*, 8 Fed. Rep. 81.

Where a Judgment Is Void as Against

One of Two Joint Debtors against whom it was rendered, no action can be maintained upon it against the other. *Hall v. Williams*, 6 Pick. (Mass.) 232.

3. *Georgia*.—*Tompkins v. Cooper*, 97 Ga. 631.

Iowa.—*Taylor v. Runyon*, 3 Iowa 474; *Clemmer v. Cooper*, 24 Iowa 185.

Kansas.—*Ritter v. Hoffman*, 35 Kan. 215.

Massachusetts.—*Knapp v. Abell*, 10 Allen (Mass.) 485.

Nebraska.—*Snyder v. Critchfield*, 44 Neb. 66.

New York.—*Teel v. Yost*, 128 N. Y. 387, affirming 57 N. Y. Super. Ct. 481; *Trebilcock v. McAlpine*, 46 Hun (N. Y.) 469.

South Dakota.—*Thomas v. Pendleton*, 1 S. Dak. 150.

United States.—*Christmas v. Russell*, 5 Wall. (U. S.) 290.

A judgment rendered and entered in accordance with the laws of the state where it was rendered, and valid there, is valid and enforceable by action in a sister state, although a judgment rendered and entered in the same manner and form under like circumstances in the latter state would be utterly void. *Ritter v. Hoffman*, 35 Kan. 215; *Kitchen v. Bellefontaine Nat. Bank*, 53 Kan. 242.

If it be proved that by the law, practice, and usage of the state from which a transcript of a foreign judgment comes it is entitled to the faith and credit of a judgment, the courts of a sister state will give it the same force and effect although it is insufficient to constitute a judgment under the laws and practice of the latter state. *Clemmer v. Cooper*, 24 Iowa 185.

But see cases cited in the following section where it is held that an action will not lie in a sister state notwithstanding service of process was valid by the law of the state where the judgment was rendered.

Presumption as to Lex Loci.—Where a judgment would not be valid under

(2) *Service of Process*. — An action cannot be maintained upon a judgment when jurisdiction of the person of the judgment debtor was not acquired by proper service or notice in the action wherein the judgment was rendered.¹ This question most frequently arises in actions upon judgments of sister states, and it is held that where the judgment is void in the state where rendered for want of service,² or where the service was by publication merely,³ or even where there has been personal service out of the state,⁴ provided the defendant did not appear,⁵ the action cannot be maintained. If, however, the defendant was properly served, or if he appeared, jurisdiction was obtained, and the judgment will support an action.⁶

the laws of the state wherein an action upon it is brought, it will not be presumed to be valid by the laws and practice of the state where it was rendered, but the law of such foreign or sister state authorizing the judgment must be proved. *Taylor v. Runyon*, 3 Iowa 474; *Clemmer v. Cooper*, 24 Iowa 185; *Teel v. Yost*, 56 N. Y. Super. Ct. 456, 57 N. Y. Super. Ct. 481; *Trebilcock v. McAlpine*, 46 Hun (N. Y.) 469; *Thomas v. Pendleton*, 1 S. Dak. 150.

1. *Sanborn v. Stickney*, 69 Me. 343 [citing *Ex p. Davis*, 41 Me. 38; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Eastman v. Wadleigh*, 65 Me. 251; *Water-ville Iron Mfg. Co. v. Goodwin*, 43 Me. 431; *Langdon v. Doud*, 6 Allen (Mass.) 423; *Fitzgerald v. Salentine*, 10 Met. (Mass.) 436; *Wilbur v. Ripley*, 124 Mass. 468]. See also *Hall v. Williams*, 6 Pick. (Mass.) 232.

Illustrations. — A judgment against a defendant named in the writ but not made a party, either by service, public notice, or attaching his estate, is merely void and should be disregarded when produced on a plea of *nul tiel record*. *Armstrong v. Harshaw*, 1 Dev. L. (N. Car.) 187.

A foreign judgment rendered after a reversal and without the notice required by law cannot be made the foundation of an action in a sister state. *Meyer v. Hartman*, 14 Mo. App. 130.

2. **Want of Service.** — *Barrett v. Oppenheimer*, 12 Heisk. (Tenn.) 298; *Moren v. Killbrew*, 2 Yerg. (Tenn.) 376; *Coffee v. Neely*, 2 Heisk. (Tenn.) 304; *Turley v. Taylor*, 6 Baxt. (Tenn.) 376.

3. **Service by Publication.** — *Kane v. Cook*, 8 Cal. 449; *Miller v. Miller*, 1 Bailey L. (S. Car.) 242; *Rentschler v. Jamison*, 6 Mo. App. 135.

A judgment obtained by publication of summons against a defendant then out of the state in which the judgment is rendered, though it may be enforced against his property in that state, has no binding force *in personam*, and is a mere nullity when attempted to be enforced in an action in another state. *Kane v. Cook*, 8 Cal. 449.

4. **Personal Service Out of State.** — *Shepard v. Wright*, 59 How. Pr. (N. Y. Supreme Ct.) 512; *Fenton v. Garlick*, 8 Johns. (N. Y.) 194; *Shepard v. Wright*, 113 N. Y. 582; *Kibbe v. Kibbe*, Kirby (Conn.) 126; *Turnbull v. Walker*, 5 Reports 132, 67 L. T. 767.

In *Shepard v. Wright*, 113 N. Y. 582, Finch, J., said: "It is beyond question that such service was ineffectual to give the judgment validity here if the defendant was not a citizen of Canada or domiciled within that jurisdiction" [citing *Schwinger v. Hickok*, 53 N. Y. 280; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; *Pennoyer v. Neff*, 95 U. S. 714; *Freeman v. Alderson*, 119 U. S. 185].

5. **Appearance Will Confer Jurisdiction** over the person. See *Shepard v. Wright*, 59 How. Pr. (N. Y. Supreme Ct.) 512, 113 N. Y. 582; *Turnbull v. Walker*, 5 Reports 132, 67 L. T. 767; *Miller v. Miller*, 1 Bailey L. (S. Car.) 242; *Rentschler v. Jamison*, 6 Mo. App. 135. See also article APPEARANCES, vol. 2, p. 639.

In an action on a foreign judgment it is immaterial that the record shows that the defendant was a nonresident and was served only by publication, where it appears that he appeared and was defended by attorney. *Omahundro v. Clarkson*, 13 Mo. App. 582.

6. *Smith v. Rhoades*, 1 Day (Conn.) 168; *Weymouth v. Washington*, etc., R. Co., 1 MacArthur (D. C.) 19; *Cone*

Judgments Against Common Right. — Where, however, the law of a foreign or a sister state authorizes a process by which the property of a man can be taken without notice to him to defend against the proceeding, it is opposed to common right, and a judgment founded on such process will not be enforced in other jurisdictions.¹

One or More Joint Defendants Not Served. — A judgment recovered under a statute providing that if process is served on one person jointly indebted, a final judgment may be entered against all defendants jointly indebted, and execution may issue against the joint property of all the defendants and the individual property

v. Cotton, 2 Blackf. (Ind.) 82; *Omahundro v. Clarkson*, 13 Mo. App. 582; *Barringer v. King*, 5 Gray (Mass.) 9; *Comstock v. Holbrook*, 16 Gray (Mass.) 111.

An action may be maintained in the District of Columbia on a transcript of a judgment rendered in the state of New York against a railroad company, on service of summons on its secretary, found in New York. The debt on which judgment was rendered having been contracted in New York, the court obtained complete jurisdiction by such service, and the judgment is entitled to the same conclusiveness in the District of Columbia as in New York. It is competent for a state legislature to authorize the commencement of suits by service of process upon the president, secretary, or treasurer of a foreign corporation having a place of business or making contracts within the state. *Weymouth v. Washington, etc., R. Co.*, 1 MacArthur (D. C.) 19.

As to effect of appearance, see cases cited in preceding note.

1. *Dennison v. Hyde*, 6 Conn. 519.

Departure from Common Law. — The judgment of a court in a foreign country has no binding effect in one of the United States as against one of our own citizens where the principles on which it has been obtained constitute a departure from the principles of common law in respect to jurisdiction over persons and subject-matter as recognized by our courts. *Anderson v. Haddon*, 33 Hun (N. Y.) 435.

Regular Foreign Judgments Not Enforced — Illustrations. — In *Ewer v. Coffin*, 1 Cush. (Mass.) 23, the plaintiff, a citizen of Rhode Island, commenced an action there against a citizen of Massachusetts, made a nominal attachment of his property there, and under the order of the court made service upon him in

Massachusetts by reading a copy of the writ and order of the court thereon; but the defendant never appeared to the action, never was an inhabitant of Rhode Island, nor was he ever in that state during the pendency of the suit. It was held that a judgment by default in Rhode Island, although regular there, could not be enforced in Massachusetts. To the same effect see *Kibbe v. Kibbe, Kirby* (Conn.) 126.

An action will not lie on a judgment by default on a return of *nil* upon a *sci. fa.* to revive a judgment in another state against a defendant who, when the judgment was entered, had ceased to reside in such state. *Robb v. Anderson*, 43 Ill. App. 575.

Validity as to Resident of Foreign or Sister State. — It seems, however, that where the judgment debtor was domiciled in the state where the judgment was rendered its validity must be determined by the laws of that state. See *Huntley v. Baker*, 33 Hun (N. Y.) 578; *Teel v. Yost*, 57 N. Y. Super. Ct. 481. In this last case it appeared that the judgment debtor was domiciled in Pennsylvania when the judgment sued on was entered, and that he was not served with process and did not appear, but that the judgment under the local law was entered on a judgment note before maturity, and that it could not be enforced by execution until maturity. It was held that, the judgment being valid under the foreign law, it could be sued on here. *Ingraham, J.*, dissented on the ground that the defendant did not have his debt in court in a foreign state, and cited *Shumway v. Stillman*, 6 Wend. (N. Y.) 453; *Kerr v. Kerr*, 41 N. Y. 275; *Shepard v. Wright*, 59 How. Pr. (N. Y. Supreme Ct.) 514, 113 N. Y. 582. Compare *Anderson v. Haddon*, 33 Hun (N. Y.) 435.

of the defendant served, will not support an action in a sister state against the defendant not served,¹ nor even against the defendant who was served.² But it has been held that an action on such a judgment may be maintained against all the defendants, provided the record of the judgment is supplemented by other evidence showing a joint liability on the part of the defendant not served.³

g. ERRONEOUS JUDGMENTS. — An action may be maintained upon an erroneous judgment of either a domestic or foreign court, provided such court had jurisdiction,⁴ and the judgment in such

1. *Hoffman v. Newell*, (Super. Ct.) 20 N. Y. Supp. 432; *Hoffman v. Wight*, 1 N. Y. App. Div. 514, holding further that the existence of a similar statute in New York was immaterial. See also *Wilson v. Niles*, 2 Hall (N. Y.) 358; *Sherrard v. Nevius*, 2 Ind. 241.

2. "The question presented, therefore, for our determination is whether a judgment of a court of another state, rendered against several defendants jointly, in an action where one of them was not served with process, can be enforced in this state by an action of debt thereon against one of the defendants who in the foreign action was served with process. We think this question must be answered in the negative. From the pleadings in the case, as they now stand, it appears that the New York court rendered judgment against all of said defendants when only two of them had been served with process; and this being so, and no statutory authority being shown for any such proceeding in that state, the record shows that said court was without jurisdiction as to said defendant, Samuel J. Steinau, and that the judgment as to him was a mere nullity. The question, then, arises as to what effect this has on the other defendants who were served with process. While there is some conflict of authority upon this question, yet, we think, the rule which is established by the preponderance of authority is that the plaintiff who sues on a judgment must recover against all of the defendants or none; for, the judgment being an entirety, whatever constitutes a good defense for one of the defendants operates also for the benefit of the others." *Watson v. Steinau*, (R. I. 1895) 33 Atl. Rep. 4 [citing *Hall v. Williams*, 6 Pick. (Mass.) 232; *Oakley v. Aspinwall*, 4 N. Y. 514; *Richards v.*

Walton, 12 Johns. (N. Y.) 434; *Holbrook v. Murray*, 5 Wend. (N. Y.) 161; *Rangely v. Webster*, 11 N. H. 299; *Knapp v. Abell*, 10 Allen (Mass.) 485; *Buffum v. Ramsdell*, 55 Me. 252; *Hulme v. Janes*, 6 Tex. 242; *Brockman v. McDonald*, 16 Ill. 112; *Williams v. Chalfant*, 82 Ill. 218; *Winslow v. Lambard*, 57 Me. 356; *Burt v. Stevens*, 22 N. H. 229; *Donnelly v. Graham*, 77 Pa. St. 274; *St. Louis v. Gleason*, 15 Mo. App. 25; *Wright v. Andrews*, 130 Mass. 149; *Pratt v. Dow*, 56 Me. 88]. See also *Frothingham v. Barnes*, 9 R. I. 474.

3. *Duryee v. Hale*, 31 Conn. 217.

Argument in Support of Rule. — The court in the case last cited said that the ground on which, consistently with established principles, such a judgment could be held conclusive as to the amount of the indebtedness against the defendant not served with notice was that by reason of the relation existing between them, growing out of the joint character of their contract, the defendant served with notice might be regarded as authorized to act for the other defendant so far as it bound him by his admission of the amount of the debt, and that, therefore, where there is failure to prove, in an action founded on the judgment, the joint liability of the two defendants, the defendant not served with process cannot be regarded as affected to any extent by the judgment.

4. **Domestic Judgments.** — Debt will lie upon an erroneous domestic judgment until it is reversed on error. *Hawes v. Hathaway*, 14 Mass. 233. And if the statute of limitation has run against the writ of error the defendant is remediless. *Ives v. Finch*, 28 Conn. 114.

Sister State Judgments. — *Whiting v. Johnson*, 5 Dana (Ky.) 390; *State v. Helmer*, 21 Iowa 370.

action cannot be reversed for the error in the former judgment.¹

h. EFFECT OF ISSUANCE OF EXECUTION AND PROCEEDINGS THEREON. — The issuance of an execution upon a judgment does not suspend the common-law right to sue thereon,² and such an action will lie without a return of the execution unsatisfied,³ or even where the execution has not been returned at all.⁴

Levy of Execution. — An action of debt will not lie upon a judgment which appears of record to be satisfied by a levy of execution.⁵

1. Remedy of Judgment Debtor. — "The course to be taken is first to obtain a reversal of the original judgment by writ of error; and the plaintiff in error may then apply for a review of the action in which the Common Pleas rendered the judgment brought before us by this process. There is at present no ground shown on which that judgment can be reversed." *Hawes v. Hathaway*, 14 Mass. 233.

In *Caouette v. Young*, (N. H. 1892) 32 Atl. Rep. 157, which was an appeal from a judgment in an action upon an erroneous judgment, the court said: "As the judgment has not been reversed or set aside, it follows that the plaintiff is entitled to recover as the case now stands. Nevertheless we think, upon the facts found at the hearing, that the case should be discharged and remanded to the trial term, and there be continued, to enable either party to have the original action brought forward in the police court for such proceedings in that court as justice may require; or, upon the refusal of that court to take action in the premises, a writ of error or some other process may be issued by this court upon petition and notice."

2. *Field v. Sims*, 96 Ala. 540; *Linton v. Hurley*, 114 Mass. 76; *Wilson v. Hatfield*, 121 Mass. 551; *Hale v. Angel*, 20 Johns. (N. Y.) 342; *Whittemore v. Carlin*, 58 N. H. 576; *Boyd v. Mann*, 9 Baxt. (Tenn.) 349.

On the other hand, the right of a creditor to an execution on the judgment is not suspended by the pendency of an action upon it. *Moor v. Towle*, 38 Me. 133; *Cushing v. Arnold*, 9 Met. (Mass.) 23; *McDonald v. Dickson*, 85 N. Car. 248.

3. *Sterne v. Spalding, Kirby* (Conn.) 177.

Regularly, debt cannot be sustained upon a judgment upon which execution has issued, without showing a return of the execution unsatisfied in

whole or in part. *Dewey v. Bradbury*, 2 Tyler (Vt.) 201; *White River Bank v. Downer*, 29 Vt. 338.

4. *Georgia.* — *Reynolds v. Lyon*, 20 Ga. 225.

Massachusetts. — *Wilson v. Hatfield*, 121 Mass. 551; *Linton v. Hurley*, 114 Mass. 76.

New Hampshire. — *Morse v. Pearl*, (N. H. 1893) 36 Atl. Rep. 255.

New York. — *Hale v. Angel*, 20 Johns. (N. Y.) 342.

Vermont. — *White River Bank v. Downer*, 29 Vt. 332; *Tarbell v. Downer*, 29 Vt. 339.

See also *Hummer v. Lamphear*, 32 Kan. 439.

In debt on a judgment, brought a long time after the judgment was recovered, it is competent for the defendant to show that execution was issued soon after its rendition and placed in the hands of an officer; that the defendant at the time had property sufficient which could be reached on execution; that the officer was dead, and the execution not returned, and not to be found among the papers of the officer. Such facts, unexplained, will warrant a finding for the defendant. *Gassner v. Sandford*, 2 Sandf. (N. Y.) 440; *Miller v. Smith*, 16 Wend. (N. Y.) 425.

5. The Record Must Be Held Conclusive until, by some proceeding brought to operate directly upon the record itself, the levy is avoided. *Pratt v. Jones*, 22 Vt. 341. See also *Hurlbut v. Mayo*, 1 D. Chip. (Vt.) 387; *Lawrence v. Pond*, 17 Mass. 433; *Grosvenor v. Chesley*, 48 Me. 369.

As to the Effect of a Levy of Execution as a satisfaction of the judgment, see *infra*, XVIII. 6. *g. Discharge, Payment, and Satisfaction.* See also article EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 8, p. 636; and the titles *Executions and Judgments* in Am. and Eng. Encyc. of Law.

A Return of Satisfaction, made upon

Where, however, the levy is void or fruitless, it seems that an action upon the judgment may be maintained.¹

Arrest of Debtor. — So, also, it seems that the action will lie notwithstanding the arrest of the judgment debtor on execution.²

an execution by an officer, will not bar an action of debt on the judgment if it be proved that in fact no such satisfaction was made. *Hutchinson v. Greenbush*, 30 Me. 450.

Where a Levy on Real Estate Is Not Regarded as a Satisfaction of the judgment, it constitutes no plea in bar to an action or a *scire facias* on the same judgment. *Shepard v. Rowe*, 14 Wend. (N. Y.) 260; *Taylor v. Ranney*, 4 Hill (N. Y.) 619; *Ladd v. Blunt*, 4 Mass. 402; *Boyd v. Mann*, 9 Baxt. (Tenn.) 349. But, doubtless, the court in which the second action is pending might stay proceedings therein until a subsisting levy was disposed of. *Gregory v. Stark*, 4 Ill. 612; *Shepard v. Rowe*, 14 Wend. (N. Y.) 260. See also *Gold v. Johnson*, 59 Ill. 62; *Herrick v. Swartwout*, 72 Ill. 341; *Robinson v. Brown*, 82 Ill. 279; *Pearl v. Wellman*, 8 Ill. 311.

Chief Justice Bronson, in *People v. Hopson*, 1 Den. (N. Y.) 574, said: "If the broad ground has not yet been taken, it is time it should be asserted, that a mere levy upon sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain action on the judgment, nor use it for the purpose of becoming a redeeming creditor. * * * The mere levy neither gives anything to the creditor nor takes anything from the debtor. It does not divest a title; it only creates a lien on the property."

1. *Connecticut*. — *Stoyel v. Cady*, 4 Day (Conn.) 222; *Denison v. Williams*, 4 Conn. 402; *Williams v. Cable*, 7 Conn. 119; *De Forest v. Strong*, 8 Conn. 513; *Fish v. Sawyer*, 11 Conn. 545; *Cowles v. Bacon*, 21 Conn. 462.

Maine. — *Grosvenor v. Chesley*, 48 Me. 369.

Massachusetts. — *Lawrence v. Pond*, 17 Mass. 433; *Gooch v. Atkins*, 14 Mass. 378; *Ladd v. Blunt*, 4 Mass. 402; *Tate v. Anderson*, 9 Mass. 92; *M'Lellan v. Whitney*, 15 Mass. 137. —

Texas. — *Townsend v. Smith*, 20 Tex. 465; *Stone v. Darnell*, 25 Tex. Supp. 430.

In *Massachusetts* it was formerly held that an action of debt would lie upon a judgment where the execution had been levied upon land not belonging to the debtor, and that the creditor was not obliged to bring a *scire facias*, as authorized by Stat. 1785, c. 6. *Greene v. Hatch*, 12 Mass. 195; *Gooch v. Atkins*, 14 Mass. 378. But this is not now the law. See Rev. Stat., c. 73, §§ 20, 21, construed in *Dennis v. Arnold*, 12 Met. (Mass.) 449; *Perry v. Perry*, 2 Gray (Mass.) 326. See also *Dewing v. Durant*, 10 Gray (Mass.) 31.

Waiver of Levy. — In *Grosvenor v. Chesley*, 48 Me. 369, it was held under the statutes then existing that where an execution has been levied on real estate, and, before it has been returned and recorded, it is ascertained that the levy is invalid for any reason, the creditor may waive the levy and resort to any other remedy for the satisfaction of his judgment, but that after the execution is returned and recorded, if the levy proves to be invalid, the creditor's only remedy is *scire facias* to revive the judgment, and an action of debt will not lie. It was held further that such statutes were applicable to levies made before they were enacted, because they related to the remedy and not the right. The court distinguished *Ware v. Pike*, 12 Me. 303; *Greene v. Hatch*, 12 Mass. 195; *Gooch v. Atkins*, 14 Mass. 378.

2. *Clark v. Goodwin*, 14 Mass. 237; *Moor v. Towle*, 38 Me. 133.

Effect of Discharge. — In an action on a judgment against several joint defendants, the imprisonment of one of the defendants on the execution, being as to him a satisfaction of the debt so long as the imprisonment continues, is a defense as far as he is concerned and is fatal to the joint action. *Chapman v. Hatt*, 11 Wend. (N. Y.) 41.

Where a judgment debtor is taken in execution and is afterwards discharged with the consent of the creditor no action can be maintained upon such judgment. *King v. Goodwin*, 16 Mass. 63. See also generally *Appleby v.*

An Action lies upon a Foreign Judgment notwithstanding the levy of execution upon lands in such foreign jurisdiction.¹

Effect of Bond Taken by Sheriff. — But the action will not lie after a levy of execution where the sheriff has returned the property to the defendant and taken a bond with security for the payment of the debt.²

2. In What Court. — An action upon a judgment is altogether a new action and not a continuation of the former one.³ Accordingly, it may be brought in the same court or in any other court of competent jurisdiction,⁴ which, in the absence of any special statutory regulation, is to be determined by ordinary considerations.⁵ Thus the action may be brought in an inferior court on a judgment obtained in a superior one,⁶ and, conversely, an action lies in a superior court upon a judgment rendered in an inferior one.⁷

3. Form of Action — *a.* **DOMESTIC JUDGMENTS** — **Debt the Appropriate Action.** — An action of debt is the appropriate common-law action on a judgment record.⁸

Clark, 10 Mass. 59; Dunning v. Owen, 14 Mass. 157; Brown v. Kendall, 8 Allen (Mass.) 209; Coburn v. Palmer, 10 Cush. (Mass.) 273. See also article EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 8, p. 636.

1. Field v. Sanderson, 34 Mo. 542, holding that the fact that execution had been issued and levied upon the lands of the defendant within the foreign jurisdiction, which were advertised for sale at a future day, did not show any ground of defense to the action on the judgment and did not constitute grounds for a continuance to await the results of such sale.

2. Blair v. Caldwell, 3 Mo. 353.

3. Barraclof v. Griscom, 1 N. J. L. 224; Davis v. Packard, 7 Pet. (U. S.) 276.

4. Hartsford v. Van Auken, 79 Ind. 157; Palmer v. Glover, 73 Ind. 529; Becknell v. Becknell, 110 Ind. 42.

An action may be brought upon a judgment not dormant, before the same justices and in the same jurisdiction in which the first judgment was rendered. Fox v. Burns, 2 West. L. M. (Ohio) 387.

Federal Courts. — An action may be maintained in a federal court upon a judgment of a sister state. Buchanan County First Nat. Bank v. Duell County, 74 Fed. Rep. 373; Knapp v. Knapp, 59 Fed. Rep. 641.

An assignee of a judgment cannot sue thereon in the federal courts unless the action could have been brought there if the assignment had

not been made. Walker v. Powers, 104 U. S. 245.

5. Wherever Jurisdiction of the Parties May Be Obtained an action upon the judgment may be maintained, although none of the parties reside in the state where such action is brought, and although the judgment was rendered in a sister state. Reed v. Chilson, 142 N. Y. 152; Smith v. Kander, 58 Mo. App. 61.

The County of the Defendant's Residence is the proper county in which to bring an action of debt on a judgment. Townsend v. Smith, 20 Tex. 465.

6. Barraclof v. Griscom, 1 N. J. L. 224. But see Baldwin v. Roberts, 30 Hun (N. Y.) 163, and Lyon v. Manly, 10 Abb. Pr. (N. Y. Supreme Ct.) 337, decided under the New York code, both of which cases, however, were *disapproved* in Harris v. Clark, 65 Hun (N. Y.) 361.

7. Alexander v. Arters, 17 Pa. Co. Ct. Rep. 379.

8. Illinois. — St. Louis, etc., R. Co. v. Miller, 43 Ill. 199; Hawkins v. Harding, 37 Ill. App. 564, 141 Ill. 572.

Maine. — Lancaster v. Richmond, 83 Me. 534.

Massachusetts. — Ladd v. Blunt, 4 Mass. 402; Appleby v. Clark, 10 Mass. 59; Hawes v. Hathaway, 14 Mass. 233; Sewall v. Sparrow, 16 Mass. 24; Talmage v. Chapel, 16 Mass. 71; Clark v. Goodwin, 14 Mass. 237; Allen v. Holden, 9 Mass. 133; Healy v. Root, 11 Pick. (Mass.) 389.

Assumpsit Will Not Lie upon a judgment,¹ although in a few cases the contrary is held.²

Trustee Process. — Debt together with trustee process may be maintained upon a judgment.³

Specific Performance. — An action for the specific performance of a judgment will not lie.⁴

b. SISTER STATE JUDGMENTS. — Debt, and not assumpsit,⁵ is the proper common-law form of action upon a judgment rendered in a sister state.⁶

Pennsylvania. — Harter *v.* Harter, 4 Pa. Dist. Rep. 211.

Tennessee. — Fossett *v.* Turnage, 9 Humph. (Tenn.) 686; Gardner *v.* Henry, 5 Coldw. (Tenn.) 458.

Vermont. — Stoddard *v.* Allen, N. Chip. (Vt.) 44; Pierson *v.* Mudget, cited in Newcomb *v.* Peck, 17 Vt. 308; Woods *v.* Pettis, 4 Vt. 556; Dewey *v.* Bradbury, 2 Tyler (Vt.) 201.

See also article DEBT, vol. 5, p. 904.

Where a plaintiff, for any sufficient cause, desires to revive a judgment against one or more of several defendants without joining all, his remedy is by action of debt on the judgment. Carson *v.* Moore, 23 Tex. 450.

Where the plaintiff, an administrator, died after the judgment, an action of debt on the judgment by the administrator *de bonis non* was the proper remedy before the Act of 1846. Austin *v.* Townes, 10 Tex. 24.

Under the Code. — The California Practice Act, declaring that there shall be but one form of civil action, includes the remedies provided for the enforcement of judgments. Humiston *v.* Smith, 21 Cal. 129.

1. Woods *v.* Pettis, 4 Vt. 556. See cases cited in preceding note.

2. Alexander *v.* Arters, 11 Pa. Co. Ct. Rep. 211, 1 Pa. Dist. Rep. 359; Fullmer Western Wheeled Scraper Co. *v.* Pine Tp., 17 Pa. Co. Ct. Rep. 482.

Assumpsit Lies on a Justice's Judgment. — Alexander *v.* Arters, 17 Pa. Co. Ct. Rep. 379; Green *v.* Fry, 1 Cranch (C. C.) 137.

Assumpsit, but Not Account Stated. — Though by statute assumpsit may be brought, a judgment must be declared on specially and with accuracy. A count on an account stated will not lie thereon. Gooding *v.* Hingston, 20 Mich. 439.

3. Dunning *v.* Owen, 14 Mass. 157.

4. Maple *v.* Beach, 43 Ind. 51, wherein the court said: "It seems to us that

the idea of a complaint for the specific performance of a judgment or decree is novel, to say the least of it. It was sometimes necessary in the former equity practice to file a bill to carry a decree into execution; but this was done when the parties had neglected to proceed upon the decree, their rights under it becoming so embarrassed by subsequent events that it became necessary to have the decree of the court to settle and ascertain them. Mitford Ch. Pl. 95. But the remedy sought in this case is not of this nature."

5. Andrews *v.* Montgomery, 19 Johns. (N. Y.) 162; Garland *v.* Tucker, 1 Bibb (Ky.) 361; Morehead *v.* Grisham, 13 Ark. 431.

Reason for Rule. — A judgment rendered in any state of the United States is treated in every other state as a domestic judgment, and under the constitution and laws of the United States it has the same validity and effect in every other state as in the state where rendered. Hence, an action of assumpsit will not lie upon a judgment rendered in a sister state, it being a matter of record. Boston India Rubber Factory *v.* Hoit, 14 Vt. 92.

Error Cured by Verdict. — If the action is brought in assumpsit instead of debt, the error will be cured after verdict by the statute of jeofails. Bone *v.* McGinley, 7 How. (Miss.) 671.

6. Carter *v.* Crews, 2 Port. (Ala.) 81; Sanford *v.* Sanford, 28 Conn. 12; Latine *v.* Clements, 3 Ga. 427; Williams *v.* Preston, 3 J. J. Marsh. (Ky.) 600; Brisbane *v.* Dobson, 50 Mo. App. 170; Smith *v.* Kander, 58 Mo. App. 61; Fullerton *v.* Horton, 11 Vt. 425; Boston India Rubber Factory *v.* Hoit, 14 Vt. 92.

An action upon a judgment recovered in another state in an action for tort is an action *ex contractu*. Johnson *v.* Butler, 2 Iowa 535; Taylor *v.* Root, 4 Keyes (N. Y.) 335.

Case. — There is one decision at least to the effect that an action in case will lie upon a judgment of a sister state.¹

c. FOREIGN JUDGMENTS. — Either debt or assumpsit will lie upon a foreign judgment.²

d. COIN JUDGMENTS. — An Action of Debt may be maintained upon a judgment recovered in another state to be paid in United States gold coin.³

4. Parties — **a. PARTIES PLAINTIFF** — (1) *In General.* — At Common Law an action upon a judgment must be brought in the name of its legal owner, who is the person in whose name it is rendered.⁴

Debt Lies on a Justice's Judgment rendered in a sister state. *Silver Lake Bank v. Harding*, 5 Ohio 545; *Hoagland v. Rogers*, 3 Blackf. (Ind.) 501, holding that a *sci. fa.* to procure the award of an execution on such judgment does not lie.

1. *Spencer v. Brockway*, 1 Ohio 259, holding that liability or promise to pay and breach must be averred.

2. *Buttrick v. Allen*, 8 Mass. 273; *Garland v. Tucker*, 1 Bibb (Ky.) 361; *Hazzard v. Nottingham*, Tappan (Ohio) 146; *Moore v. Adie*, 18 Ohio 430; *Mellin v. Horlick*, 31 Fed. Rep. 865; *Grant v. Easton*, 13 Q. B. Div. 302; *Godard v. Gray*, L. R. 6 Q. B. 139; *Williams v. Jones*, 13 M. & W. 633; *Walker v. Wilter*, 1 Doug. 1; *Sadler v. Robins*, 1 Campb. 253; *Henley v. Soper*, 8 B. & C. 16, 15 E. C. L. 147; *Henderson v. Henderson*, 6 Q. B. 288; *Russell v. Smyth*, 9 M. & W. 810; *Robinson v. Bland*, 2 Burr. 1077; *McFarlane v. Derbyshire*, 8 U. C. Q. B. 12.

Costs Awarded in a Foreign Judgment may be recovered in either debt or assumpsit. *Mellin v. Horlick*, 31 Fed. Rep. 867; *Russell v. Smyth*, 9 M. & W. 810.

An Action of Assumpsit Lies on a foreign judgment, for, as the judgment is only *prima facie* evidence, the defendant has all the benefits he could be entitled to in an action upon the original cause. *Buttrick v. Allen*, 8 Mass. 273; *Hazzard v. Nottingham*, Tappan (Ohio) 146.

The Reason for the Rule that assumpsit would lie upon a foreign judgment, but not upon a domestic or sister state judgment, was founded upon the fact that foreign judgments were only *prima facie* evidence of the debt, while domestic and sister state judgments were conclusive. Foreign judgments are now very generally held to be equally conclusive, and the reason for a differ-

ent rule in the two cases would seem to be no longer available. See *Andrews v. Montgomery*, 19 Johns. (N. Y.) 165.

3. *Belford v. Woodward*, 158 Ill. 122, affirming 55 Ill. App. 307. The court said: "Counsel for plaintiff in error invoke the well-settled rule that debt will not lie on any obligation except one for the payment of a sum specifically certain, and insist that the clause as to payment in United States gold coin does not call for the payment of money or a sum certain, but for the payment of an unliquidated amount to be determined according to the fluctuations of the gold market. Even if the clause in question be regarded as a valid part of the judgment, we are unable to agree with counsel upon this point. We regard an obligation to pay 'in United States gold coin' as an obligation to pay in money, or an agreement to deliver a certain weight of standard gold ascertainable by count of coins made legal tender by statute. A contract for the payment of so many dollars in gold and silver is a contract for the direct payment of money, and the judgment in a suit thereon should be entered for coined dollars and parts of dollars when such is the will of the creditor. *Hart v. Flynn*, 8 Dana (Ky.) 191; *Dewing v. Sears*, 11 Wall. (U. S.) 379. We do not regard the case of *Mix v. Nettleton*, 29 Ill. 245, where it was held that an action of debt would not lie upon a due bill for so many dollars payable in county orders, as having any application here."

4. See *infra*, XVIII. 4. *u.* (3) *Assignees.*

A Judgment in Favor of the United States may be sued upon in the name of the district attorney. *Benton v. Woolsey*, 12 Pet. (U. S.) 27.

A Sister State having recovered judgment in its own court on proper notice may sue thereon in its own name. *Healy v. Root*, 11 Pick. (Mass.) 391.

Thus, a judgment in favor of one person by mistake for another cannot be sued upon by the latter.¹ So, also, a judgment recovered by one person to the use of another must be sued upon by the person in whose name it was recovered.²

A Next Friend by whom the plaintiff sued in the original action is neither a necessary nor a proper party in an action upon the judgment.³

A Judgment in Favor of a Partnership cannot be sued upon by one partner.⁴

(2) *Executors and Administrators.* — Where the plaintiff in a judgment dies, his personal representative may maintain an action of debt against the defendant in the judgment.⁵ So, also, he

Allowance to Attorneys in Divorce Proceedings. — Where the defendant in divorce proceedings is ordered to pay the plaintiff's attorneys a certain sum for services, such attorneys may maintain an action against the defendant to recover such allowance after the dismissal of the divorce proceedings. *Bowers v. Kauts*, 2 Kan. App. 644.

Action by Indorser Who Had Paid Judgment. — A judgment recovered by the last indorsee of a note against the maker and all the indorsers cannot form the basis of an action by an indorser who has paid the judgment against the prior indorser. *Jordan v. Ford*, 7 Ark. 416.

1. **Judgment for Wrong Person by Mistake.** — A judgment rendered in favor of B by mistake for A cannot be sued upon by A, even if it is alleged and proved that the judgment was rendered in favor of A by the name of B, and such defect may be taken advantage of under the general issue and need not be pleaded in abatement. *Gilbert v. Hanford*, 13 Mich. 40. Compare *Bennett v. Libhart*, 27 Mich. 489, where it is held that "Henry V. Libhart" is not entitled to recover in an action upon a judgment in favor of "H. V. Libhart," without any allegation or proof of his identity with the party in whose favor the judgment was rendered. In this case it was further held that the fact that the judgment was received in evidence by consent did not preclude the defendant from disputing the right to recover on it, as proof of the judgment was only one of the steps necessary to make out a case. See also *Thompson v. Manrow*, 1 Cal. 428.

2. **Judgments to the Use of Another.** — *Triplett v. Scott*, 12 Ill. 137, holding that a judgment in a suit in the name

of the equitable assignor of a chose in action brought for the use of the assignee cannot be sued upon in the name of the assignee, the legal title to the judgment being in the nominal plaintiff; and it makes no difference that the debtor has wrongfully paid the amount of the judgment to the assignor, although such payment does not satisfy the judgment.

In *Lee v. Gardiner*, 26 Miss. 521, it was held that where a suit was brought in the name of A for the use of B, and B died pending the action, but before his death had assigned all his interest to C, a suit brought on the judgment in the name of A for the use of C was properly brought.

Under the Code, the action may be brought by the person for whose use the judgment was recovered. *Greene v. Republic F. Ins. Co.*, 84 N. Y. 572.

Protecting Cestui Que Use. — In an action on a judgment entered "for use," the court will look beyond the mere legal party, in order to protect the interests of the *cestui que use*. *Peterson v. Lothrop*, 34 Pa. St. 223.

3. *Wygal v. Myers*, 76 Tex. 598. Compare *Cook v. Thornhill*, 13 Tex. 293, wherein it is held that where a judgment is recovered by a lunatic in another state, suing by her next friend, an action on the judgment may be maintained in a sister state by the lunatic suing by the same next friend, and in such action the original judgment is conclusive as to the plaintiff's right to recover in the name and capacity in which she sues.

4. *Jansen v. Hyde*, 8 Colo. App. 38. See also article PARTNERSHIP.

5. *Gardner v. Henry*, 5 Coldw. (Tenn.) 458; *Smith v. Pearce*, 2 Swan (Tenn.) 127, holding that the plaintiff

may sue individually on a judgment recovered by him in his representative capacity,¹ and he may do so even in a state which is foreign to the one from which he received his letters.²

An Administrator De Bonis Non may sue on a judgment recovered by the original executor or administrator.³

(3) *Assignees*. — At Common Law, the assignee of a judgment cannot maintain an action thereon in his own name,⁴ but the action must be brought in the name of the original plaintiff.⁵ The assignee, however, has an absolute right to sue in the name of his assignor, and free from the latter's control.⁶

may, at his option, either revive the judgment by *sci. fa.* or maintain an action of debt thereon.

1. Talmage v. Chapel, 16 Mass. 71.

2. See article EXECUTORS AND ADMINISTRATORS, vol. 8, p. 710.

3. Smith v. Pearce, 2 Swan (Tenn.) 127; Austin v. Townes, 10 Tex. 24.

4. *Alabama*. — Bunnell v. Magee, 9 Ala. 433; Smith v. Harrison, 33 Ala. 706; Lovins v. Humphries, 67 Ala. 437; Moorer v. Moorer, 87 Ala. 545; Wolffe v. Eberlein, 74 Ala. 99.

Arkansas. — Hanks v. Harris, 29 Ark. 325.

Indiana. — Moore v. Ireland, 1 Ind. 531; Reid v. Ross, 15 Ind. 265.

Iowa. — Edmonds v. Montgomery, 1 Iowa 143.

New Jersey. — Sharp v. Moore, 3 N. J. L. 413; Little v. Gibbs, 4 N. J. L. 240.

The rule is the same as to a *sci. fa.* to revive a judgment. Macon v. Bibb County Academy, 7 Ga. 204; Forbes v. Tiffany, 4 Ind. 204; M'Kinney v. Mehaffey, 7 W. & S. (Pa.) 276.

In Alabama. — "Sections 2927-8 of the Code of 1886 provide a remedy for assignees of judgments or decrees who seek to enforce them by mesne or final process, issued upon the judgment assigned. These sections have no application to separate or independent suits, brought for the collection of debts evidenced by judgments or decrees. When the effort is made, as it generally may be, to collect by suit a debt due by judgment or decree, different rules prevail. Code, § 2170. If an action at law be resorted to, then the judgment is not such a contract for the payment of money as that the beneficial owner can sue on it in his own name. Smith v. Harrison, 33 Ala. 706; Lovins v. Humphries, 67 Ala. 437. The rule is different in chancery. Whoever has the rightful ownership, whether legal or equitable, is the proper complain-

ant." Moorer v. Moorer, 87 Ala. 545. See also Wolffe v. Eberlein, 74 Ala. 99.

5. Wolffe v. Eberlein, 74 Ala. 99; Moorer v. Moorer, 87 Ala. 545; Smith v. Harrison, 33 Ala. 706; Lovins v. Humphries, 67 Ala. 437; Morehead v. Grisham, 13 Ark. 431; Garvin v. Hall, 83 Tex. 295.

6. *Right to Use Assignor's Name* — *Alabama*. — Johnson v. Martin, 54 Ala. 272; Haden v. Walker, 5 Ala. 86; Harrison v. Marshall, 6 Port. (Ala.) 65; Black v. Everett, 5 Stew. & P. (Ala.) 60; Steele v. Thompson, 62 Ala. 323.

Arkansas. — Weir v. Pennington, 11 Ark. 745.

Georgia. — Macon v. Bibb County Academy, 7 Ga. 204; Robinson v. chly, 6 Ga. 515.

Indiana. — Forbes v. Tiffany, 4 Ind. 204.

Maine. — Herrick v. Bean, 20 Me. 51.

Missouri. — Bardon v. Savage, 1 Mo. 560.

New York. — Ross v. Clussman, 3 Sandf. (N. Y.) 676.

The assignee may sue in the name of his assignor whenever he may choose to do so, and may control the issuance of final process and recover the money collected. Weir v. Pennington, 11 Ark. 745.

The assignee may use the assignor's name in collecting the judgment, and the fact of the assignment is no defense to an action on the judgment in the name of the assignor. Bardon v. Savage, 1 Mo. 560.

Original Plaintiff a Nominal Party. —

"The bringing of an action for the use of the party in interest, in accordance with the common-law rule that a chose in action is not assignable, is recognized in the decisions. Morton v. Morton, 13 S. & R. (Pa.) 107; Welch v. Mandeville, 1 Wheat. (U. S.) 233, and note; M'Cullum v. Cox, 1 Dall. (Pa.) 139; Canby v. Ridgway, 1 Binn. (Pa.)

By Statute, in many states, assignees of judgments are authorized to sue thereon in their own names.¹ Thus, where the statute requires actions to be brought in the name of the real party in interest, the equitable owner or assignee of a judgment is the proper party plaintiff,² and, indeed, he is the only party entitled to maintain the action.³

496; *Southgate v. Montgomery*, 1 Paige (N. Y.) 47. The plaintiff in such an action is merely a nominal party. He has no actual interest in the suit, cannot control it, nor in any way interfere with the rights of the real party; nor is he a trustee in any sense, as he has no authority whatever. The owner alone is the real party, and it is only by reason of the rule referred to, which in this state has been superseded by the code, that the action is brought in this form. The judgment belongs to the owner quite as much as if he was named as the plaintiff, and under the code he alone can sue to recover the same." *Greene v. Republic F. Ins. Co.*, 84 N. Y. 572.

1. *Shirts v. Irons*, 54 Ind. 13; *Burson v. Blair*, 12 Ind. 371; *Kelley v. Love*, 35 Ind. 106; *Reid v. Ross*, 15 Ind. 265; *Edmonds v. Montgomery*, 1 Iowa 143; *Charles v. Haskins*, 11 Iowa 329; *Clark v. Willet*, 59 N. J. L. 308; *Moore v. Nowell*, 94 N. Car. 265.

An Assignment of a Foreign Judgment is valid, and enables the assignee to bring an action thereon, although the assignor, a foreign corporation, might not have been able to bring an action thereon against the defendant, another foreign corporation. *Nazro v. McCalmont Oil Co.*, 36 Hun (N. Y.) 296.

2. *Edmonds v. Montgomery*, 1 Iowa 143; *Greene v. Republic F. Ins. Co.*, 84 N. Y. 572; *J. I. Case Threshing Mach. Co. v. Pederson*, 6 S. Dak. 140.

Real Party in Interest. — One suing on a foreign judgment may show by parol that he is its true owner and that the nominal plaintiff, who need not be made a party, was but his agent. *Lewis v. Wilder*, 4 La. Ann. 574.

The transfer of a judgment upon condition that the transferee was to pay for it if he could make anything out of it does not invest him with such property in the judgment as entitles him to recover on it before a justice, nor constitute him the party really interested. *Pike v. Bright*, 29 Ala. 332.

Recovery by Third Person to Use of Plaintiff. — In *Greene v. Republic F.*

Ins. Co., 84 N. Y. 572, the action was brought upon a judgment recovered in Mississippi by a third person to the use of the plaintiff. It appeared that the rule of the common law that choses in action are not assignable, and that actions thereon, when assigned, must be brought in the name of the assignor, prevailed in Mississippi. It was held that the plaintiff, to whose use the judgment was recovered, was presumptively the owner thereof, and that the record plaintiff in the former action was merely a nominal party, having no interest in or right to control the judgment, that he was not a trustee in any rightful sense under the code, and that the plaintiff alone could sue upon the judgment.

Who Is Not an Assignee. — Where an officer having an execution in his hands for collection pays over the amount to the creditor out of his own money and retains the execution in his hands until it cannot be renewed, it not being assigned to him, he cannot maintain an action on the judgment in the name of the creditor, for his own benefit, against the debtor. He cannot be considered an assignee either at law or in equity. *Whittier v. Heminway*, 22 Me. 238.

3. *Charles v. Haskins*, 11 Iowa 329; *Edmonds v. Montgomery*, 1 Iowa 143; *Clark v. Digges*, 5 Gill (Md.) 109; *Murphy v. Cochran*, 1 Hill (N. Y.) 339; *Greene v. Republic F. Ins. Co.*, 84 N. Y. 572; *Andrews v. Kibbee*, 12 Mich. 94; *Moore v. Smith*, 103 Mich. 387; *Benne v. Schnecko*, 100 Mo. 250; *Moore v. Nowell*, 94 N. Car. 265.

An action at law may be maintained on a judgment at law in the name of a judgment creditor for the use of an assignee of the judgment, notwithstanding the Act of 1881 (Laws, c. 3241; Rev. Stat., § 981) allowing the real parties to sue in their own name. *Sammis v. Wightman*, 31 Fla. 10.

Making Assignor a Party. — Where the suit is in equity by the assignee of a judgment, the assignor, though merely a nominal and unnecessary party, is

b. PARTIES DEFENDANT — (1) In General. — The person against whom a judgment is rendered is the proper party defendant to an action thereon.¹ So, also, the assignor² or the legal owner³ has been held to be a necessary party defendant where the action is by an assignee.

Enforcement of Lien. — In a suit to enforce a judgment lien against lands covered by a deed of trust both the trustee and *cestui que trust* are necessary parties defendant.⁴

(2) Joint Defendants. — In the **Absence of Statute**, where a judgment has been rendered against several defendants jointly, all such defendants must be joined in a new action upon such judgment.⁵

yet not an improper one, *Sammis v. Wightman*, 31 Fla. 45; and it was held in *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69, that the assignor should be made a party in equity.

1. Identity of Defendant — Sameness of Name. — Where the name of the judgment debtor in the record of a judgment is identical with that of the defendant in the action on such judgment, it is *prima facie* proof of identity of person, *Ritchie v. Carpenter*, 2 Wash. 512; and on a demurrer to the evidence it is sufficient, *Hazzard v. Nottingham*, Tappan (Ohio) 192.

Judgment Recovered in Wrong Name. — Where a judgment is recovered against a corporation by a wrong name, an action may be brought thereon against the corporation by its correct name, alleging that the judgment was recovered against the defendant by the other name, and evidence is admissible that such name was an erroneous one. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404. To the same effect, see *Bloomfield R. Co. v. Burress*, 82 Ind. 83; *Behrensmeyer v. Kreitz*, 135 Ill. 591.

Christian Name Omitted. — A judgment rendered against a defendant omitting his Christian name is not void, and an action may be maintained thereon against such defendant, provided his identity is alleged. *Newcomb v. Peck*, 17 Vt. 302.

2. In an Action by the Assignee of a judgment against the judgment debtor, the assignor is a necessary party and should be joined as a defendant to answer as to the assignment or his interest in the subject of the action. *McCammock v. Clark*, 16 Ind. 320.

3. Legal Owner. — In an action to enforce the judgment by one holding not a legal but an equitable title thereto, the one possessing the legal title should

be made a party defendant. *Starnes v. Underwood*, 54 Ind. 48.

In *Shirts v. Irons*, 54 Ind. 13, it was held that, in an action on a judgment by its equitable owner, if the party holding the legal title must be a party to answer as to his interest (a point not decided), the failure to join him as a party is waived unless objection is made.

4. Bansimer v. Fell, 39 W. Va. 448.

5. Sheehan, etc., Transp. Co. v. Sims, 28 Mo. App. 64; *U. S. v. Cushman*, 2 Sumn. (U. S.) 310. Compare *Roane v. Drummond*, 6 Rand. (Va.) 182.

"The plaintiff in an action upon a judgment at common law must recover against all of the defendants or none. Whatever constitutes a good defense for one of the defendants operates for the benefit of the others, because the obligation is joint. *Freeman on Judgments*, § 439; *Pratt v. Dow*, 56 Me. 81." *Sheehan, etc., Transp. Co. v. Sims*, 28 Mo. App. 64.

When a judgment was rendered in one state against two defendants as copartners, and an action on the judgment was brought in the courts of a sister state against one of the defendants only, it was held that, as the petition did not show that both parties were living and within the jurisdiction of the court, the action could not be sustained. *Blake v. Burley*, 9 Iowa 592.

Where, in a judgment record from another state, it appears that in a joint suit against two defendants a judgment was rendered at different times for the same amount against each defendant, but for the breach of a joint promise, a suit against such two defendants on such record will be sustained. *Oyster v. Peavy*, 40 N. J. L. 401.

Lies Jointly Against Stayer and Defendant. — "No reason is apparent why the

There are cases, however, in which actions against one of several joint judgment debtors have been sustained.¹

Joint Obligations Made Joint and Several by Statute.— In many states statutes exist providing in effect that all contracts or obligations which would have been joint at common law shall be deemed to be joint and several. Such a statute has been held to apply to judgment obligations and to authorize separate suits thereon against joint judgment debtors.² But the contrary has also been held.³

Under a Statute as to Joint Debtors authorizing judgments against both where one only is served, it seems that in an action on such judgment the debtor not served is not a proper party defendant.⁴

action of debt will not lie against the stayor as well as against the principal defendant in the judgment. The stay of execution is in the nature of a confession of judgment, and the stayor becomes a party to the judgment, and is properly suable as such." *Gardner v. Henry*, 5 Coldw. (Tenn.) 458.

A Defendant and His Replevin Bail may be sued jointly. *Hansford v. Van Auken*, 79 Ind. 157.

1. Judgment on Joint and Several Cause of Action.— An action may be maintained against one of several joint judgment debtors upon a judgment recovered in another state upon a joint and several cause of action. *Olson v. Veazie*, 9 Wash. 481.

Revival Against One.— Where a plaintiff for any sufficient cause desires to revive a judgment against one or more of several defendants, without joining all, his remedy is by an action of debt on the judgment. *Carson v. Moore*, 23 Tex. 450, citing *Austin v. Reynolds*, 13 Tex. 544.

Failure to Serve Joint Defendant.— A justice's judgment, though joint in form, is not in law a joint obligation, binding both defendants alike, if only one was served, and it does not merge the debt so as to preclude suing both over again. The one who was not served is not personally bound, and cannot be until he is sued on the original obligation. The judgment, therefore, may be sued as an individual obligation against the one who was served, and the case may be discontinued as to the other. *Holcomb v. Tift*, 54 Mich. 647.

2. Roane v. Drummond, 6 Rand. (Va.) 182; *Read v. Jeffries*, 16 Kan. 534, holding, under Gen. Stat. 1868, c. 20, §§ 1 and 4 (Gen. Stat. 1897, c. 114, §§ 1 and 4), that a personal judgment against two parties is a joint and sev-

eral obligation, and that an action can be maintained thereon against either one of the defendants separately, and that it can in like manner be used as a set-off against either one.

3. Sheehan, etc., Transp. Co. v. Sims, 28 Mo. App. 64; *U. S. v. Cushman*, 2 Sumn. (U. S.) 310.

Judgments Not Contracts Within Meaning of Statute.— "The fact that a judgment is a contract in one sense does not necessarily make it a contract within the meaning of the statute. * * * The statute making contracts, joint at common law, several in this state has been in force since 1835 at least. It is found in the revision of that year, and has been retained without alteration ever since. The courts have repeatedly decided thereafter that a judgment was an entire thing, and either valid or void as to all, where there are several defendants. *Rush v. Rush*, 19 Mo. 441; *Covenant Mut. L. Ins. Co. v. Clover*, 36 Mo. 392. And while subsequent decisions have modified the rigor of the rule in cases where the validity of a judgment was drawn in question in collateral proceedings (*Lenox v. Clarke*, 52 Mo. 117), or where the judgment itself is the subject of review on error or appeal (*Crispen v. Hannovan*, 86 Mo. 168; *Hunt v. Missouri R. Co.*, 89 Mo. 609), there is no case which denies the general proposition asserted in earlier cases. Not one case can be found that proceeds on the theory that a judgment is a several contract by virtue of the statute. The later cases above cited merely give effect to certain provisions of the statute of jeofails and the statutory powers conferred upon appellate courts to render independent judgments of their own." *Sheehan, etc., Transp. Co. v. Sims*, 28 Mo. App. 64.

4. Tay v. Hawley, 39 Cal. 93; *Spen-*

(3) *Executors and Administrators.* — At Common Law a judgment against several defendants jointly could not be enforced in any mode whatsoever against the personal representative of one of the defendants. The sole remedy was against the surviving judgment debtors.¹

Statutes exist, however, in many states, making the executor or administrator liable upon joint obligations against his decedent in the same manner that he would be liable if such demands were several as well as joint, and under such a statute it has been held that an action upon a judgment against several defendants jointly would lie against the survivors and personal representatives of the deceased jointly.²

Judgments Against Executors and Administrators. — It has been doubted whether debt would lie on a judgment against an executor.³ But it will clearly lie if a devastavit is suggested.⁴ A judgment

cer v. Wait, 9 Civ. Pro. Rep. (N. Y. Supreme Ct.) 93, *affirming* 2 How. Pr. N. S. (N. Y.) 117. But see Johnson v. Smith, 23 How. Pr. (N. Y. C. Pl.) 444. In this case it was held that where there has been an action and judgment against one partner or joint debtor, with service of process on him only, the plaintiff may commence an action against the other joint debtor alone for the same indebtedness. And this practice under the code is applicable to justices' courts. The court said: "Whether the defendant Smith could be sued alone after the judgment does not appear to have been considered heretofore, and I believe has not been decided in any reported case. The original indebtedness as to the partner served with process is merged in the judgment, and the proceeding against him is on the judgment rendered. The defendant not served would have the right to interpose any defense of which he could have availed himself in the former action. Carman v. Townsend, 6 Wend. (N. Y.) 207. The judgment against him was not conclusive. It was evidence only of the extent of the plaintiff's demand after the defendant's liability should be established by other evidence. Oakley v. Aspinwall, 4 N. Y. 513; 2 Rev. Stat. 377, § 2, vol. 3, 660 (5th ed.). The action would be anomalous in this view of it, because the issues would be different as to each defendant."

1. U. S. v. Cushman, 2 Sumn. (U. S.) 310; Roane v. Drummond, 6 Rand. (Va.) 184.

2. Where a joint judgment is obtained against two defendants, and one

dies, an action of debt on the judgment lies against the representative of the deceased defendant, the law respecting partitions, joint rights, and obligations, 1 Rev. Code Va. 359, being applicable to judgments. Roane v. Drummond, 6 Rand. (Va.) 182. See also Read v. Jeffries, 16 Kan. 534.

Contra. — In U. S. v. Cushman, 2 Sumn. (U. S.) 310, it was held that a statute of New Hampshire providing that the executor or administrator shall be liable for joint demands against the deceased and any other person in the same way and manner as he would be liable if such demands were several as well as joint did not apply to a suit on a joint judgment, whatever might be the case as to a suit on the original contract or demand. See also Sheehan, etc., Transp. Co. v. Sims, 28 Mo. App. 64.

3. Olmsted v. Clark, 30 Conn. 110.

4. **Debt Suggesting Devastavit.** — "The plaintiff has now brought an action of debt upon the judgment against the defendant as administratrix, suggesting a devastavit. Judgment is sought *de bonis propriis*. If the defendant has been guilty of waste and mismanagement of the estate and effects of the deceased, she is liable in this form of action. Wheatly v. Lane, 1 Saund. 216; Olmsted v. Clark, 30 Conn. 109." Davis v. Vansands, 45 Conn. 600.

"In England an action of this sort, suggesting a devastavit, will lie; but the leading case in which this was finally established proceeded throughout upon the idea that without such a suggestion it could not be sustained. Wheatly v. Lane, 1 Saund. 216. But

against an administrator alone will not support an action against the administrator and heir jointly.¹

Foreign Executors and Administrators. — An action will not lie against an administrator appointed in one state upon a judgment recovered against an administrator appointed under the authority of another state.² A distinction in this regard, however, is drawn between executors and administrators, and it is held that a judgment against an executor in one state will support an action against another executor in another state.³ So it has been held that an action will lie against an administrator with the will annexed in one state on a judgment obtained against the executor in another state.⁴

5. Declaration, Petition, or Complaint — *a.* IN GENERAL. — In an action upon a judgment the declaration, petition, or complaint must allege the rendition⁵ of a final⁶ personal judgment for the

in the form in which this suit is brought it appears to be a novelty, and there is obviously no necessity for such an action. The judgment must, in substance, be against the assets in the executor's hands, as was the case with the first judgment; and these of course could be reached by the first as easily as by a subsequent judgment, and in the same way. We need not, however, determine whether the action will lie, because we are satisfied that there is another good defense to the suit." *Olmsted v. Clark*, 30 Conn. 108.

1. *Nourse v. Ramsey*, 2 Bibb (Ky.) 547.

2. *Slauter v. Chenoweth*, 7 Ind. 211; *Creswell v. Slack*, 68 Iowa 110; *Haynes v. Colvin*, 19 Ohio 392, *approving* *Stacy v. Thrasher*, 6 How. (U. S.) 44.

Reason for Rule. — If one has obtained a judgment against an administrator in one state, he cannot institute suit upon this judgment against another administrator of the same succession in a different state. The judgment against the first administrator is *res inter alios acta* as regards the second administrator and the property confided to his care. *Stacy v. Thrasher*, 6 How. (U. S.) 44; *McLean v. Meek*, 18 How. (U. S.) 16.

3. *Turley v. Dreyfus*, 33 La. Ann. 885.

Distinction Between Executors and Administrators. — There is no privity between administrators deriving their commissions to act from different political sovereignties; but executors stand upon a different footing, and a judgment against an executor in one state is *prima facie* evidence of the debt in a suit against another executor of the

same testator in a different state. *Hill v. Tucker*, 13 How. (U. S.) 458.

4. *Latine v. Clements*, 3 Ga. 427.

5. Sufficiency of Averment of Rendition. — In an action on a foreign judgment an averment that plaintiffs signed final judgment, "which said judgment was then and there duly given, made, and entered," is sufficient as against a demurrer on the ground that the complaint does not aver that the court ever made or gave the judgment. *Dore v. Thornburgh*, 90 Cal. 64. See also *infra*, XVIII. 5. c. (2) (b) *Statutory Regulation — Averment that Judgment Was "Duly Given."*

Entry Pending Action. — The Superior Court has power, under its rules, upon petition of a party to an action pending therein, and after notice to the adverse party, to order the record of a former action between the same parties to be completed, and the judgment therein made up and entered. The judgment, when so recorded, takes effect from the date of the original judgment; and it is within the discretion of the court to allow the plaintiff in the pending action, in whose favor the original judgment was rendered, to file an amended declaration therein, counting upon that judgment. *King v. Burnham*, 129 Mass. 598. *Compare* *Walton v. McKesson*, 64 N. Car. 77.

6. *Edwards v. Hellings*, 99 Cal. 214, wherein it was held that an allegation that in the prior action the court "adjudged" that the defendant should pay to the plaintiff a certain sum of money, without the use of the word "judgment," was held insufficient to show a cause of action.

plaintiff against the defendant.¹

Alleging Plaintiff's Ownership. — The complainant must allege that he is the owner of the judgment,² and where the action is by an assignee, the assignment must be alleged.³

Alleging Defendant's Identity. — Where the original judgment was rendered against the defendant by another name, the identity of the defendants in the two actions must be alleged.⁴

1. *Lippperd v. Edwards*, 39 Ind. 165.

Executors and Administrators. — An executor or administrator suing upon a judgment in his favor need not describe himself in his representative capacity. *Biddle v. Wilkins*, 1 Pet. (U. S.) 692; *Talmage v. Chapel*, 16 Mass. 71; *Hansford v. Van Auker*, 79 Ind. 157.

When Declaration Must Be in Representative Capacity. — "The declaration should allege that which the law requires to be proved, and it need not allege that which is not necessary to be proved. Whenever, therefore, it becomes necessary for the plaintiff to show his representative character, or, in other words, to make proof of his letters testamentary, he should sue in his representative character; but, on the other hand, where this is not necessary there is no reason for requiring the setting up that character in the pleadings. Perhaps there is no better criterion by which to settle this question than this: Is it necessary to prove his letters testamentary? It certainly cannot be, if the former judgment is to have its usual and necessary effect. That judgment is conclusive of the plaintiff's right to recover, and as conclusive of his representative character as of any other fact which was necessary to be proved. The effect of that judgment was to vest the right in him personally; and, at common law, no other person could prosecute or control the judgment." *Adams v. Campbell*, 4 Vt. 447.

Proof of Letters. — In *Biddle v. Wilkins*, 1 Pet. (U. S.) 686, it was held that the plaintiff need not make a proof of his letters of administration or name himself as administrator.

Joint Liability of Defendant and His Replevin Bail. — In an action on a judgment against the judgment defendant and his replevin bail, the complaint, on demurrer thereto by the bail for want of sufficient facts, need not show a joint liability; it is enough that it shows a cause of action against him by his becoming a judgment defendant by

confession. *Hansford v. Van Auker*, 79 Ind. 157.

2. *Ryan v. Spieth*, 18 Mont. 45. Compare *Blake v. Burley*, 9 Iowa 592.

Sufficiency of Allegation of Ownership. — In *Thompson v. Cook*, 21 Iowa 472, it was held that an allegation that "said judgment has now become the property of your petitioners" was defective for the reason that it was merely an allegation of a conclusion of law, but that the defect could not be taken advantage of by demurrer. The proper remedy was a motion to compel the plaintiff to state how he became the owner of the judgment.

An allegation that the judgments sued on are the property of the complainant is a sufficient allegation that he is the real party in interest, and therefore entitled, under the *Iowa Code*, to sue, though it appear that the judgments were originally recovered in his name for the use of another. *Postlewait v. Howes*, 3 Iowa 365.

3. *Hughes v. Brewer*, 7 Colo. 583, holding that a denial of such an averment presented a material issue.

Sufficiency of Allegation of Assignment. — In a complaint seeking to set off a judgment held by the plaintiff, as assignee, against one recovered by the defendant against the plaintiff, the time of assignment is stated with sufficient definiteness if it is said that the judgment against the plaintiff was recovered after assignment. Allegation that the third party "assigned, sold, transferred, and set over to the plaintiff the said judgment," sufficiently alleges an absolute assignment, and no consideration for such assignment need be stated. *Martin v. Kanouse*, 2 Abb. Pr. (N. Y. Supreme Ct.) 330.

4. *Mobile, etc., R. Co. v. Yeates*, 67 Ala. 164.

Where a party to the record is incorrectly named, he may be connected with the judgment by proper averments, and when such averments are proved the party intended to be named in the judgment will be affected in the

A Demand for payment need not be alleged.¹

Leave to Sue. — Where a statute requires prior leave of court as a condition precedent to the right to sue upon a judgment, it is not clear upon the authorities whether or not such leave must be alleged in the petition.²

Reason for Suing. — Where an action lies upon a judgment as a matter of right, and without any necessity therefor, the declaration need not allege any reason for bringing the suit other than nonpayment of the judgment.³ But where a new action will not lie upon a judgment without any ground of necessity therefor, as has been seen to be the case in a few jurisdictions, the reason for bringing the suit must be alleged.⁴

Bringing Case Within Statutory Exceptions. — Where a statute exists prohibiting actions upon judgments except in certain named cases, the petition in such an action must show that the case falls within some of such exceptions.⁵

Original Cause of Action. — It is of the very essence of debt upon a judgment that the obligation should result from the record itself.⁶ Accordingly, where the judgment sued on is sufficiently described, no description of the cause of action whereon it was founded is necessary,⁷ nor is it necessary to

same manner as if his real name were used. *Behrensmeyer v. Kreitz*, 135 Ill. 591.

Sufficiency of Averment of Identity. — In an action upon a judgment an averment in the complaint that the judgment was rendered against the defendant by another name is sufficient to show that he is bound by the judgment. *Bloomfield R. Co. v. Burress*, 82 Ind. 83; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404.

1. *Masterson v. Matthews*, 60 Ala. 260; *Moss v. Shannon*, 1 Hilt. (N. Y.) 175; *Pennington v. Gibson*, 16 How. (U. S.) 65.

An Assignee of a judgment, suing thereon, need not aver a demand of payment by him or a refusal of the debtor to pay. *Moss v. Shannon*, 1 Hilt. (N. Y.) 175.

2. In California the petition need not allege that the plaintiff was authorized by an order of court to institute the action. *Bronzan v. Drobaz*, 93 Cal. 650. *Compare Graham v. Scripture*, 26 How. Pr. (N. Y. Supreme Ct.) 501. See also *supra*, XVIII. 1. a. (1) (c) *dd. Objections to Want of Leave*.

3. *Denison v. Williams*, 4 Conn. 402; *Ives v. Finch*, 28 Conn. 114.

It is unnecessary to aver that an execution has been sued on the judgment

and an unsuccessful effort made to collect it. *King v. Blood*, 41 Cal. 314.

4. *Pitzer v. Russel*, 4 Oregon 124, holding that where a judgment creditor had neglected for more than one year to file a transcript of his judgment with the county clerk, and had thereby lost his power to levy on real estate, and the complaint contained no explanation of the delay, the complaint did not lay a foundation for an action upon the judgment, as a necessity for suing which is caused by the plaintiff's own fault is not sufficient.

5. *Moore v. Coleman*, 4 N. Y. Wkly. Dig. 21.

6. The record imports absolute and complete verity. It is neither to be increased nor diminished by any averment out of or beyond the record, and must show a still subsisting obligation, perfect in its inception, and still unsatisfied. *Dimick v. Brooks*, 21 Vt. 569, approved in *Pratt v. Jones*, 22 Vt. 341.

7. *Sims v. Herzfeld*, 95 Ala. 145; *Omaha First Nat. Bank v. Crosby*, 179 Pa. St. 63.

In suing a stockholder on a judgment against the corporation the original liability need not be described. *Miller v. White*, 57 Barb. (N. Y.) 504.

Adding Count on Original Debt by Amendment. — In an action of debt on

allege its justness and the consideration therefor.¹

Judgments of Foreign and Sister States. — It has been held that the judgments of courts of sister states must be treated as domestic records in pleadings,² and accordingly it is not necessary to allege or prove that a judgment of a sister state was warranted by the law of such state.³ But in case of a foreign judgment, it seems that the laws and practice of the court should be alleged.⁴

b. DESCRIPTION OF JUDGMENT — (1) *Statement of Rule.* — As a general rule, judgments should be described with certainty and

a foreign judgment with a single count the writ is not amendable by inserting a count on the original cause of indebtedness on which the judgment is founded. *Latine v. Cléments*, 3 Ga. 426.

Construction of Complaint. — A complaint which avers that the defendant made his note, that the plaintiff commenced an action on the note and obtained judgment, and that no part of the note or judgment has been paid, states a cause of action on the judgment and not on the note, and does not state two causes of action. *Anderson v. Mayers*, 50 Cal. 525.

Allegations in a complaint, based on a foreign judgment, relating to a covenant on which that judgment was based, are not to be construed as an attempt to set out an independent cause of action on such covenant, where a material averment of such cause of action is wanting and where the allegations, though not necessary, are proper in the action on the judgment. *Krower v. Reynolds*, 99 N. Y. 245, *reversing* 19 N. Y. Wkly. Dig. 383.

In the following cases the declaration was construed to state a cause of action upon the judgment, and not upon the original cause of action. *Teel v. Yost*, 56 N. Y. Super. Ct. 456; *Sheldon v. Mirick*, 70 Hun (N. Y.) 41.

1. *St. Louis, etc., R. Co. v. Miller*, 43 Ill. 199. But see *Bevington v. Buck*, 18 Ind. 414.

2. *Garland v. Tucker*, 1 Bibb (Ky.) 361; *Davis v. Lane*, 2 Ind. 548; *McKim v. Odom*, 12 Me. 94; *Andrews v. Montgomery*, 19 Johns. (N. Y.) 162; *Evans v. Tatem*, 9 S. & R. (Pa.) 252; *Boston India Rubber Factory v. Hoit*, 14 Vt. 92; *Mills v. Duryee*, 7 Cranch (U. S.) 481.

3. *Miller v. Leach*, 95 N. Car. 229.

Alleging Foreign Law. — In an action on a foreign judgment it will be presumed that the laws of the foreign state in regard to the term at which the judgment should be rendered are the

same as the laws of the state where the action is brought. *Thurmond v. Georgia Bank*, (Tex. Civ. App. 1894) 27 S. W. Rep. 317.

Where the judgment was rendered by a special judge, it is unnecessary to allege and prove the laws authorizing the appointment of a special judge. *Henry v. Allen*, 82 Tex. 35.

Judicial Notice. — It seems that in an action upon a judgment of a sister state, authenticated under the Acts of Congress, the court would take judicial notice of the laws of the state in which the judgment was rendered. Under general allegations in an action upon such judgment, the constitution and laws of the sister state would be admissible without being specially pleaded to show the regularity of such judgment. *Henry v. Allen*, 82 Tex. 35. But see *Elliott v. Ray*, 2 Blackf. (Ind.) 31, wherein it was held, in an action of debt on a decree in chancery in another state, that if the decree has by statute of that state the force and effect of a judgment at law, that fact should be averred and proved, as the statutes of other states are not noticed without proof. To the same effect is *Hinson v. Wall*, 20 Ala. 298, wherein it was held that if the record of a judgment was insufficient in the state where sued upon, although sufficient in the state where rendered, such fact should be averred in the declaration, and then the laws and practice of such state would be evidence, and under the Act of Congress the judgment would then be given full faith and credit.

4. *Wright v. Chapin*, 87 Hun (N. Y.) 144, holding that an allegation that under the laws of a foreign country and the rules and practice of its court a judgment has a certain effect is sufficient to authorize the admission of evidence as to such laws, rules, and practice. See also prior report of same case, *Wright v. Chapin*, 74 Hun (N. Y.) 521.

particularity.¹ A declaration on a judgment is sufficient where it describes the court which rendered the judgment,² the place where the court was held,³ the names of the parties,⁴ the date at which the judgment was entered,⁵ and the amount of the judgment.⁶

1. *Lawrence v. Willoughby*, 1 Minn. 87; *Whitaker v. Bramson*, 2 Paine (U. S.) 209.

In pleading or replying a judgment as an estoppel more minuteness must be observed than in declaring upon it. It must appear that precisely the same question was decided in the former action and that the decision was upon the merits. *Big. on Estop.* (4th ed.) 672; *Gilbreath v. Jones*, 66 Ala. 129; *Krutsinger v. Brown*, 72 Ind. 466; *Temple v. Williams*, 91 N. Car. 82; *Fowlkes v. State*, 14 Lea (Tenn.) 14. This exactness may be escaped by pleading the general issue, when the judgment would be admissible in evidence under it. See *Big. on Estop.* (4th ed.) 672. For a sufficient plea of former judgment, see *Langmead v. Maple*, 18 C. B. N. S. 255, 114 E. C. L. 255; *Big. on Estop.* (4th ed.) 674. See also article FORMER ADJUDICATION, vol. 9, p. 611.

When a judgment is set up to establish some collateral fact, it must be pleaded more strictly than is necessary when it is pleaded in bar of the action. *Aurora City v. West*, 7 Wall. (U. S.) 82; *Perkins v. Walker*, 19 Vt. 144.

Inconsistent Averments in Complaint — One or More Counts. — When the complaint contains but a single count, inconsistent or contradictory averments in the statement or description of the cause of action are grounds of demurrer; but not when the complaint contains two or more counts, varying the descriptive averments. *Andrews v. Flack*, 88 Ala. 294.

2. Description of Court Rendering Judgment. — *Ewing v. Jennings*, 15 Nev. 379; *Packard v. Hill*, 7 Cow. (N. Y.) 434; *Duyckinck v. Clinton Mut. Ins. Co.*, 23 N. J. L. 279; *Andrews v. Flack*, 88 Ala. 294; *Memphis Medical College v. Newton*, 2 Handy (Ohio) 163; *Bement v. Wisner*, 1 Code Rep. N. S. (N. Y. Supreme Ct.) 143.

A paper, purporting to be a record of a judgment, which fails to show by what court it was rendered, or when, or for what cause of action, is a nullity and inadmissible. *Bevington v. Buck*, 18 Ind. 414.

A complaint alleging that on the 16th day of March, 1877, in the Porter Circuit Court, the plaintiff's intestate,

naming her, recovered a judgment, etc., sufficiently shows that the judgment was "duly rendered," and when and where. *Hansford v. Van Auker*, 79 Ind. 157.

3. Place Where Court Was Held. — *Ewing v. Jennings*, 15 Nev. 379; *Packard v. Hill*, 7 Cow. (N. Y.) 434; *Duyckinck v. Clinton Mut. Ins. Co.*, 23 N. J. L. 279; *Andrews v. Flack*, 88 Ala. 294. See also *American Linen Thread Co. v. Sheldon*, 31 N. J. L. 420.

4. Names of Parties. — *Ewing v. Jennings*, 15 Nev. 379; *Packard v. Hill*, 7 Cow. (N. Y.) 434; *Andrews v. Flack*, 88 Ala. 294; *Memphis Medical College v. Newton*, 2 Handy (Ohio) 163.

In *Mink v. Shaffer*, 124 Pa. St. 280, the declaration alleged that the original plaintiff had assigned the judgment to the plaintiff in the latter action, and referred to the transcript which was annexed to the declaration. The transcript contained the names of the parties and counsel, the date of trial, verdict, and judgment, and the amount of the judgment. This declaration was held sufficient to require an affidavit of defense. Compare *Memphis Medical College v. Newton*, 2 Handy (Ohio) 163, abstracted in second succeeding note.

5. Date of Judgment. — *Ewing v. Jennings*, 15 Nev. 379; *Packard v. Hill*, 7 Cow. (N. Y.) 434; *Duyckinck v. Clinton Mut. Ins. Co.*, 23 N. J. L. 279; *Andrews v. Flack*, 88 Ala. 294; *Mink v. Shaffer*, 124 Pa. St. 280.

An averment of the date of rendition as being "on or about" is sufficient on demurrer. The proper remedy is by motion to make more definite and certain. *Bement v. Wisner*, 1 Code Rep. N. S. (N. Y. Supreme Ct.) 143.

It is not a good ground of demurrer, though specially assigned, that the petition misdescribes the date of the judgment sued upon, an exemplification of which is made a part of the petition. *Garvin v. St. Clair*, 17 Tex. 435.

In declaring on a judgment, where the cause was taken under advisement, the judgment is properly described as of the date of its entry, not of the date of submission for decision. *Chase v. De Wolf*, 69 Ill. 47.

6. Amount of Judgment. — *Ewing v.*

In Hæc Verba. — A judgment need not be set out *in hæc verba*. It is sufficient to set it out according to its legal effect.¹

Judgment Affirmed on Appeal. — A declaration in an action on a judgment affirmed upon appeal may be upon the judgment as rendered by the court below.²

(2) **Averment of Amount.** — As was seen in the last preceding section, the amount of a judgment must be alleged as an element of its description. Where the complaint consists of two or more counts, the counts may vary the amount alleged to have been recovered.³ A declaration setting forth the recovery of a judgment for a certain sum as damages and another certain sum as costs is sufficient.⁴

Costs need not be averred in describing the judgment, but if averred must be correctly stated.⁵

Jennings, 15 Nev. 379; Andrews v. Flack, 88 Ala. 294; Packard v. Hill, 7 Cow. (N. Y.) 434; Duyckinck v. Clinton Mut. Ins. Co., 23 N. J. L. 279; Mink v. Shaffer, 124 Pa. St. 280.

In a suit on a judgment in a court of another state, the petition must show the court in which the judgment was rendered, the term at which it was rendered, the parties, and the sum recovered, as in the old action of debt; and these facts must appear in the body of the petition, without any reference to the transcript of the record, which is only used as evidence. Memphis Medical College v. Newton, 2 Handy (Ohio) 163. Compare Mink v. Shaffer, 124 Pa. St. 280. See also succeeding section, (2) *Averment of Amount*.

1. Central Bank v. Veasey, 14 Ark. 671.

2. Dow v. Blake, 148 Ill. 76. In this case the court said: "It is not, therefore, necessary to declare upon the foreign judgment as disposed of by the appellate court, but only as rendered by the inferior court; especially where, as is the case here, the judgment of the inferior court does not show upon its face that an appeal from it has been taken. The pendency of an appeal which operates as a stay is a matter to be proven as a defense to, or in suspension of, the action. In the present suit, however, the proof introduced by the defendant shows that the appeal was not pending, but had been disposed of by an affirmance of the judgment by the Supreme Court of Wisconsin."

3. "A complaint which consists of one count only, in which the sum claimed is variant or contradictory, is

obnoxious to demurrer; but when it consists of two or more counts, the different counts may vary the descriptive allegations of the cause of action." Andrews v. Flack, 88 Ala. 294.

A less sum than is demanded may be recovered in debt on judgments and specialties, as well as in debt on simple contracts; though a variance between the description of the instrument declared upon, and that offered in evidence, would be fatal. Keyes v. Throop, 2 Aik. (Vt.) 276.

4. O'Neal v. Kittredge, 3 Allen (Mass.) 470.

5. Adair v. Rogers, Wright (Ohio) 428.

Declaration for Damages Omitting Costs. — A justice's judgment is not necessarily invalidated by an excessive allowance of costs, and such judgment may be sued over again for the damages only. Whelpley v. Nash, 46 Mich. 25.

Where the declaration is for the amount of a judgment, and is silent as to costs, it is no variance if the record shows a recovery also of costs. Adair v. Rogers, Wright (Ohio) 428.

Declaration for Costs. — In describing a judgment, the rules of pleading require a succinct and accurate statement of the recovery; and where a judgment for costs is stated, the plaintiff must aver that some certain amount was adjudged for his costs, or, if adjudged generally, aver an amount under a *videlicet*. Mitchell v. Gibson, 14 Ark. 224.

In Caldwell v. Bell, 3 Ark. 419, it was held that when no specific sum is adjudged to a party for his costs, he should not, in declaring upon such a

Judgment to Be Discharged by Lesser Sum. — Where a judgment is rendered for a certain sum to be discharged by a lesser sum, in describing the judgment the former sum should be averred.¹

(3) *Variance.* — A party declaring upon a record must show at the trial of the issue, on a plea of *nul tiel record*, such a record as he has described in his declaration, or there will be a fatal variance,²

judgment, describe it as a judgment for costs *in numero*, but should describe it truly, and then by appropriate averments show the amount of costs to which he is entitled upon and by virtue of the judgment. But it is not necessary that the averment should state the exact amount of costs recovered by such judgment; it will be sufficient to state a sum large enough to cover the amount of costs. *Shelton v. Clark*, 7 Ark. 194.

1. In an action on the case for not satisfying a judgment for \$1,500, entered by confession on a judgment bond with the sum of \$789.45 indorsed as the real debt thereof in the margin of it upon the record, if the real debt is alleged in the declaration to be the amount for which the judgment was recovered, instead of \$1,500, the variance will be fatal. *Lofland v. Cade*, 3 Houst. (Del.) 222. See also, to the same effect, *Roane v. Drummond*, 6 Rand. (Va.) 182, wherein it was further held that if the declaration demands a wrong sum, and no special demurer is filed, the error is cured by the statute of jeofails, there being enough in the declaration to show the true amount of the judgment. But see *Carter v. Crews*, 2 Port. (Ala.) 81, where it was held not to be error to declare for the lesser sum.

Where the issue of *nul tiel record* was found for the plaintiff in an action on a judgment rendered for the penalty of a bond, and it appeared to be the practice in the state where the judgment was rendered to issue a *feri facias* only for the sum actually due, it was held that execution should be awarded for such sum only. *Rathbone v. Rathbone*, 10 Pick. (Mass.) 1.

2. *Butler v. Owen*, 7 Ark. 369.

Fatal Variances — Illustrations. — Averment, a recovery in debt; proof, a judgment in partition charging plaintiff's purport with owelty. *Davis v. Norris*, 8 Pa. St. 122.

Amount of Judgment. — Averment, judgment for twelve and a half cents costs; proof, judgment for forty-seven

and a half cents costs. *Adair v. Rogers, Wright* (Ohio) 428.

Averment, judgment for a sum certain as costs; proof, a judgment for costs taxed at an amount left blank. *Noyes v. Newmarch*, 1 Allen (Mass.) 51.

Averment, judgment for a specified amount of damages and a specified amount of costs; proof, judgment specifying amount of damages and awarding costs generally. *Butler v. Owen*, 7 Ark. 369; *Lackland v. Pritchett*, 12 Mo. 484; *Lawrence v. Wiloughby*, 1 Minn. 87.

Averment, judgment for a sum certain; proof, judgment for such sum with interest. *Thompson v. Jameson*, 1 Cranch (U. S.) 282.

Date of Judgment. — Averment, judgment dated August 16, 1799; proof, judgment recovered on August 17, 1799. *Gulick v. Loder*, 14 N. J. L. 572.

Averment, judgment rendered at December term, 1830; proof, judgment rendered at December term, 1831, *nunc pro tunc*. *Howard v. Cousins*, 7 How. (Miss.) 114.

Averment, judgment rendered on the 23d of October; proof, judgment rendered on the 19th of October. *Silver Lake Bank v. Hardin, Wright* (Ohio) 430.

Parties. — Henry V. Libhart is not entitled to recover in an action upon a judgment in favor of H. V. Libhart, without any allegation or proof of his identity with the party in whose favor the judgment was rendered. The fact that the judgment was received in evidence by consent does not preclude the defendant from disputing the right to recover on it; proof of the judgment was only one of the steps necessary to make out a case. *Bennett v. Libhart*, 27 Mich. 489.

In an action of debt on a judgment, the plaintiffs averred that the plaintiff called in the judgment S. C. is the same person called in this action Samuel C.; and that the plaintiff called in the judgment Samuel G. is the same person called in this action Andrew

it being a well-settled rule that descriptive allegations must

G.; that the plaintiffs herein truly named are the same persons called in the judgment by the names of S. C. and Samuel G; plea, *nul tiel record*. The judgment when produced was found to answer the description, and the plaintiffs proved their true names as alleged, and their identity with the plaintiffs in the judgment. It was held that there was no variance for which the plaintiffs could be nonsuited; and that the plaintiffs might, under the pleadings, prove that they were in fact the plaintiffs in the judgment misnamed therein. *Barry v. Carothers*, 6 Rich. (S. Car.) 331.

A judgment entered by default against "A. Schwarz" does not at common law authorize an action upon the judgment in another state against "Anton Schwarz," in the absence of evidence in the record or otherwise showing that the letter "A." was used as an abbreviation for the defendant's name, or that the defendant's name was unknown. *Wiehle v. Schwarz*, 54 N. Y. Super. Ct. 169, citing *Farnham v. Hildreth*, 32 Barb. (N. Y.) 278; *Grant v. Birdsall*, 48 N. Y. Super. Ct. 428.

A declaration against Barnard H. is not supported by a record of a judgment against Barent H. Ducommun *v. Hysinger*, 14 Ill. 249.

Averment, judgment against one person; proof, judgment against two or more persons jointly. *Hallum v. Dickinson*, 47 Ark. 120; *Lawrence v. Willoughby*, 1 Minn. 87.

Where an action upon a foreign judgment rendered against two, one of whom was not served with process, is brought against the party as upon a joint judgment, he may show the variance upon a proper plea, and so exclude the record when offered as proof. *Smith v. Smith*, 17 Ill. 482. See also *Dart v. Goss*, 24 Mich. 266.

Immaterial Variances — Illustrations.—

Averment of general judgment; proof of judgment payable out of certain public funds. *East St. Louis v. Canty*, 65 Ill. App. 325.

Averment of a judgment for a certain sum; proof, a judgment payable in gold. *Belford v. Woodward*, 158 Ill. 122.

Misdescription of Court. — Averment of a judgment rendered in the United States Circuit Court in a suit brought therein; proof, judgment in a suit

originating in a state court and removed to the federal court. *Dudley v. Lindsey*, 9 B. Mon. (Ky.) 486.

Averment, judgment of the Supreme Court; proof, judgment of a chancery court. *Barringer v. Boyd*, 27 Miss. 473. See also *Rowley v. Carron*, 117 Pa. St. 52.

Amount of Judgment. — Averment, a judgment for \$19.50; proof, judgment for \$18.30 (under the Code, § 105). *Ritchie v. Carpenter*, 2 Wash. 512.

Averment, judgment for damages and costs *in solido*; proof, judgment for damages and costs separately. *Frevert v. Swift*, 19 Nev. 400.

Averment of a judgment for a certain amount, saying nothing as to costs; proof, judgment for such amount and also for costs. *Adair v. Rogers*, *Wright* (Ohio) 428.

Averment of a judgment for a named sum as costs; proof, a judgment for costs generally, elsewhere taxed at the sum named. *Hunt v. Middlesworth*, 44 Mich. 448.

In a suit on a judgment where the declaration sets out the amount of the judgment correctly, the circumstance that the sum named in the *queritur* is less is not material. *Harris v. Muskingum Mfg. Co.*, 4 Blackf. (Ind.) 267.

Date of Judgment. — Where a plaintiff who sues on a judgment states in the petition that the judgment was rendered April 15, 1872, at a term of the court begun and held April 18, 1872, but in these allegations does not attempt to recite the record, the allegations of time are immaterial, and that the plaintiff may, under such allegations, show that the judgment was rendered April 18, 1872. *Haynes v. Cowen*, 15 Kan. 637. See also, as to variances in date, *Lazier v. Westcott*, 26 N. Y. 146.

Parties. — An objection that the clerk's certificate to the transcript of the foreign judgment in suit recites a suit against more than one defendant, whereas the suit, originally brought against the defendant and another, was dismissed as to the other before trial, is without merit where the record shows that the plaintiffs and defendant are identical with the plaintiffs and defendant in the foreign suit. *Gates v. Newman*, (Ind. App. 1897) 46 N. E. Rep. 654.

Averment of a judgment against E

be strictly proved.¹

c. AVERMENT OF JURISDICTION — (1) *Courts of General Jurisdiction* — (a) *Domestic*. — In an action upon a judgment rendered by a domestic court of general jurisdiction, the facts conferring jurisdiction to render such a judgment need not be alleged, because in such case jurisdiction will be presumed.² A declaration alleging the judgment to have been "duly" given or rendered is sufficient.³ But even the allegation that the judgment was duly rendered is unnecessary,⁴ and it is sufficient to allege merely

H., *alias* E. B. H.; proof of a judgment against E. B. H. *Harris v. Muskingum Mfg. Co.*, 4 Blackf. (Ind.) 267.

In an action against Brenham on a judgment recovered in California, the record showed service on "defendant Brennan" and others personally. It did not appear that any one named Brennan was connected with the action. It was held that the variance did not affect the validity of the judgment. *Miller v. Brenham*, 68 N. Y. 83.

Averment, judgment in personal capacity; proof, judgment in representative capacity. *Barringer v. Boyd*, 27 Miss. 473. See also *Stewart v. Spaulding*, 72 Cal. 264.

1. *Butler v. Owen*, 7 Ark. 369.

The transcript must correspond to the declaration, or it cannot be read in the evidence. *Lawrence v. Wiloughby*, 1 Minn. 87.

Substantial Conformity between the judgment described and the judgment shown by the transcript introduced in evidence is sufficient to prevent a fatal variance. *Bailey v. Martin*, 119 Ind. 103.

"If there is a material variance it will be fatal. But if substantially proved as alleged it will suffice. The averments and proof should be substantially identical, though it is not absolutely essential that the precise words of the record be followed. 'Surplusage, or immaterial omissions not matters of substance,' as the court remarks in *Whitaker v. Bramson*, 2 Paine (U. S.) 209, 'are attended with no other consequences than in other cases.' " *Lancaster v. Richmond*, 83 Me. 534.

Generally, for illustrations of variances, see *Central Bank v. Veasey*, 14 Ark. 672; *Howell v. Shands*, 35 Ga. 66; *Howard v. Cousins*, 7 How. (Miss.) 114; *Dietrich's Appeal*, 107 Pa. St. 174; *Ferrance's Appeal*, 107 Pa. St. 180; *Billing v. Hitchings*, 18 L. J. Exch. 192; *Cocks v. Brewer*, 11 M. & W. 51.

2. *Colorado*. — *Bruckman v. Taussig*, 7 Colo. 561.

Illinois. — *People v. Lane*, 36 Ill. App. 649.

Indiana. — *Spaulding v. Baldwin*, 31 Ind. 376; *Hansford v. Van Auken*, 79 Ind. 302.

Minnesota. — *Holmes v. Campbell*, 12 Minn. 221.

New Hampshire. — *Rogers v. Odell*, 39 N. H. 452; *Wilbur v. Abbott*, 58 N. H. 272.

New York. — *Springsteene v. Gillett*, 30 Hun (N. Y.) 260.

United States. — *Lathrop v. Stuart*, 5 McLean (U. S.) 167; *Pennington v. Gibson*, 16 How. (U. S.) 65.

But see *Downer v. Dana*, 22 Vt. 337; *Caldwell v. Richards*, 2 Bibb (Ky.) 331; *Burnes v. Simpson*, 9 Kan. 663.

A count on a judgment of the Marine Court, which is a court of record, alleging that the plaintiff levied his plaint in said court, against the defendant, for a cause arising within the jurisdiction of said court, and such proceedings were thereupon had, that judgment was obtained, etc., is sufficient to show that the court had jurisdiction of the defendant's person. *Bennet v. Moody*, 2 Hall (N. Y.) 471.

Personal Service Need Not Be Alleged in order to show jurisdiction in such a case. *Burnes v. Simpson*, 9 Kan. 658.

3. *Edwards v. Hellings*, 99 Cal. 214.

"The common-law rule in regard to pleading judgments has been somewhat relaxed by statute. 12 Am. and Eng. Encyc. of Law 1492-1493, and authorities therein cited. In this state it is not necessary in pleading a judgment to state the facts conferring jurisdiction, but it is sufficient to state that the judgment was duly rendered. Code, § 2714." *American Emigrant Co. v. Fuller*, 83 Iowa 599. The judgment sued on in this case was rendered by a federal court.

4. *Hansford v. Van Auken*, 79 Ind. 302; *Weller v. Dickinson*, 93 Cal. 108.

that the judgment was "recovered" or "rendered,"¹ the presumption being that the court acted within the authority conferred upon it by law.²

(b) **Foreign and Sister States.** — The jurisdiction of a superior common-law court is presumed unless the contrary appears,³ and therefore in an action upon a judgment of such a court, although of a foreign or a sister state, it is not necessary to aver that such court had jurisdiction,⁴ either of the subject-matter or of the person.⁵

1. *Camp v. Lassen*, 67 Cal. 139; *Weller v. Dickinson*, 93 Cal. 108; *People v. Lane*, 36 Ill. App. 649.

A complaint alleging that on the 16th day of March, 1877, in the Porter Circuit Court, the plaintiff's intestate, naming her, recovered a judgment, etc., sufficiently showed that the judgment was "duly rendered," and when and where. *Hansford v. Van Auken*, 79 Ind. 157.

2. *Weller v. Dickinson*, 93 Cal. 108.

3. *Wilbur v. Abbot*, 58 N. H. 272. See generally article JURISDICTION, vol. 12, p. 114.

4. *Alabama*. — *Gunn v. Howell*, 27 Ala. 663.

California. — *Meredith v. Santa Clara Min. Assoc.*, 56 Cal. 178; *Low v. Burrows*, 12 Cal. 181.

Colorado. — *Bruckman v. Taussig*, 7 Colo. 561.

Kansas. — *Butcher v. Brownsville Bank*, 2 Kan. 70.

Kentucky. — *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600.

Massachusetts. — *Bissell v. Wheelock*, 11 Cush. (Mass.) 277.

Mississippi. — *Stephens v. Roby*, 27 Miss. 744.

New Hampshire. — *Wilbur v. Abbot*, 58 N. H. 272.

New York. — *Halstead v. Black*, 17 Abb. Pr. (N. Y. Supreme Ct.) 227; *Bement v. Wisner*, 1 Code Rep. N. S. (N. Y. Supreme Ct.) 143; *Hoffheimer v. Stiefel*, 17 Misc. Rep. (N. Y. Supreme Ct.) 236.

Pennsylvania. — *Thompson v. Owen*, 8 Kulp (Pa.) 36; *Mink v. Shaffer*, 124 Pa. St. 280; *Wetherill v. Stillman*, 65 Pa. St. 105.

Texas. — *Reid v. Boyd*, 13 Tex. 241. Compare *Ashley v. Laird*, 14 Ind. 222; *Gebhard v. Garnier*, 12 Bush (Ky.) 321; *Karns v. Kunkle*, 2 Minn. 313.

Wisconsin. — *Jarvis v. Robinson*, 21 Wis. 524.

Sufficiency of Declaration. — The declaration need not allege either the

jurisdiction or the nature of the action. *Mink v. Shaffer*, 124 Pa. St. 280; *Wetherill v. Stillman*, 65 Pa. St. 105.

The declaration on a judgment against a married woman need not allege all the jurisdictional facts, nor allege the law of the sister state on the liability of married women. *Thompson v. Owen*, 8 Kulp (Pa.) 36.

If the court in fact failed to get jurisdiction to render such judgment, that fact must be pleaded by the defendant, unless it appears positively from the record, in which case objection may be taken to the reading of the record in evidence. *Jarvis v. Robinson*, 21 Wis. 524.

A judgment of the United States Circuit Court is sufficiently pleaded by alleging that the plaintiffs on, etc., at a Circuit Court of the United States for the district of, etc., by the judgment and consideration of said court, having jurisdiction therein, recovered judgment against the defendants for the sum of, etc., damages and costs, which judgment was duly given by said court, and still stands in full force and effect, not satisfied or annulled, and the plaintiffs say the defendants are indebted, etc. Jurisdiction is intended of the judgments of the United States Circuit Courts. *Ex p. Watkins*, 3 Pet. (U. S.) 207; *Bement v. Wisner*, 1 Code Rep. N. S. (N. Y. Supreme Ct.) 143.

In *Kibbe v. Kibbe*, Kirby (Conn.) 119, the court said that the jurisdictional facts should appear in the plaintiff's declaration in an action upon a judgment of a sister state. See also *Wehrman v. Reakirt*, 2 Cinc. Super. Ct. Rep. 29; *Ashley v. Laird*, 14 Ind. 222.

A Plea of a Foreign Judgment must contain an allegation that the court had jurisdiction, or so much of the proceedings must be spread on the record as will show affirmatively that the court had jurisdiction. *Burnham v. Webster*, 4 Fed. Cas. No. 2178.

5. *Connecticut*. — *Fisher v. Fielding*, 67 Conn. 92.

Averment that Court Was One of General Jurisdiction. — An allegation that the court rendering the judgment was a court of record or of general jurisdiction is sufficient to raise a presumption that it had jurisdiction of the subject-matter and of the parties.¹ But it seems that it is not even necessary to allege that the court was a court of record or of general jurisdiction.²

Illinois. — *Rae v. Hulbert*, 17 Ill. 572.

Kentucky. — *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600.

Minnesota. — *Gunn v. Peakes*, 36 Minn. 177, *overruling* *Karns v. Kunkle*, 2 Minn. 313; *Smith v. Mulliken*, 2 Minn. 319.

Nevada. — *Phelps v. Duffy*, 11 Nev. 80.

Ohio. — *Dougherty v. Longmore*, 2 Cinc. Super. Ct. Rep. 134.

Texas. — *Reid v. Boyd*, 13 Tex. 241.

England. — *Robertson v. Struth*, 5 Q. B. 941, 48 E. C. L. 941; *Barber v. Lamb*, 8 C. B. N. S. 95, 98 E. C. L. 95; *Henderson v. Henderson*, 6 Q. B. 288, 51 E. C. L. 288.

At Common Law, in suits on foreign judgments, it does not seem to have been necessary to aver jurisdiction in the court rendering the judgment. *Butcher v. Brownsville Bank*, 2 Kan. 70, *citing* 2 Chitty's Plead., p. 414, N. C.; Comyns's Dig., tit. Pleader, 2. W. 12 and E. 18. See also *Robertson v. Struth*, 5 Q. B. 941, 48 E. C. L. 941; *Barber v. Lamb*, 8 C. B. N. S. 95, 98 E. C. L. 95; *Gunn v. Peakes*, 36 Minn. 177; *Bruckman v. Taussig*, 7 Colo. 561.

An allegation that an English judgment was "duly given, made, and entered" is sufficient as against a general demurrer. *Dore v. Thornburgh*, 60 Ca. 64.

In *Douglas v. Forrest*, 4 Bing. 686, 15 E. C. L. 113, the jurisdiction of the foreign court was not alleged except in general terms, but the transcript showed the method of service, and parol evidence was admitted to show the legality of such service by the foreign law.

The same presumptions arise in an action on a judgment of a sister state in favor of the jurisdiction of the person and of the regularity of the proceeding that would arise upon a domestic judgment. *Rae v. Hulbert*, 17 Ill. 572.

In *Karns v. Kunkle*, 2 Minn. 313, it was held that judgments of sister states are so far foreign judgments that in actions on them jurisdiction of the subject-matter and of the defendant must be alleged. This decision was

followed in *Smith v. Mulliken*, 2 Minn. 319; but in *Gunn v. Peakes*, 36 Minn. 177, the case of *Karns v. Kunkle*, 2 Minn. 313 was declared wrong, both in reason and upon authority, and it was held that a judgment of a foreign court (in this case Nova Scotia), complete and regular upon its face, is *prima facie* valid, and consequently that a complaint upon such judgment need not allege jurisdiction either of the cause or of the parties.

1. Averment of General Jurisdiction Sufficient. — *Indiana.* — *Gates v. Newman*, (Ind. App. 1897) 46 N. E. Rep. 654.

Wisconsin. — *Kunze v. Kunze*, 94 Wis. 54.

United States. — *Tenney v. Townsend*, 9 Blatchf. (U. S.) 274; *Pennington v. Gibson*, 16 How. (U. S.) 65.

In an action upon a judgment rendered in another state, if the complaint shows that the court by which the judgment was rendered was one of general jurisdiction, it need not allege any jurisdictional facts. *Jarvis v. Robinson*, 21 Wis. 523.

Want of jurisdiction is a fact to be set up by answer. *Kunze v. Kunze*, 94 Wis. 54.

Sufficiency of Averment that Court Was a Court of Record. — Where the declaration on a judgment of a sister state follows the form of debt on a domestic judgment and concludes "as by the record and proceedings thereof remaining in said court fully appears," it is sufficiently alleged that the court was a court of record. *Davis v. Lane*, 2 Ind. 548.

2. Rae v. Hulbert, 17 Ill. 572; *Phelps v. Duffy*, 11 Nev. 80.

In *McLaughlin v. Nichols*, 13 Abb. Pr. (N. Y. Supreme Ct.) 244, it was held that a complaint on a judgment of a county Circuit Court of another state must either aver the existence of a general jurisdiction in such court or it must allege a limited jurisdiction which extended to the cause of action for which the judgment was recovered, and that the court had jurisdiction of the person of the defendant. *Compare*

Judicial Notice of Character of Court. — Where the court rendering the judgment sued on is designated as a Court of Common Pleas,¹ or a Circuit Court,² judicial notice will be taken of the fact that such courts are courts of general jurisdiction.³

Various Forms of Declarations or petitions held sufficiently to aver jurisdiction are set out below in the notes.⁴

Rae *v.* Hulbert, 17 Ill. 572; Williams *v.* Preston, 3 J. J. Marsh. (Ky.) 600; Reid *v.* Boyd, 13 Tex. 241, in which case it was held that the declaration need not aver jurisdiction, either general or special, of the subject-matter or the person, if the judgment be that of a court of record. The question of jurisdiction of the person is one of evidence at the trial of the action on the judgment.

The court will take notice that there was jurisdiction of the subject-matter. Rae *v.* Hulbert, 17 Ill. 572.

1. Court of Common Pleas. — In Butcher *v.* Brownsville Bank, 2 Kan. 70, the petition set out a judgment recovered in the Court of Common Pleas in Pennsylvania, and it was held that the courts of Kansas would take judicial notice of the Constitution of Pennsylvania, and, therefore, that the Court of Common Pleas in Pennsylvania is a common-law court having original and appellate jurisdiction, and that a judgment obtained therein in a regular course of common law is conclusive.

2. Circuit Court. — An allegation in the complaint that the judgment was rendered by "the Circuit Court of Kent county, state of Michigan," was held a sufficient averment that it was rendered by a court of general jurisdiction, such being the general character of the Circuit Courts of the states of this Union. Jarvis *v.* Robinson, 21 Wis. 524. To the same effect see Specklemeyer *v.* Dailey, 23 Neb. 101, wherein it was held that the courts of one state would take judicial notice of the fact that the Circuit Courts of sister states are courts of general jurisdiction.

3. Marine Court. — "In Archer *v.* Romaine, 14 Wis. 375, this court inferred that the Marine Court of the city of New York was a court of special jurisdiction, from the fact that the complaint alleged that the judgment was "duly given" in that court, so as to bring the case within the provisions of section 23, c. 125, Rev. Stat. The jurisdiction of the Marine Court, whether special or general, was not alleged. I think the fact that it was

not a court of general jurisdiction was properly assumed from its name." Jarvis *v.* Robinson, 21 Wis. 524.

4. Sufficient Declarations — Illustrations. — A petition which alleged that "on the 11th day of September, 1882, in the Superior Court of Guinnett county, Ga., being then and there a court of record, with jurisdiction in the premises, plaintiff herein recovered of defendant herein, by the judgment and consideration of said court, a personal judgment for the sum of," etc., was held to be sufficient in Thurmond *v.* Georgia Bank, (Tex. Civ. App. 1894) 27 S. W. Rep. 317.

The complaint alleged that at the date named, at Baltimore, in the state of Maryland, the Baltimore City Court, being a court of general jurisdiction, in an action therein pending between the plaintiff and defendant, by its judgment therein duly given and made, adjudged, etc. It was held that this was a sufficient averment of the jurisdiction of the court. Meredith *v.* Santa Clara Min. Assoc., 56 Cal. 178.

The complaint in an action on a judgment alleged that the judgment was joint as to all the defendants, and several as to the defendant B.; that B. had been personally served with summons in Brooklyn, N. Y.; that he appeared by counsel; that judgment was duly rendered against him; that the City Court of Brooklyn was a court of record; and that, under the constitution and laws of New York, it had jurisdiction of the subject-matter of the action. It was held sufficiently to state a cause of action against B. Schenk *v.* Birdseye, 2 Idaho 130.

"As to the complaint, Code, § 481, provides that the complaint shall set forth 'a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition;' and the plaintiff is only required, under the system of pleading now prevailing in this state, to state concisely those facts which go to make up his cause of action, and which, upon a general denial, he must prove, in order to show himself entitled to a judgment. The

(2) *Courts of Inferior Jurisdiction* — (a) *In Absence of Statute* — *Statement of Rule.* — In an action on a judgment of an inferior court or court of limited jurisdiction, in the absence of a statute changing the rule, it is necessary to aver in detail all the facts conferring jurisdiction of both the subject-matter and the person of the defendant.¹

complaint alleges the recovery of a judgment against the defendant in a court of Connecticut, and that that court was a court of general jurisdiction, directing the payment to plaintiff of certain specified sums of money. The complaint also alleges personal service upon the defendant of the process of that court, thus giving the court jurisdiction of the person. In fact, the jurisdiction of the court of the subject-matter of the action, of its jurisdiction of the person of the defendant, and of the recovery of the judgment, are admitted by the demurrer, which concedes all the facts stated in the complaint. The demurrer was therefore properly overruled, and the judgment appealed from must be affirmed, with costs to the respondent." *Crane v. Crane*, (City Ct.) 19 N. Y. Supp. 693. See also *Bell v. Good*, 22 Civ. Pro. Rep. (N. Y. City Ct.) 317, 356.

"The ultimate facts that the court in which the judgment was rendered was a court of general jurisdiction, and that the summons and a copy of the complaint were duly and personally served upon the defendant, were all that it was necessary to allege in the complaint. The probative facts requisite to prove these ultimate facts were matters of evidence, and were not required to be set out in the complaint. The recitals in the judgment and accompanying affidavits were *prima facie* evidence, at least, of the facts giving the court jurisdiction. *D'Arcy v. Ketchum*, 11 How. (U. S.) 165; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *St. Clair v. Cox*, 106 U. S. 350." *Gude v. Dakota F. & M. Ins. Co.*, 7 S. Dak. 644.

Declaration Held Insufficient. — A mere averment that a judgment had been recovered in another state by the assignor of the plaintiff against the defendant, without alleging that it was duly recovered, or proof on the trial of any fact or circumstances indicating that the defendant had been made a party to the former action by the serv-

ice of process, either actually or constructively, upon him, was held not to establish the plaintiff's right of recovery, notwithstanding the admissions to be derived constructively from the omission to deny the complaint. *Horton v. Shepherd*, 14 N. Y. W'kly Dig. 453.

1. *California.* — *Smith v. Andrews*, 6 Cal. 652.

Indiana. — *Willey v. Strickland*, 8 Ind. 453; *Crake v. Crake*, 18 Ind. 156; *Draggou v. Graham*, 9 Ind. 212.

Massachusetts. — *Bridge v. Ford*, 4 Mass. 641.

New York. — *Turner v. Roby*, 3 N. Y. 193; *Barnes v. Harris*, 3 Barb. (N. Y.) 603; *Cornell v. Barnes*, 7 Hill (N. Y.) 35; *People v. Koeber*, 7 Hill (N. Y.) 39; *Lawton v. Erwin*, 9 Wend. (N. Y.) 233; *Stiles v. Stewart*, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142; *Nicholl v. Mason*, 21 Wend. (N. Y.) 339; *Sherwood v. Johnson*, 1 Wend. (N. Y.) 443; *Dakin v. Hudson*, 6 Cow. (N. Y.) 221; *Cleveland v. Rogers*, 6 Wend. (N. Y.) 438; *Bowman v. Russ*, 6 Cow. (N. Y.) 234; *Hunt v. Dutcher*, 13 How. Pr. (N. Y. Supreme Ct.) 538.

England. — *Read v. Pope*, 1 Crompt. M. & R. 302; *Sollers v. Lawrence*, Willes 413.

See in general article JURISDICTION, vol. 12, p. 114.

There Is No Distinction Between the Declaration and Other Pleadings, according to the better opinion, in respect to the method of pleading jurisdictional facts in alleging a judgment of an inferior court. *Turner v. Roby*, 3 N. Y. 193; *Barnes v. Harris*, 3 Barb. (N. Y.) 603, 4 N. Y. 375; *Lawton v. Erwin*, 9 Wend. (N. Y.) 233; *Cornell v. Barnes*, 7 Hill (N. Y.) 35 and note. But see *Nicholl v. Mason*, 21 Wend. (N. Y.) 339. And see cases cited *supra*, p. 1132.

In *Michigan* it was held, in *Goodsell v. Leonard*, 23 Mich. 374, that a declaration on a justice's judgment requires no further allegation in regard to jurisdiction than would be required in a suit upon the judgment of a court of record.

A Mere General Averment of Jurisdiction will not be sufficient, but the facts conferring it must be alleged in detail, so that the court can see that there was in fact jurisdiction.¹

To Show Jurisdiction over the Person, it is necessary to aver either that the party appeared or that process was sued out and duly served on him.²

Jurisdiction of the Subject-matter is sufficiently averred when the facts pleaded as to the amount and nature of the claim show that it is within the provisions of the statute conferring jurisdiction upon the court. It is not necessary to plead such statute, as the court will take judicial notice of it.³

1. *Turner v. Roby*, 3 N. Y. 193; *Sheldon v. Hopkins*, 7 Wend. (N. Y.) 435; *Lawton v. Erwin*, 9 Wend. (N. Y.) 233; *Nicholl v. Mason*, 21 Wend. (N. Y.) 339; *Barnes v. Harris*, 3 Barb. (N. Y.) 603; *Dakin v. Hudson*, 6 Cow. (N. Y.) 224; *Cleveland v. Rogers*, 6 Wend. (N. Y.) 438.

Sufficiency of Averment — Approved Precedents. — In *Barnes v. Harris*, 3 Barb. (N. Y.) 603, Morehouse, J., after stating that it was not necessary to set out the proceedings at large, but that they might be included under a general allegation of *taliter processum fuit*, said: "Under this general rule another principle of pleading is to be kept in view: that facts are to be stated for the information of the court, not arguments, or inferences, or matters of law. Facts, then, must be shown to give jurisdiction, not a mere averment of jurisdiction; and it must be complete, that is, the court must be shown to have had jurisdiction of the subject-matter and of the persons affected by the proceeding or judgment. The case of *Smith v. Mumford*, 9 Cow. (N. Y.) 26, furnishes, apparently, an approved precedent of a declaration in debt on a judgment in a justice's court, short of this, in not showing jurisdiction of the person; and so also does *Stiles v. Stewart*, 12 Wend. (N. Y.) 473. The former case was brought before the court upon demurrer to the evidence, and the latter in arrest of judgment. The court do not, however, in either case, advert to the circumstance as affecting the rule. Upon established principles they were good after verdict, though bad before. The case of *Cleveland v. Rogers*, 6 Wend. (N. Y.) 438, lays down what I esteem the true rule on the subject. It is referred to in *Stiles v. Stewart*, 12 Wend. (N. Y.) 473, with the remark that it must be considered as

confined to a case of an avowry or other pleading subsequent to the declaration, where greater certainty was required. *Lawton v. Erwin*, 9 Wend. (N. Y.) 233, confirming the rule in 6 Wendell, was not referred to. In *Cornell v. Barnes*, 7 Hill (N. Y.) 35, the rule as above laid down was reasserted."

2. *Cornell v. Barnes*, 7 Hill (N. Y.) 35; *Nicholl v. Mason*, 21 Wend. (N. Y.) 339; *Turner v. Roby*, 3 N. Y. 193.

Must Allege Process or Appearance. — In a note to *Cornell v. Barnes*, 7 Hill (N. Y.) 39, Mr. Hill says: "The allegations showing jurisdiction of the person will of course vary according to the mode of proceeding prescribed for and adopted by the inferior court; and it is scarcely necessary to mention that the precedents to be found in the English books on pleading are not to be too closely followed in this respect. In setting forth the judgment of a justice of the peace, the pleader should pursue the course indicated by the case reported in the text; that is, begin by alleging the issuing and service of the summons or other process by which the suit was commenced, and then pass to the rendition of the judgment by a *taliter processum fuit*, etc. See *Hoose v. Sherrill*, 16 Wend. (N. Y.) 33; *Cleveland v. Rogers*, 6 Wend. (N. Y.) 438. If jurisdiction in the case was acquired independently of the process, as by the party appearing and joining issue upon the merits, the pleading should state the matter accordingly. See *Cornell v. Barnes*, 7 Hill (N. Y.) 39, reported in the text, in connection with *Onderdonk v. Ranlett*, 3 Hill (N. Y.) 327, and the cases there cited."

3. *Masterson v. Matthews*, 60 Ala. 260; *Stiles v. Stewart*, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142.

After Verdict, want of allegation of jurisdictional facts will be deemed cured.¹

There Is an Exception to the General Rule of pleading here stated. Where, on nonsuit or otherwise, judgment is rendered in favor of the defendant for costs in a suit on such judgment, the facts conferring jurisdiction need not be averred.²

Judgment of Sister State.—These general rules apply in full force to actions on judgments of justices of the peace of sister states, and in such case the jurisdictional facts must be alleged.³ It seems, however, that the statute conferring jurisdiction upon the justice must be pleaded.⁴ This is because at common-law justices of the peace had no civil jurisdiction, and the courts of one state will not take judicial notice of the laws of another state.⁵

1. *Stiles v. Stewart*, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142; *Turner v. Roby*, 3 N. Y. 193; *Barnes v. Harris*, 3 Barb. (N. Y.) 603; *Groff v. Griswold*, 1 Den. (N. Y.) 432; *Bentley v. Donnelly*, 8 T. R. 127; *Bull v. Steward*, 1 Wils. 255.

2. *Turner v. Roby*, 3 N. Y. 193.

Reason for Exception.—"When the plaintiff in an inferior court suffers a judgment of nonsuit, and an action is brought against him on the judgment to recover the costs which were adjudged to the defendant, the pleader need not aver that a plaintiff was levied in the inferior court for a cause of action arising within its jurisdiction; for although the plaintiff had no cause of action, and was nonsuited for that reason, he must pay the defendant's costs. *Murray v. Wilson*, 1 Wils. 316. And the same principle will apply in declaring upon any judgment for the defendant in an inferior court, where the only object is to recover the costs which were adjudged to the defendant in that action. But the rule is different where, as in this case, the plaintiff had judgment in the inferior court, and the judgment is pleaded in bar of another action; for if the inferior court had no jurisdiction, the judgment is void, and cannot be enforced by execution; and if the plaintiff cannot sue on the original cause of action, he is without remedy. In such a case the pleader should follow the general rule, and show that the inferior court had jurisdiction to give a judgment which would bar another action. And the principle must be the same in all cases where the former recovery is set up as a bar to another action." *Turner v. Roby*, 3 N. Y. 193.

In *Murray v. Wilson*, 1 Wils. 316, it was held that a declaration on a judgment of nonsuit in an inferior court need not show that a plaintiff was levied for a cause of action arising within the jurisdiction of the court, for, as the court there said, the plaintiff's process may be illegal from beginning to end, and yet the defendant may be nevertheless entitled to his costs.

3. *Iowa*.—*Gay v. Lloyd*, 1 Greene (Iowa) 78.

Missouri.—*Hofheimer v. Losen*, 24 Mo. App. 652.

New York.—*Sheldon v. Hopkins*, 7 Wend. (N. Y.) 435; *Thomas v. Robinson*, 3 Wend. (N. Y.) 267; *Stiles v. Stewart*, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142.

Texas.—*Beal v. Smith*, 14 Tex. 305; *Schermerhorn v. Schermerhorn*, 3 Am. L. J. 61.

4. **Pleading Statute Conferring Jurisdiction**—*Indiana*.—*Cone v. Cotton*, 2 Blackf. (Ind.) 82; *Wormer v. Smith*, 2 Ind. 235.

New York.—*Sheldon v. Hopkins*, 7 Wend. (N. Y.) 435; *Thomas v. Robinson*, 3 Wend. (N. Y.) 267; *Stiles v. Stewart*, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142.

Texas.—*Henry v. Allen*, 82 Tex. 35; *Grant v. Bledsoe*, 20 Tex. 456; *Beal v. Smith*, 14 Tex. 305.

5. *M'Gee v. Sheffield*, 3 Stew. & P. (Ala.) 351; *Ellis v. White*, 25 Ala. 540. But see *Draggou v. Graham*, 9 Ind. 212, wherein the court said: "And in the absence of proof of the law of Ohio, at the date of the judgment, we might have to presume it to be the same as our own. *Pelton v. Platner*, 13 Ohio 209, and *Shaw v. Wood*, 8 Ind. 518. Though it has been recently de-

(b) **Statutory Regulation — Averment that Judgment Was "Duly Given" — Statement of Rule.** — By statute in most of the states it is no longer necessary to plead the jurisdictional facts in an action upon a judgment of an inferior court,¹ but it is sufficient to allege that such judgment was "duly given or made."² Under these statutory provisions the allegation that a judgment of an inferior court was duly given or made is equivalent to and is a substitute for the averments of jurisdictional facts required at common law, and dispenses with the necessity for any such averments.³

cided by the Supreme Court of Pennsylvania, in *Ohio v. Hinchman*, 27 Pa. St. 479, that in suits upon judgment records of other states than that in which the suit is brought, the court should take notice of the laws of the state in which the judgment was rendered — this being necessary under the constitutional requirement to give full faith, etc., to judgments of the several states."

1. **Typical Statute.** — "In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction; but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction." N. Y. Code Pro., § 161 (now Code Civ. Pro., § 532).

This statute is enacted in almost identical terms in nearly all of the states and territories of the United States.

2. *California.* — *Beans v. Emanuelli*, 36 Cal. 117; *Bronzan v. Drobaz*, 93 Cal. 647; *Edwards v. Hellings*, 99 Cal. 214; *Hanscom v. Tower*, 17 Cal. 518.

Indiana. — *Crake v. Crake*, 18 Ind. 156; *Richardson v. Hickman*, 22 Ind. 244.

Kansas. — *Burnes v. Simpson*, 9 Kan. 658.

Missouri. — *Musick v. Kansas City, etc.*, R. Co., 124 Mo. 544.

Nevada. — *Keys v. Grannis*, 3 Nev. 548.

New York. — *Hunt v. Dutcher*, 13 How. Pr. (N. Y. Supreme Ct.) 538; *Wheeler v. Dakin*, 12 How. Pr. (N. Y. Supreme Ct.) 537; *Cutting v. Massa*, (Supreme Ct.) 15 N. Y. St. Rep. 316.

Oregon. — *Cougill v. Farmers' Ins. Co.*, 25 Oregon 360.

Object of Statute. — Section 161 of the code was expressly intended to alter

the former rule (and it is abrogated in terms) that in pleading a judgment or determination of a court of inferior and limited jurisdiction, the facts conferring the jurisdiction must be specially pleaded. Now, in pleading any determination of a court of limited jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may simply be alleged to have been duly given or made. If that be denied, jurisdiction and all jurisdictional facts must be proved. *Wheeler v. Dakin*, 12 How. Pr. (N. Y. Supreme Ct.) 537.

Justices' Judgment. — Such a statute applies to a judgment of a justice of the peace condemning land for reservoir area for a railroad. *Musick v. Kansas City, etc.*, R. Co., 124 Mo. 544.

A Judgment of the Probate Court may be stated to have been duly rendered without pleading the facts conferring jurisdiction. *Beans v. Emanuelli*, 36 Cal. 117. Therefore a complaint by an executor or administrator sufficiently alleges his appointment if it avers by what court or officer it was made and that it was duly made. *Wheeler v. Dakin*, 12 How. Pr. (N. Y. Supreme Ct.) 537.

In Oregon, under such a statute, it was held that an allegation that a judgment was duly rendered was sufficient. *Toby v. Ferguson*, 3 Oregon 28. But see *Dick v. Wilson*, 10 Oregon 490, where, without reference to any statute, it was held that the jurisdictional facts must be alleged.

3. *California.* — *Hanscom v. Tower*, 17 Cal. 518; *Beans v. Emanuelli*, 36 Cal. 117.

Indiana. — *Willey v. Strickland*, 8 Ind. 453; *Crake v. Crake*, 18 Ind. 156; *Snyder v. Snyder*, 25 Ind. 399; *Toledo, etc.*, R. Co. v. *McNulty*, 34 Ind. 531.

Mississippi. — *State v. Bowen*, 45 Miss. 347.

Nevada. — *Keys v. Grannis*, 3 Nev. 548.

But the Statutory Mode of Allegation Is Not Exclusive, and the pleader may at his option allege either the jurisdictional facts or that the judgment was duly given or made, and either form will be sufficient.¹

Sufficiency of Declaration under Statute. — Where the statutory mode of declaring is adopted, either the words of the statutes or words of exactly similar import must be used.² Hence, an allegation that the plaintiff "recovered a judgment,"³ or that a judgment was "entered in said action,"⁴ without averring that it was "duly" entered, is not sufficient.⁵

New York. — *Wheeler v. Dakin*, 12 How. Pr. (N. Y. Supreme Ct.) 537.

1. *California.* — *Himmelman v. Danos*, 35 Cal. 441.

Indiana. — *Crake v. Crake*, 18 Ind. 156; *Baker v. Flint*, 63 Ind. 137; *Toledo, etc., R. Co. v. McNulty*, 34 Ind. 531; *Shockney v. Smiley*, 13 Ind. App. 181.

New York. — *Stiles v. Stewart*, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142; *Tuttle v. Robinson*, 91 Hun (N. Y.) 187.

In *Snyder v. Snyder*, 25 Ind. 399, the suit was upon a judgment rendered by a justice of the peace in the state of Ohio. The transcript contained the following return to the summons: "Served on the 21st by leaving a copy at place of residence with Daniel Snyder." It was held that the service was insufficient at common law, and that the complaint was bad on demurrer for want of averments that the justice had jurisdiction of the subject-matter and that the service was sufficient by the law of Ohio, or the equivalent averment, made sufficient by statute, "that the judgment or decision was duly given or made."

Where There Is No Allegation that the Judgment Was Duly Given or made, and no equivalent allegation, then the facts necessary to confer jurisdiction must be averred as at common law. *Crake v. Crake*, 18 Ind. 156; *Himmelman v. Danos*, 35 Cal. 441; *Tuttle v. Robinson*, 91 Hun (N. Y.) 187; *Shockney v. Smiley*, 13 Ind. App. 181.

2. *Hunt v. Dutcher*, 13 How. Pr. (N. Y. Supreme Ct.) 538.

3. *Harmon v. Comstock Horse, etc., Co.*, 9 Mont. 243; *Weaver v. English*, 11 Mont. 84.

4. **Necessity of Using Term "Duly."** — *Hunt v. Dutcher*, 13 How. Pr. (N. Y. Supreme Ct.) 538. In this case the court said, referring to N. Y. Code Pro., § 161 (now Code Civ. Pro., § 532): "The plaintiff has not used

the language of this section. He says, in the complaint, that such proceedings were had before the justice that 'judgment was entered in said action.' This is clearly not equivalent to the words that such judgment has been or was 'duly given or made.' It may not be necessary, and probably is not, to use in the pleading the precise language of the statute, but words to the same effect and substance must be used. *Boyce v. Brown*, 7 Barb. (N. Y.) 84. To say that a judgment is *entered* is merely to allege the single fact of the entry of the judgment, without including an averment that it was properly or lawfully done. All this is embraced in the language of the code, that the judgment was 'duly given or made.' The word *entered*, or *perfected*, may be equivalent to the word *made*, or *given*. But the word *duly* is most essential. It can hardly be dispensed with and satisfy the terms of the statute. I can imagine no single word that will supply its place. The allegation that the judgment was *entered* would be proved by simple evidence of the actual rendition of a judgment. But the allegation that the judgment was 'duly given or made' could only be proved by establishing on the trial the facts conferring jurisdiction upon the justice, and showing that the judgment was, in all respects, lawfully and regularly obtained or rendered. The statute gives a short and simple form of pleading a judgment; and it is safest, if not indispensable, that the statute language be adopted and used when the party seeks to avail himself of this provision of the code, instead of following the common-law forms in such cases. The demurrer is well taken, and judgment must be given for the defendant thereon, with leave to the plaintiff to amend, on payment of costs."

5. **Illustrations of Averments Held Sufficient.** — An allegation that a judgment

Application to Courts of Record. — It seems that the statutes under discussion have no application to judgments rendered in courts of record or of general jurisdiction.¹ They have, however, sometimes been applied in actions upon judgments of superior courts of foreign or sister states.²

was "duly made by and entered in" a certain court is sufficient. *Lee v. Terbell*, 33 Fed. Rep. 850.

The statute is substantially complied with by an allegation that the plaintiff "recovered a judgment" against the defendant, and that "said judgment was duly docketed." *Pierstoff v. Jorges*, 86 Wis. 128.

An allegation that a judgment was obtained "in due course of procedure" is sufficient under *Mansf. Ark. Dig.*, § 5067. *Lazarus v. Freidheim*, 51 Ark. 371.

See also, for averments held equivalent to that provided by statute, *Willis v. Havemeyer*, 5 Duer (N. Y.) 447.

Averment Held Insufficient. — The officer making the adjudication must be designated; therefore, a plea that certain premises were "duly sold" for the nonpayment of a tax "duly imposed," without stating by whom it was imposed, is insufficient under the *New York Code*, § 161 (now *Code Civ. Pro.*, § 532). *Carter v. Koezley*, 9 Bosw. (N. Y.) 583, 14 Abb. Pr. (N. Y.) 147.

1. *California.* — *Weller v. Dickinson*, 93 Cal. 108.

Kansas. — *Butcher v. Brownsville Bank*, 2 Kan. 70.

Minnesota. — *Smith v. Mulliken*, 2 Minn. 319; *Karns v. Kunkle*, 2 Minn. 313.

New York. — *Wheeler v. Dakin*, 12 How. Pr. (N. Y. Supreme Ct.) 537; *Hunt v. Dutcher*, 13 How. Pr. (N. Y. Supreme Ct.) 538.

Ohio. — *Memphis Medical College v. Newton*, 2 Handy (Ohio) 165.

2. **Foreign Superior Courts.** — "The complaint, instead of averring jurisdiction in the Pennsylvania court, follows the language of section 161 of the Code [now *Code Civ. Pro.*, § 532], and avers that the judgment was *duly* recovered, etc. To this complaint a demurrer was interposed that it does not state facts sufficient to constitute a cause of action. The demurrer presents the single question whether, in pleading the judgment of a court of record of a sister state, the provision of section 161 of the code applies. A decision upon this precise

point is nowhere reported, to my knowledge. Justice Allen, in *Hollister v. Hollister*, 10 How. Pr. (N. Y. Supreme Ct.) 532, said: 'It appears to be conceded that section 161 of the code does not apply to foreign judgments;' and from that inferred that 'a general averment of jurisdiction would not be sufficient,' citing *Barnes v. Harris*, 3 Barb. (N. Y.) 603; but that case hardly sustains the learned judge in his assertion. *Ayres v. Covill*, 18 Barb. (N. Y.) 260, also is sometimes cited as an authority to the point here under consideration, but has no bearing thereon. I can see no good reason why the same rules should not prevail in pleading the judgments of a court of record of a sister state as in pleading the judgments of such courts of our own state. Judgments of the courts of the several states have the like effect in all the states which they have in the states where rendered, and, when pleaded in an action, the same rules should govern as in pleading our own judgments; and if the allegations of the complaint be controverted, the plaintiff will then be required to establish on the trial the facts showing jurisdiction, in the court rendering the judgment, over the subject-matter and over the person of the defendant." *Halstead v. Black*, 17 Abb. Pr. (N. Y. Supreme Ct.) 227. See also *Phelps v. Duffy*, 11 Nev. 80; *De Nobele v. Lee*, 47 N. Y. Super. Ct. 372.

In an action upon a judgment of a court of a foreign country, it is unnecessary for the plaintiff specifically to allege that such court had jurisdiction of the parties and subject-matter, that the defendant had reasonable notice of the institution of the suit and a fair opportunity to be heard, or that any hearing on trial was had. These facts are the indispensable conditions of the due adjudication of the foreign court, and are necessarily implied in the averment (authorized by the *Practice Book*, Form 169) that the court "duly adjudged" that the defendant should pay, etc. *Fisher v. Fielding*, 67 Conn. 91.

In *Dore v. Thornburgh*, 90 Cal. 64, and *Stephens v. Roby*, 27 Miss. 744, an averment that a foreign judgment

Foreign Inferior Courts. — It has often been held that such statutes apply to the judgments of inferior courts of a sister state;¹ but the contrary has also been distinctly held.²

d. PROFERT OF RECORD. — In an action upon a judgment the declaration need not contain a *profert in curia* of the record.³ It is sufficient to refer to the judgment as remaining of record — *prout patet per recordum*.⁴

was duly rendered was held sufficient, but it seems that such a holding could be sustained upon the principles discussed in the last preceding section, irrespective of any statute.

1. *Indiana*. — *Terre Haute, etc., R. Co. v. Baker*, 122 Ind. 433; *Crake v. Crake*, 18 Ind. 156; *Toledo, etc., R. Co. v. McNulty*, 34 Ind. 531; *Snyder v. Snyder*, 25 Ind. 399; *Richardson v. Hickman*, 22 Ind. 244; *Baker v. Flint*, 63 Ind. 137; *Draggou v. Graham*, 9 Ind. 212; *Willey v. Strickland*, 8 Ind. 453; *Ault v. Zehering*, 38 Ind. 429.

Kansas. — *Butcher v. Brownsville Bank*, 2 Kan. 70.

2. *Minnesota*. — *Karns v. Kunkle*, 2 Minn. 313.

New York. — *McLaughlin v. Nichols*, 13 Abb. Pr. (N. Y. Supreme Ct.) 244 (*semble*); *Hollister v. Hollister*, 10 How. Pr. (N. Y. Supreme Ct.) 539.

Ohio. — *Wehrman v. Reakirt*, 2 Cinc. Super. Ct. Rep. 29.

In *Hollister v. Hollister*, 10 How. Pr. (N. Y. Supreme Ct.) 539, it was said that section 161 of the *New York Code* (now *Code Civ. Pro.*, § 532), did not apply to foreign judgments, and therefore did not change the common-law rule as to pleading judgments of inferior courts in a sister state, but the statement was merely an *obiter dictum*. In *Halstead v. Black*, 17 Abb. Pr. (N. Y. Supreme Ct.) 227, it was directly decided, on the other hand, that section 161 of the *New York Code* did apply to the judgment of a sister state, which could therefore be pleaded as having been duly given or made. The judgment involved in this case, however, was rendered by a superior court. If the statute applies at all to foreign judgments, it must apply to those of courts of inferior jurisdiction. See also *De Nobele v. Lee*, 47 N. Y. Super. Ct. 372.

In *Karns v. Kunkle*, 2 Minn. 313, followed in *Smith v. Mulliken*, 2 Minn. 319, it was held, citing *Hollister v. Hollister*, 10 How. Pr. (N. Y. Supreme Ct.) 539, that a statute authorizing judgments of inferior courts to be pleaded

as having been duly given or made did not apply to judgments of courts in foreign or sister states, either superior or inferior. These cases were *overruled* in so far as they held that jurisdictional facts must be alleged where the court was one of general jurisdiction, in *Gunn v. Peakes*, 36 Minn. 178; but this was on general principles, and the effect of the statute was neither raised nor decided. In *Memphis Medical College v. Newton*, 2 Handy (Ohio) 165, it was held generally that statutes of this class did not apply to judgments of domestic courts of superior jurisdiction or to judgments of courts of sister states.

3. *Harlow v. Beekle*, 1 Blackf. (Ind.) 237; *Walton v. McKesson*, 64 N. Car. 77.

Justices' Judgments. — In debt upon a domestic judgment rendered by a justice of the peace, profert of the original papers or an exemplification is not required. *Gardner v. Henry*, 5 Coldw. (Tenn.) 458.

Judgments of Sister States. — In an action on a judgment of a Circuit Court of another state, profert of the record is not necessary. *Stephenson v. McNary*, 5 Blackf. (Ind.) 360; *Capp v. Gilman*, 2 Blackf. (Ind.) 45.

Profert in Replication. — A former judgment is not pleaded with a profert, but a profert is tendered in reply to the plea or replication of *nul tiel record*. *Burnham v. Webster*, 4 Fed. Cas. No. 2178.

4. **The Prout Patet per Recordum** is sufficient even on special demurrer. *Stephenson v. McNary*, 5 Blackf. (Ind.) 360; *Capp v. Gilman*, 2 Blackf. (Ind.) 45.

Destruction of Record. — In *Walton v. McKesson*, 64 N. Car. 77, the plaintiff declared upon a judgment the record of which had been destroyed, and alleged such destruction as an excuse for not making profert; the defendant demurred, and the demurrer was sustained. The court said: "The plaintiff's remedy in this case was, upon notice to the defendants, a motion in the original suit, to have a record made of the judg-

Demurrer. — Where a profert is in fact made, however, it does not bring the judgment into the record so as to enable the defendant to demur for defects therein,¹ though it has been held that where profert is made and oyer granted a demurrer lies if the judgment is void on its face.²

e. SETTING OUT PROCEEDINGS. — In declaring on a judgment, it is not necessary to set forth the whole proceedings in the suit.³

ment in place of that which was destroyed, and then to offer the record in evidence in this suit. It was neither necessary nor proper to make profert of the judgment, but to refer to it as of record, *prout patet per recordum*; but instead of such reference, it is stated in the complaint as an excuse for not making profert that the record had been destroyed. It is not desirable that the merits of a cause should be prejudiced by technicalities, and the courts are liberal in allowing amendments to reach substantial justice. If, upon the coming in of the demurrer, the plaintiff had obtained leave to amend his complaint, so as to refer to the judgment as 'remaining of record,' and upon motion in the original cause had made a record, it might have been offered on the trial, but as the plaintiff joined in the demurrer, we are obliged to say that it ought to have been sustained. There is error."

The Omission of the Prout Patet per Recordum cannot be objected to except on such demurrer. *Harlow v. Becktle*, 1 Blackf. (Ind.) 237.

1. *Deem v. Crume*, 46 Ill. 69; *Hall v. Harrison*, 21 Mo. 227.

"The declaration was sufficient, *prima facie*, to sustain the action. Could the defendant then crave oyer of the transcript on file and demur? Such a course would completely exclude the plaintiff's testimony, and in most cases work the greatest injustice. Oyer at common law is only demandable of specialties. Our statute has probably extended the rule, but clearly limits the right to demand oyer of instruments signed by the party, and cannot apply to actions founded on judgments." *Giles v. Shaw*, 1 Ill. 219.

2. *Cone v. Cotton*, 2 Blackf. (Ind.) 82. This case was debt on a judgment of a justice of a sister state. The court said: "The plaintiff made profert of an authenticated transcript of said judgment. The defendants craved oyer of the transcript, which was granted. And in this it is said by the plaintiff that

the Circuit Court erred. But it should be remembered that, although oyer of record is not properly demandable, yet if profert is made and oyer granted, no error is committed. So as it respects the transcript of this judgment. It is not a record; but as both parties have treated it as a record, we see no reason that either has to complain."

"The defendant may crave oyer of the record and have it set forth in terms as part of the pleading, and if it do not sustain, and fully sustain the declaration, may demur." *Per Redfield, J.*, in *Dimick v. Brooks*, 21 Vt. 578, *quoted with approval* in *Miller v. Dungan*, 35 N. J. L. 391.

3. *Denison v. Williams*, 4 Conn. 402; *Johnson v. Butler*, 2 Iowa 535; *Caldwell v. Richards*, 2 Bibb (Ky.) 331; *Springsteene v. Gillett*, 30 Hun (N. Y.) 260; *Downer v. Dana*, 22 Vt. 337.

A deficiency judgment in foreclosure may be alleged in general language, under Code Civ. Pro., § 532, without setting forth the proceeding. *Springsteene v. Gillett*, 30 Hun (N. Y.) 260.

The petition on which a former judgment was based need not be set out. *Davis v. Davis*, 65 Fed. Rep. 380. *Compare Ashley v. Laird*, 14 Ind. 222.

Enough of the Previous Proceedings should be recited or stated to show that the parties were properly in court, and that the general nature of the subject-matter came within the cognizance of the court. *Downer v. Dana*, 22 Vt. 337.

In *Dimmick v. Wyoming Mfg. Co.*, 2 Lack. Leg. N. (Pa.) 171, it was held that where the action was on a judgment rendered in another county, the record of such judgment must be set forth in full. *Compare Johnson v. Butler*, 2 Iowa 535, where it was held that the plaintiff may bring his action upon a transcript of a judgment only, or upon so much of the record as shows that the court had jurisdiction of the person and subject-matter; that the judgment was rendered; but that the defendant, by his plea of *nullius in terra*, want of jurisdiction, no service or ap-

This rule applies to judgments both of inferior¹ and of foreign courts.²

Summarizing Proceedings. — It is sufficient, after alleging the required jurisdictional facts, to summarize the intermediate proceedings leading up to the rendition of the judgment by a general averment that "such proceedings were thereupon had" (*superinde taliter processum fuit*)³ that afterwards, by the consideration and judgment of the court, the plaintiff recovered the sum mentioned.⁴

pearance, or that the judgment was obtained by fraud, may render it necessary for the plaintiff to produce the whole record, or at least enough to prove a valid judgment.

1. Inferior Courts. — *Barnes v. Harris*, 4 N. Y. 375; *Cornell v. Barnes*, 7 Hill (N. Y.) 37; *Dakin v. Hudson*, 6 Cow. (N. Y.) 221; *Bowman v. Russ*, 6 Cow. (N. Y.) 234; *Mackarith v. Pollard*, 1 Ld. Raym. 80; *Rowland v. Veale*, 1 Cowp. 18; *Higginson v. Martin*, 2 Mod. 195; *Doe v. Parmiter*, 2 Lev. 81; *Pitt v. Knight*, 1 Saund. 92, note.

"It was settled in our own courts, before Chitty wrote, that in setting forth the proceedings of an inferior court, after stating enough to give it jurisdiction, it was sufficient to add *taliter processum fuit*, such an act was done by the court." *Barnes v. Harris*, 3 Barb. (N. Y.) 606 [citing *Service v. Heermance*, 1 Johns. (N. Y.) 91; *Peebles v. Kittle*, 2 Johns. (N. Y.) 363; *Dakin v. Hudson*, 6 Cow. (N. Y.) 221].

Former Rule. — It was formerly held necessary to set out the proceedings at large. *Turner v. Roby*, 3 N. Y. 193; *Rowland v. Veale*, 1 Cowp. 18; *Dennis v. Rows*, 2 Lutw. 918; *Mackarith v. Pollard*, 1 Ld. Raym. 80.

Thus in *Pinager v. Gale*, 2 Vent. 100, the defendant undertook to justify an alleged trespass in the taking of the plaintiff's goods under a judgment of the County Court, and pleaded that "J. S. levied plaint in the County Court in a plea of debt of thirty-nine shillings and eleven pence, against the now plaintiff, and *superinde taliter processum fuit* that he recovered the said debt." On demurrer it was adjudged for the plaintiff because, among other things, "when a judgment is pleaded in an inferior court, especially in a court not of record, the proceedings should be set forth at large, and not to say *taliter processum fuit*."

At the present day this plea would be deemed good. See cases cited in second succeeding note.

2. In an Action upon a Foreign Judgment, an allegation in the complaint is sufficient if it states the name of the court in which such judgment was obtained, and that the same was a court of competent jurisdiction, without alleging the actions and proceedings thereof. *Martin v. Moore*, 1 Wyoming 22.

The plaintiff in an action on a foreign judgment need only set out so much of the judgment as to show that the court had jurisdiction of the person and subject-matter, and that the judgment was rendered. It may become necessary to introduce the judgment record in evidence, but it cannot be required that it be set out in the pleadings. *Johnson v. Butler*, 2 Iowa 535.

3. Turner v. Roby, 3 N. Y. 193; *Cornell v. Barnes*, 7 Hill (N. Y.) 39, note; *Hoose v. Sherrill*, 16 Wend. (N. Y.) 33; *Cleveland v. Rogers*, 6 Wend. (N. Y.) 438; *Barnes v. Harris*, 3 Barb. (N. Y.) 603, affirmed in 4 N. Y. 375; *Dakin v. Hudson*, 6 Cow. (N. Y.) 221; *Bowman v. Russ*, 6 Cow. (N. Y.) 234; *Downer v. Dana*, 22 Vt. 337; *Pitt v. Knight*, 1 Saund. 92; *Mackarith v. Pollard*, 1 Ld. Raym. 80; *Rowland v. Veale*, 1 Cowp. 18; *Doe v. Parmiter*, 2 Lev. 81; *Higginson v. Martin*, 2 Mod. 195.

The Form of a Declaration upon a judgment setting forth the whole proceedings will be found in *Pitt v. Knight*, 1 Saund. 86, and the modern abbreviated form in note 2 to that case, p. 92. The latter is as follows: "At a certain court, etc., held at, etc., A B levied his certain plaint against C D in a certain plea of trespass on the case, or debt, etc. (as the case may be), for a cause of action arising within the jurisdiction of the court, and thereupon such proceedings were had that afterwards, etc., it was considered by the said court that the said A B should recover against the said C D, etc."

4. Burnes v. Simpson, 9 Kan. 658; *Biddle v. Wilkins*, 1 Pet. (U. S.) 686.

Omission of the Allegation that "such proceedings were had," etc., must be taken advantage of by special demurrer and is cured by verdict.¹

f. EXHIBITS — Record of Judgment. — In the absence of statute, where the declaration properly describes the judgment a copy of the record need not be attached as an exhibit.²

A Judgment Is Not a Written Instrument within the meaning of a statute requiring such instruments to be filed as exhibits when they constitute the foundation of a pleading,³ although a few cases hold the contrary.⁴

See also *Hansford v. Van Auken*, 79 Ind. 157.

1. *Barnes v. Harris*, 3 Barb. (N. Y.) 603. But see the same case *affirmed* in 4 N. Y. 374, where the court said that this allegation was not omitted.

2. *Hall v. Mackay*, 78 Tex. 248. See also *Johnson v. Butler*, 2 Iowa 538.

3. *Collins v. Fraiser*, 27 Ind. 477; *Hinkle v. Reid*, 43 Ind. 390; *Richardson v. Jones*, 58 Ind. 240; *Lytle v. Lytle*, 37 Ind. 281; *Campbell v. Cross*, 39 Ind. 155; *Becknell v. Becknell*, 110 Ind. 42; *Wilson v. Vance*, 55 Ind. 584; *Ryan v. Curran*, 64 Ind. 345; *Logansport v. La Rose*, 99 Ind. 117.

The earlier cases in *Indiana* took a contrary view. See *Brady v. Murphy*, 19 Ind. 258; *Reasor v. Raney*, 14 Ind. 441; *State v. Pierce*, 22 Ind. 116; *Robbins v. Dishon*, 19 Ind. 204. But these cases were expressly *overruled* in *Lytle v. Lytle*, 37 Ind. 281.

In *Ohio* it has been held that a foreign judgment is not a written instrument of indebtedness a copy of which must be filed with the petition under the code, § 117 (*Cox v. Farley*, 2 West L. M. (Ohio) 315), and that it is not proper to insert a copy of the transcript sued on or annex a copy as an exhibit. *Renniman v. Dean*, 2 Wkly. L. Gaz. (Ohio) 2. If it is included in or attached as an exhibit to the petition, it will be stricken out on motion. *Judd v. Dean*, 2 Disney (Ohio) 210. But in *Wehrman v. Reakirt*, 2 Cinc. Super. Ct. Rep. 29, it was said that a copy of the judgment need not be exhibited as a part of the petition, and cannot properly be so exhibited, but a copy ought to be filed with the petition, under the code, § 117, and in *Dougherty v. Longmore*, 2 Cinc. Super. Ct. Rep. 134, it was held that unless a copy of the judgment sued on is attached to and filed with the petition, or a statement of the reason of its absence given, a demurrer will lie.

In *Fordyce v. Marks*, 1 Am. L. Rec. (Ohio) 257, *affirmed* in 2 Am. L. Rec. (Ohio) 392, it is held that in an action on a judgment of a sister state the petition must aver facts sufficient to enable the plaintiff to recover, since the record cannot be made part of the petition under the code, § 122, although it should be filed with or attached to it under section 117, which applies to such written instruments as are mere evidences and by such filing do not become part of the record.

In *Memphis Medical College v. Newton*, 2 Handy (Ohio) 163, it is said that the transcript of the record is not "an instrument of writing for the unconditional payment [of money] only," and cannot therefore be made an exhibit under the code, § 122, but that it seems that such transcript is "a written instrument as evidence of indebtedness" under section 117 of the code, the court saying that "section 117 was intended as a substitute for oyer under the former practice, and perhaps as a requisition on a plaintiff to give in advance those copies of written instruments on which the action might be founded, which he might have been required to give, on an application for that purpose, under the former practice act. *Swan's Stat.* 670."

4. *Burnes v. Simpson*, 9 Kan. 658; *Jefferson v. Alexander*, 84 Ill. 278, *followed* by *Lambert v. Jonte*, 28 Ill. App. 591. See also *Ohio* cases cited in preceding note.

Remedy for Failure to File Transcript. — In *Burnes v. Simpson*, 9 Kan. 658, the court said: "We think this was such an instrument as the code requires to be filed with the pleadings; but the defect was one to be corrected on motion, not by demurrer. In states like *Indiana*, where the code makes the instrument or account on which the pleading is founded a part of the

Exhibit as a Part of the Pleadings. — A copy of the transcript filed as an exhibit constitutes no part of the pleadings, and therefore will not aid a defective declaration; nor, on the other hand, will defects apparent in the record set out render a declaration demurrable that is otherwise good.¹

Authentication of Exhibit. — The exhibit filed need not be authenticated.²

Note Sued On Originally. — In an action on a foreign judgment it is not necessary to file a copy of the note on which the judgment was obtained.³

record, the not filing it may well be taken advantage of by demurrer; but in a code like ours such a practice is not logical, and ought not to be enforced." But see *Indiana* cases cited in next succeeding note.

1. *McLaughlin v. Nichols*, 13 Abb. Pr. (N. Y. Supreme Ct.) 244; *Wharton v. Wilson*, 60 Ind. 591; *Wilson v. Vance*, 55 Ind. 584; *Knight v. Flatrock, etc.*, *Turnpike Co.*, 45 Ind. 134; *Noble v. McGinnis*, 55 Ind. 528; *Pollard v. Bowen*, 57 Ind. 232; *Wyant v. Wyant*, 38 Ind. 48; *Brooks v. Harris*, 41 Ind. 390; *Kokomo v. State*, 57 Ind. 152; *Lytle v. Lytle*, 37 Ind. 281, *overruling* *Reasor v. Raney*, 14 Ind. 441; *Norris v. Amos*, 15 Ind. 365, and other cases following these decisions. See also *Deem v. Crume*, 46 Ill. 69.

Illustrations. — In *Becknell v. Becknell*, 110 Ind. 42, the action was brought upon a decree for alimony. A copy of the decree filed with the petition showed that the amount sued for was not yet due. The defendant, therefore, demurred, but the demurrer was overruled. The court said: "In construing these provisions of the code, we have uniformly held that a judgment was not a written instrument, within the meaning of the statute, and that the filing of a copy thereof with a pleading would not make the judgment a 'part of the record.' *Wilson v. Vance*, 55 Ind. 584; *Ryan v. Curran*, 64 Ind. 345; *Logansport v. La Rose*, 99 Ind. 117." But see *Ault v. Zehering*, 38 Ind. 429, where a demurrer for defects in the transcript set out was considered without reference to the question whether or not a demurrer was proper at all. In several earlier cases in *Indiana* it has been held that a demurrer would lie for defects in the transcript set out, as where it shows insufficient service or the like, upon the theory that such transcript constitutes part of the pleading. See *Ashley v. Laird*, 14 Ind. 222;

Snyder v. Snyder, 25 Ind. 399. But see *Lytle v. Lytle*, 37 Ind. 281, repudiating this theory and overruling earlier cases. In *Toledo, etc., R. Co. v. McNulty*, 34 Ind. 531, it was held that where the copy of the judgment filed shows upon its face that the judgment is invalid, a demurrer to the pleading is properly sustained, unless the allegations of the pleading are such as to warrant the introduction of extrinsic evidence which would render the judgment valid.

2. *White v. Treon*, 25 Kan. 484, holding that a failure to have the transcript authenticated is not ground for demurrer.

Affidavit of Defense. — "It is also argued that the judgment was not certified according to the Act of Congress, and therefore no judgment can be entered for want of an affidavit of defense. But while the insufficiency of the certificate must be conceded, and while this would have constituted a valid objection to its admission in evidence on the trial, it has been well decided by this court that it is unavailing in an affidavit of defense. *Moore v. Fields*, 42 Pa. St. 467, and *Wetherill v. Stillman*, 65 Pa. St. 105. In the latter case *Thompson, C. J.*, said: 'No doubt a well-founded objection of this kind would prevent it being evidence in a trial at law; but that is quite another thing from the purpose it serves as the foundation of the plaintiff's claim under the affidavit-of-defense law or rule of court.' We think the learned court below was right in entering judgment for want of an affidavit of defense, and therefore the judgment is affirmed." *Mink v. Shaffer*, 124 Pa. St. 280.

Neither Placita nor Authentication is necessary in a copy of a judgment filed with the complaint thereon. *Snyder v. Snyder*, 25 Ind. 399.

3. *Hogg v. Charlton*, 25 Pa. St. 200.

Assignment to Plaintiff. — Where the plaintiff claims as assignee a copy of the assignment need not be filed.¹

g. AVERMENT THAT JUDGMENT REMAINS IN FORCE, UNSATISFIED — Statement of Rule. — In pleading a judgment it is usual to aver that "it remains in full force and virtue, and in no wise set aside, reversed, or held for naught;" but the better opinion seems to be that such an averment is not a substantial one, and being only a matter of form its omission will not render the declaration demurrable.²

Demurrer. — Where, however, the declaration shows on its face that the judgment does not remain in full force and virtue, it is demurrable.³ Thus a complaint on a judgment is demurrable which shows on its face that no execution has been issued for twenty years, unless the complaint states facts which rebut the presumption of payment.⁴

1. *Love v. Fairfield*, 10 Ill. 303, holding that where a suit is brought upon a judgment in the name of A for the use of B, it is not necessary to file with the declaration a copy of the assignment.

2. *Vaden v. Ellis*, 18 Ark. 355; *Carter v. Paige*, 80 Cal. 390; *Law v. Vierling*, 45 Ind. 25; *Campbell v. Cross*, 39 Ind. 155; *Blake v. Burley*, 9 Iowa 592; *Simpson v. Huston*, 14 Tex. 476; *Thurmond v. Georgia Bank*, (Tex. Civ. App. 1894) 27 S. W. Rep. 317.

It is sufficient to allege that the amount claimed is due thereon. *Blake v. Burley*, 9 Iowa 592.

3. *Gilpin v. Baltimore, etc., R. Co.*, (C. Pl.) 17 N. Y. Supp. 520.

Demurrable Complaints. — A complaint in an action on a foreign judgment, alleging that the plaintiff recovered a judgment against the defendant in the Superior Court of another state, no part of which has been paid; that the same remains in force and effect; that on motion of the defendant the judgment was vacated, annulled, and set aside by such court; that by writ of certiorari the entire proceedings were referred to the Supreme Court, where a judgment against the defendant and in favor of the plaintiff was rendered, adjudging that the order of the Superior Court vacating the judgment be set aside, and that the plaintiff recover her costs; but failing to allege any remittitur from the Supreme Court to the Superior Court, does not state a cause of action. *Cougill v. Farmers' Ins. Co.*, 25 Oregon 360.

Where the complaint alleges that the judgment sued on was "for damages sustained by plaintiff by reason of the

fraud and deceit of defendant, alleged in the complaint," such allegation is not absolute, but is limited to the fraud and deceit alleged in the complaint in the former action, and even a failure to deny such averment will not operate as an admission that the former judgment was based on fraud so as to show that the judgment was not discharged in bankruptcy, unless such fraud was the gravamen of the former action. *Thomas v. Snyder*, 77 Hun (N. Y.) 365.

4. Rebutting Presumption of Payment. — "But a presumption of payment from lapse of time may be raised by demurrer when shown by the facts stated in the complaint, as was done in *Olden v. Hubbard*, 34 N. J. Eq. 85. And to repel such presumption any existing circumstances which would have that effect should be alleged. In *Solomon v. Solomon*, 81 Ala. 507, it was held that the presumption of payment arising from the lapse of time may be taken by demurrer when shown by the facts stated, but that it is a matter of defense and must be claimed, the court saying: 'While the defense of staleness may be made by demurrer when the facts out of which it springs appear on the face of the bill (Story's Eq. Pl., §§ 404, 503, 751), still it is defensive and must be claimed.' *Maury v. Mason*, 8 Port. (Ala.) 211; *Solomon v. Solomon*, 83 Ala. 395. Taking the objections by demurrer is in analogy to the rule applied to the statute of limitations, as indicated in *Olden v. Hubbard*, 34 N. J. Eq. 85, so that to avoid the presumption and render the complaint invulnerable to a demurrer the plaintiff is

Negating Appeal. — The declaration need not allege that no appeal has been taken.¹

Averment of Nonsatisfaction. — It is necessary, however, to aver that the judgment is unsatisfied.²

h. AD DAMNUM CLAUSE. — Where the amount of a judgment is truly described, a declaration for a balance due thereon is not demurrable for failure to state the amount sought to be recovered

required to allege in his complaint the facts and circumstances on which he relies to rebut such presumption." *Beekman v. Hamlin*, 20 Oregon 352.

Avoiding Statute of Limitations. — An action on a foreign judgment is not barred because not commenced within six years after it was rendered, if the complaint alleges, and it is not denied in the answer, that the defendant was out of and absent from the state where the action was brought, at the time said judgment was rendered, "and did not come into or return" to said state thereafter "until less than six years prior to the commencement" of the action, because the complaint brings the case within section 123 of the Code of Procedure, which provides that if a cause of action accrues against a person who is out of the state, it may be commenced within the time limited after his "return" into the state. *Lake v. Steinbach*, 5 Wash. 659. And see *Marx v. Sanders*, 98 Ala. 500. See also article LIMITATIONS, STATUTES OF.

1. *Chaquette v. Ortet*, 60 Cal. 594; *Bronzan v. Drobaz*, 93 Cal. 647.

2. *St. Louis, etc., R. Co. v. Miller*, 43 Ill. 199; *Dimick v. Brooks*, 21 Vt. 569.

A Correct Declaration in Debt on judgment always alleges that the judgment is not satisfied. This is so essential that if omitted the declaration would be ruled insufficient on demurrer. *Dewey v. Bradbury*, 2 Tyler (Vt.) 201.

It is sufficient to state that the amount of the judgment is unpaid. *Blake v. Burley*, 9 Iowa 592.

Alleging Debet and Detinet. — A declaration in debt upon a judgment was held bad on special demurrer for lack of the debet and detinet in *Adams v. Campbell*, 4 Vt. 447.

Liability and Breach must be averred in an action on the case brought on a judgment from a sister state. *Spencer v. Brockway*, 1 Ohio 259.

Sufficiency of Averments that Judgment Remains Unsatisfied. — An allegation that the judgment remains in full force and unpaid or unsatisfied is sufficient.

Chaquette v. Ortet, 60 Cal. 594; *O'Neal v. Kittredge*, 3 Allen (Mass.) 470.

An allegation that the judgment remains valid and in full force is equivalent to an allegation that the judgment is unpaid. *Wise v. Loring*, 54 Mo. App. 258.

An averment in an action of debt on a judgment that the judgment has not been paid or satisfied is equivalent to an allegation that it has not been settled. *St. Louis, etc., R. Co. v. Miller*, 43 Ill. 199.

In declaring on a judgment for several sums of money, each of which sums the judgment adjudges shall bear interest from a date prior to the rendering of the judgment, and some at a higher rate than six per cent. per annum, the payment of the interest accruing must be specially negated in the breach. *Louisiana Bank v. Watson*, 4 Ark. 518.

"The declaration sets out a judgment, and avers that the same remains in full force, not reversed, annulled, or satisfied; which is substantially good, without setting out the doings of the officer upon the execution. And if this were not so, the defect must be considered a formal one, and would be cured by pleading over, the supposed deficiency in this case being supplied by the defendant's first plea, in which he alleges a commitment under the execution." *Dunning v. Owen*, 14 Mass. 157.

An averment that the defendant in a judgment is insolvent, that the execution has been returned "no property found," and that the judgment has been drawing interest from the date of its rendition, amounting to a sum specified, is a sufficient averment that the judgment remains in force and unsatisfied. *Simpson v. Huston*, 14 Tex. 476.

Where the defendant introduced the execution returned in support of his plea of payment and satisfaction, it was held that a general averment in the plaintiff's petition that the judgment

or the amount due on the judgment.¹ The usual *ad damnum* clause is a sufficient allegation of damages to entitle the plaintiff to recover interest.²

6. Plea or Answer — *a.* SCOPE OF INQUIRY. — This section treats solely of the manner of pleading defenses to actions upon judgments. The sufficiency of facts to constitute a defense is a question of substantive law, and as such is beyond the scope of this article.³

Res Judicata. — Thus it is a general rule that no defense is available which was or might have been urged in defense of the original action.⁴ The reason for this is that such matters are *res judicata*. This subject is fully considered elsewhere.⁵

Equitable Defenses. — In some states equitable defenses are available in actions at law.⁶ Wherever this practice prevails, equitable

remained unsatisfied and not discharged was not a sufficient foundation for the introduction of testimony contradicting the return. *O'Conner v. Silver*, 26 Tex. 606.

A declaration which sets forth the recovery of the judgment, an issue of execution, and an acknowledgment of satisfaction by receipt of a note for the amount thereof, that the note was by mistake written for a smaller sum than the amount of the execution, and that the judgment to that extent is unsatisfied, shows a good cause for action for the unsatisfied part of the judgment. *Canfield v. Miller*, 13 Gray (Mass.) 274.

1. *O'Neal v. Kittredge*, 3 Allen (Mass.) 470, wherein Bigelow, C. J., said: "We can see no defect in this declaration. The plaintiff was not bound to set out the precise sum which he might be entitled to recover upon the judgment declared on. That would depend on the state of the evidence at the trial. The cause of action, to wit, the judgment, is described with substantial certainty and precision. Strictly speaking, if any payment had been made which reduced the amount due on the judgment, it was matter in defense, which the defendant was bound to aver and prove. Therefore he has no reason to complain that the plaintiff has declared only for a balance, instead of setting out a claim for the whole amount for which the judgment was originally rendered."

2. *Allen v. Lyman*, 27 Vt. 20.

3. See the title *Judgments*, Am. and Eng. Encyc. of Law.

4. *Alabama*. — *Crawford v. Simon-ton*, 7 Port. (Ala.) 110; *Allgood v. Whitley*, 49 Ala. 215.

Arkansas. — *Ellis v. Clarke*, 19 Ark. 420; *Morris v. Curry*, 41 Ark. 75.

Georgia. — *McAllister v. Singer Mfg. Co.*, 64 Ga. 622.

Illinois. — *Guinard v. Heysinger*, 15 Ill. 288.

Indiana. — *Brown v. Trulock*, 4 Blackf. (Ind.) 429; *Burton v. Stewart*, 11 Ind. 238; *Indianapolis, etc., R. Co. v. Risley*, 50 Ind. 60.

Iowa. — *Jackson v. Fletcher*, 1 Morr. (Iowa) 230.

Kansas. — *Snow v. Mitchell*, 37 Kan. 636.

Maine. — *Noble v. Merrill*, 48 Me. 140; *Bird v. Smith*, 34 Me. 63.

Maryland. — *Shupp v. Hoffman*, 72 Md. 359.

Massachusetts. — *Flint v. Sheldon*, 13 Mass. 443, 7 Am. Dec. 162.

Missouri. — *Poorman v. Mitchell*, 48 Mo. 45.

New Hampshire. — *Tappan v. Heath*, 16 N. H. 34.

North Carolina. — *Ludwick v. Fair*, 7 Ired. L. (N. Car.) 422, 47 Am. Dec. 333.

Tennessee. — *Bolling v. Anderson*, 1 Tenn. Ch. 127.

Texas. — *Taylor v. Harris*, 21 Tex. 438; *Bullock v. Ballew*, 9 Tex. 498; *Bridges v. Samuelson*, 73 Tex. 522.

Wisconsin. — *Morris v. Boomer*, 16 Wis. 547.

United States. — *Biddle v. Wilkins*, 1 Pet. (U. S.) 692; *Wittmore v. Malcolmson*, 28 Fed. Rep. 605.

England. — *Hayward v. Ribbans*, 4 East 311.

5. See the title *Res Judicata*, Am. and Eng. Encyc. of Law.

6. See article *EQUITABLE DEFENSES*, vol. 7, p. 799.

defenses may be set up in actions upon judgments.¹ Equitable relief in an independent suit in chancery is treated in another chapter of this article.²

Want of Jurisdiction is not always available as a defense to an action upon a judgment. Whether it is or is not available must be determined under rules elsewhere fully discussed.³

b. GENERAL RULES — Denials. — Where the defense consists merely of a denial of a material averment in the declaration or petition the denial must be direct and certain.⁴ A denial of legal conclusions is insufficient.⁵

Pleading New Matter. — Where the defendant seeks to set up new matter as an affirmative defense, he must plead the facts constituting such defense.⁶

1. See the title *Judgments*, Am. and Eng. Encyc. of Law.

2. See *infra*, XXI. *Equitable Relief Against Judgments*.

3. See the article JURISDICTION, vol. 12, p. 114. See also the titles *Judgments* and *Jurisdiction*, Am. and Eng. Encyc. of Law.

4. **Denial on Information and Belief.** — In *Vassault v. Austin*, 32 Cal. 597, it was held that the recovery of a judgment is not presumptively within the knowledge of the defendants, and therefore if the complaint avers the recovery of a judgment against one of several defendants, the court in which it was recovered, and the date and amount of the judgment, such facts may be denied in the answer upon information and belief. Compare *Roblin v. Long*, 60 How. Pr. (N. Y. Supreme Ct.) 200, holding, in an action on a foreign judgment in which the defendant had appeared and answered, that the answer, denying knowledge or information sufficient to form a belief, is a sham.

Denial under Oath. — Under *Iowa* Laws of 1853, c. 108, § 1, in an action by an assignee on a judgment rendered in a sister state where the plaintiff properly avers the assignment to him, it must be denied by the defendant under oath in order to make it necessary for the plaintiff to prove the assignment. *Edmonds v. Montgomery*, 1 Iowa 143.

Denial of Immaterial Averment. — Where the declaration alleges an assignment of the cause of action to the beneficiary for a valuable consideration, a plea that the legal owner did not assign for a valuable consideration is demurrable, as the existence of a

consideration is immaterial. *Sammis v. Wightman*, 31 Fla. 10.

5. See article LEGAL CONCLUSIONS.

Denial of Legal Conclusions — Illustrations. — If the complaint contains averments of the rendition of a judgment against the defendant by a court of competent jurisdiction, and states the character of the judgment, an answer denying that the defendant became or was lawfully bound by the judgment is only a denial of a conclusion of law, and does not raise an issue of fact. If the judgment can be attacked collaterally the answer must specify the points of its invalidity. *People v. San Francisco*, 27 Cal. 655.

Allegations in a plea that a defendant, sued in one state on a judgment obtained in a court of a sister state, did not have his day in the latter court, or that the latter court did not have jurisdiction of him, are mere conclusions of law, and bad in substance, even though they have the basis of an accompanying allegation that there was no service of summons in the action in which the judgment sued on was rendered. *Sammis v. Wightman*, 31 Fla. 10.

6. "Even if the plea of failure of consideration was available in an action on a judgment, the plea to that effect in this case was defective in failing to state the facts showing the substance of the matter relied on as a defense. *Carmelich v. Mims*, 88 Ala. 335. There was no consent to accept the pleas in short." *Sims v. Herzfeld*, 95 Ala. 145.

Sufficiency of Answer Denying Plaintiff's Title. — An answer alleging that the judgment sued on does not belong to the plaintiff, but is the property of another named person, sufficiently apprises the plaintiff of the nature of the

It is Harmless Error to sustain a demurrer to a plea where the defendant has had the full benefit in another plea of the defense sought to be set up in such plea.¹

c. NUL TIEL RECORD — (1) *When Proper* — Courts of Record. — *Nul tiel record* is the proper form of the general issue in an action upon a domestic judgment² or upon a judgment rendered in a

defense relied on, and is therefore sufficient although the particulars of the assignment are not averred; it was therefore error to strike out the answer as not stating facts, but merely a conclusion. *Holcombe v. Tracy*, 2 Minn. 241.

Objection that Plaintiff Is Not Real Party in Interest. — Where the plaintiff in an action on a judgment is the legal owner, the objection that he is not the real party in interest must be raised by answer. *Ford v. Provident Sav. L. Assur. Soc.*, 9 N. Y. Wkly. Dig. 306.

Sufficiency of Objection that Leave Was Necessary. — See *Lyon v. Manly*, 32 Barb. (N. Y.) 51, 10 Abb. Pr. (N. Y.) 337, 18 How. Pr. (N. Y.) 267.

Vacation of Judgment. — In *Carpenter v. Goodwin*, 4 Daly (N. Y.) 89, it was held that the vacation of the judgment sued on subsequent to its entry could not be shown under a general denial, but must be specially pleaded as matter in avoidance. It was further held that where an order vacating the judgment was put in evidence under a general denial, and no application was made to the trial court to amend the pleadings, the judgment would, on appeal, be reversed, and the appellate court would refuse to disregard the defect or to order the amendment to be made *nunc pro tunc*. Compare *Kinsey v. Ford*, 38 Barb. (N. Y.) 195, wherein the complaint alleged a regular, valid, and legal judgment, and the answer put in issue the existence of such a judgment. It was held that any evidence tending to show the judgment illegal or void would be competent on the part of the defendant, and that, therefore, a copy of the record showing that since issue joined the judgment had been vacated was admissible.

In an action on a justice's judgment a plea that an appeal had been taken which by law vacated the justice's judgment was held not bad for want of an averment that a bond or recognizance was given on appeal, as this fact was necessarily implied in the allowance of the appeal. *Curtiss v. Beardsley*, 15 Conn. 518.

Alleging Law of Sister State. — A plea that the note on which a judgment of a court of a sister state was recovered was not produced or filed in the cause in which such judgment was obtained is bad on demurrer, for, in the absence of an allegation in the plea that the law of the state where the judgment sued on was rendered required the stated filing of the note, and made the judgment void for noncompliance, the demurrer does not admit that the law of that state required such filing. The same propositions are true of allegations to the effect that the judgment sued on was procured on proof by affidavit of the service of the summons, and on a complaint verified by a stated affidavit. *Sammis v. Wightman*, 31 Fla. 10.

Plea that Execution Is Available. — An answer to a complaint on a judgment averring that the defendant has ample property to satisfy the judgment, but has never been called on for property or money, and that an execution issued on the judgment was returned unsatisfied by order of the plaintiff, but containing no averment that any lien was lost thereby, or that the defendant was prejudiced in any way, is insufficient on demurrer. *Hansford v. Van Auker*, 79 Ind. 157.

1. *Sims v. Herzfeld*, 95 Ala. 145.

Error in sustaining a demurrer to a plea is immaterial error where there is another plea of similar effect upon which no issue was taken. *Sammis v. Wightman*, 31 Fla. 10.

2. *Crawford v. Simonton*, 7 Port. (Ala.) 110; *Hunt v. Mayfield*, 2 Stew. (Ala.) 124; *Andrews v. Flack*, 88 Ala. 294; *Lucas v. Copeland*, 2 Stew. (Ala.) 151; *Reynolds v. Robertson*, (Cal. 1884) 4 Pac. Rep. 1192; *Holt v. Alloway*, 2 Blackf. (Ind.) 108; *Hindman v. Mackall*, 3 Greene (Iowa) 170; *Wilbur v. Abbott*, 59 N. H. 132; *Westerwelt v. Lewis*, 2 McLean (U. S.) 511; *Mills v. Duryee*, 7 Cranch (U. S.) 481.

Nul Tiel Record Is the Only Proper Plea where the record involves no question of jurisdiction or fraud. *Hindman v. Mackall*, 3 Greene (Iowa) 170.

court of record of a sister state,¹ such judgments being regarded, under the Constitution and Acts of Congress as to full faith and credit, etc., as domestic judgments. But, as will be seen in succeeding sections, *nul tiel record* is not the only plea available in an action upon a judgment of a sister state.²

Courts Not of Record. — *Nul tiel record* is not a proper plea to an action on a judgment of a court not of record.³

A Foreign Judgment is not considered as a record, and a plea to such judgment of *nul tiel record* is bad.⁴

The Decrees of Courts of Chancery are not records, and *nul tiel record* is not a proper plea in an action thereon.⁵

Refusal to Permit Nul Tiel Record After Other Plea. — After “not guilty and issue” to an action of debt on a judgment, the court will not permit the defendant to plead *nul tiel record* without showing sufficient cause for not pleading it before.⁶

(2) *What May Be Shown under Plea* — (a) **Defenses Available.** — *Nul tiel record* is the proper plea where the defendant denies the

1. *Giles v. Shaw*, 1 Ill. 219; *Davis v. Lane*, 2 Ind. 548; *Hall v. Williams*, 6 Pick. (Mass.) 232; *M’Rae v. Mattoon*, 13 Pick. (Mass.) 57; *Carleton v. Bickford*, 13 Gray (Mass.) 594; *Marx v. Logue*, 71 Miss. 905; *Andrews v. Montgomery*, 19 Johns. (N. Y.) 162; *Benton v. Burgot*, 10 S. & R. (Pa.) 240; *Mills v. Duryee*, 7 Cranch (U. S.) 481. See also cases cited in preceding note, and see cases cited to the effect that *nil debet* is not a proper plea in an action upon a judgment of a sister state, *infra*, XVIII. 6. *d. Nil Debet*.

2. It is now generally held that want of jurisdiction is available as a defense provided it is specially pleaded. *Lucas v. Copeland*, 2 Stew. (Ala.) 151; *Andrews v. Flack*, 88 Ala. 294; *Hunt v. Mayfield*, 2 Stew. (Ala.) 124; *Holt v. Alloway*, 2 Blackf. (Ind.) 108; *Hindman v. Mackall*, 3 Greene (Iowa) 170; *Bissell v. Briggs*, 9 Mass. 462; *Borden v. Fitch*, 15 Johns. (N. Y.) 121; *Andrews v. Montgomery*, 19 Johns. (N. Y.) 162; *Shumway v. Stillman*, 6 Wend. (N. Y.) 447. Compare *Benton v. Burgot*, 10 S. & R. (Pa.) 240; *Mills v. Duryee*, 7 Cranch (U. S.) 481, apparently holding that *nul tiel record* is the only plea available in an action on a judgment of a court of record of a sister state. See also *infra*, XVIII. 6. *d. Nil Debet*; *f. Want of Jurisdiction*.

3. **Judgments of Justices of the peace** are not records generally, and therefore in an action upon such a judgment *nul tiel record* is bad. *Sherwood v. Johnson*, 1 Wend. (N. Y.) 443; *Witherwax*

v. Averill, 6 Cow. (N. Y.) 590; *Green v. Fry*, 1 Cranch (C. C.) 137. Compare *Bain v. Hunt*, 3 Hawks (N. Car.) 572.

Presumption that Court Was One of Record. — Where the proceedings and judgment of a court in a sister state are certified by the clerk and attested by the judge, and the proceedings are in form like those of a court of record, and the declaration such as is usual in such case, it will be intended, on a plea of *nul tiel record*, without further proof, that the judgment was rendered by a court of record. *Hughes v. Harris*, 2 Ala. 269.

4. *Draper v. Gorman*, 8 Leigh (Va.) 628; *Tourigny v. Houle*, 88 Me. 406; *Benton v. Burgot*, 10 S. & R. (Pa.) 241.

The opposite party may treat the plea as a nullity and take judgment. *Burnham v. Webster*, 4 Fed. Cas., No. 2178.

5. *Evans v. Tatem*, 9 S. & R. (Pa.) 252, 11 Am. Dec. 717; *Baxley v. Linah*, 16 Pa. St. 248.

Proper Form of Plea. — In *Evans v. Tatem*, 9 S. & R. (Pa.) 252, it was held, in an action upon a decree in chancery of a court of a sister state, that neither *nil debet* nor *nul tiel record* was a proper plea, and that if the defendant wished to deny the existence of the decree he should frame his plea so as to meet the averment in the declaration, and the tender of issue should conclude to the country.

6. *Bastable v. Wilson*, 1 Cranch (C. C.) 124.

existence of the judgment sued on, or desires to take advantage of a variance between the judgment rendered and that described in the declaration, and as a general rule these are the only questions raised by the plea.¹ But where, under a plea of *nul tiel record*, the record produced shows upon its face that the judgment is void as against the defendant, the plaintiff cannot recover.²

1. *Alabama*. — *Allen v. Allen*, Minor (Ala.) 249; *Crawford v. Simonton*, 7 Port. (Ala.) 110.

Georgia. — *Thornton v. Lane*, 11 Ga. 459.

Illinois. — *Giles v. Shaw*, 1 Ill. 219.

Maine. — *Lancaster v. Richmond*, 83 Me. 534.

Maryland. — *Thorner v. Batory*, 41 Md. 593.

Michigan. — *Gilbert v. Hanford*, 13 Mich. 40.

Mississippi. — *Phipps v. Nye*, 34 Miss. 330.

New Hampshire. — *Caouette v. Young*, (N. H. 1892) 32 Atl. Rep. 157; *Wilbur v. Abbott*, 59 N. H. 132.

Ohio. — *Goodrich v. Jenkins*, 6 Ohio 43.

Vermont. — *Stevens v. Fisher*, 30 Vt. 200; *Stevens v. Hewitt*, 30 Vt. 262.

United States. — *Jacquette v. Hugonon*, 2 McLean (U. S.) 129; *Lincoln v. Tower*, 2 McLean (U. S.) 473.

In *Code Practice* a general denial is equivalent to the common-law general issue of *nul tiel record*, and it is sufficient to require the plaintiff to prove the record sued upon. *Clarion First Nat. Bank v. Hamor*, 47 Fed. Rep. 36.

Illustrations. — Where the plaintiff sets out, by way of inducement, a judgment of a sister state, and an affirmance thereof on error in the appellate court, and the defendant pleads *nul tiel record* to the judgment mentioned, without specifying which one, an exemplification of the judgment of the appellate court which recites the record of the judgment below is sufficient. *Phipps v. Nye*, 34 Miss. 330.

In an action upon a judgment, with an averment that four executions had been issued thereon, issue was joined upon the plea of *nul tiel record*. It was held that the plea only denied and put in issue the judgment, and that the plaintiff was not bound, under this issue, to produce or prove the executions. *Stevens v. Hewitt*, 30 Vt. 262.

Estoppel to Deny Judgment. — For general purposes *nul tiel record* is the general issue in debt upon a judgment; and under it the plaintiff may prove

matter which estops the defendant from denying that there is such a judgment. *Wilbur v. Abbott*, 59 N. H. 132.

Where an Alternative Judgment in Replevin is declared on as an absolute judgment for money, a plea of *nul tiel record* must be sustained. *Thorner v. Batory*, 41 Md. 593.

Variance in Names of Parties. — A judgment rendered in favor of B by mistake for A cannot be sued on by A, even if it is averred and proved that the judgment was rendered in favor of A by the name of B; and the defect may be taken advantage of under the general issue and need not be pleaded in abatement. *Gilbert v. Hanford*, 13 Mich. 40.

Pendency of Appeal Will Not Sustain Plea. — *Suydam v. Hoyt*, 25 N. J. L. 230.

In *Dow v. Blake*, 148 Ill. 76, the plaintiff in error took the position that when the continuation of the record was produced, showing that the judgment sued upon had been repealed, it affirmatively appeared that there was no such record as that counted upon, and that, therefore, the plea of *nul tiel record* was supported. But the contention was not sustained.

In *McCall v. Crousillat*, 3 S. & R. (Pa.) 7, it was held that where the proceedings had been confirmed in the appellate court on error, and the record ordered to be sent back, it was to be considered as out of the appellate court, whether actually sent back or not; but that even if still in the appellate court, the issue on *nul tiel record* would be with the plaintiff, where the declaration did not state it to be in the court below, but only that judgment was given in the court below.

2. *Bruce v. Cloutman*, 45 N. H. 37; *Caouette v. Young*, (N. H. 1892) 32 Atl. Rep. 157; *Stevens v. Fisher*, 30 Vt. 200.

But he may recover if the judgment, though erroneous, is merely voidable and not void, and has not been set aside or reversed. *Bruce v. Cloutman*, 45 N. H. 37. See also *supra*, XVIII. 1. *g. Erroneous judgments.*

Accordingly, want of jurisdiction is available under a plea of *nul tiel record* where it affirmatively appears on the face of the record.¹ It seems that in determining whether the record shows a judgment valid where rendered the court should take judicial cognizance of the law of a sister state.² So, also, the record produced must show a judgment apparently unsatisfied.³ Extrinsic evidence, however, is inadmissible under a plea of *nul tiel record* to show any defense which does not appear upon the face of the record.⁴ On the other hand, it has been held that if the

Valid Where Rendered.—In *Hunt v. Mayfield*, 2 Stew. (Ala.) 124, the court said: "This recovery appears to have been authorized by the law of that state, and in the form pursued. Then should the plea of *nul tiel record* have been sustained to the suit brought on this recovery? or must not the defendant, if he could avail himself of the want of jurisdiction in the court, or other extrinsic matter of defense, have resorted to a special plea in bar? Under an issue of *nul tiel record*, the court can only inspect the record of recovery, and unless the want of jurisdiction, or some other insufficiency, appear, which would destroy the force and effect of the judgment in the state in which it was rendered, judgment must be given for the plaintiff. On this important subject it would be impossible to reconcile the decisions of the Supreme Court of the Union with those of the highest tribunals of some of the states; yet it must be admitted that as the question involves the construction of the federal Constitution, the decisions of the federal tribunal, having authority to control all others, must prevail."

1. *Arkansas*.—*Kimball v. Merrick*, 20 Ark. 12.

South Carolina.—*Clark v. Melton*, 19 S. Car. 498.

Tennessee.—*Barrett v. Oppenheimer*, 12 Heisk. (Tenn.) 298.

United States.—*Thompson v. Emmer*, 4 McLean (U. S.) 96; *Berger v. Williams*, 4 McLean (U. S.) 125.

"The plea of *nul tiel record* properly raises the question of the existence of the record sued on, and this plea is triable by the court; and when, on inspection of the record, it appears that the party sued in this state was not before the court at the trial, and that the court never had jurisdiction of his person, he having had no notice of the suit or opportunity to defend it, it is in fact no record as to him, and he is

not bound by the judgment therein rendered." *Barrett v. Oppenheimer*, 12 Heisk. (Tenn.) 298.

A judgment against a defendant named in the writ, but not made a party either by service, public notice, or attaching his estate, is merely void, and should be disregarded when produced on *nul tiel record*. *Armstrong v. Harshaw*, 1 Dev. L. (N. Car.) 187.

2. The reason is that in such case the court acts under the constitution and laws of the United States, which require that the judgment shall have in every state the same faith and credit as in the state where it was rendered, which faith and credit must therefore be passed upon by the court, and depend upon the laws of the sister state. And as the Supreme Court of the United States, where the case is ultimately cognizable, will take judicial cognizance of the law of the state where the judgment was rendered, the state court in which the suit on the judgment is brought must likewise do so, in order to be guided by the same rule which is to determine the appellate court on a writ of error. See *Barrett v. Oppenheimer*, 12 Heisk. (Tenn.) 298, and note; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *Ohio v. Hinchman*, 27 Pa. St. 479; *Baxley v. Linah*, 16 Pa. St. 241; *Rae v. Hulbert*, 17 Ill. 572; *Butcher v. Brownsville Bank*, 2 Kan. 70; *Wilson v. Jackson*, 10 Mo. 330.

3. *Blair v. Caldwell*, 3 Mo. 353.

4. *Hill v. Mendenhall*, 21 Wall. (U. S.) 453; *Bennett v. Morley*, 10 Ohio 100.

Where the record discloses a valid judgment, it cannot be impeached under *nul tiel record*. *Lancaster v. Richmond*, 83 Me. 536.

Under the plea of *nul tiel record*, the plaintiff cannot show *aliunde* that the parties or causes of action are different in the two suits. *State Bank v. Arnold*, 12 Ark. 180.

record fails to show jurisdiction, it cannot be aided by other evidence.¹

(b) *Defenses Not Available.* — A plea of *nul tiel record* raises no issue as to the validity of the declaration,² nor as to the justice of the original judgment,³ nor as to its payment⁴ or satisfaction.⁵ The assignment to the plaintiff of the judgment sued on is not put in issue by *nul tiel record*,⁶ nor can fraud in procuring the judgment⁷ or clerical error in taxing costs⁸ be shown under such a plea.

(3) *Trial by Inspection by the Court.* — The issue upon a plea of *nul tiel record* is to be tried by the court upon an inspection of the record produced, and not by the jury;⁹ and for this purpose the record or a copy thereof must be produced to the court.¹⁰

In *Fritz v. Fisher*, 5 Clark (Pa.) 350, in speaking of the defense of want of jurisdiction, the court said: "The defendant may indeed negative the presumption by pleading and proof; he may show that the court which has assumed to bind him had no authority over his person, and he may do this not only when the record is silent, but in opposition to its explicit entries or allegations; but if, instead of adopting this course, he confine himself to a plea of *nul tiel record*, and thus shut the plaintiff out from sustaining the record by extrinsic evidence, the judgment itself should be sufficient proof of its own invalidity."

1. *Kimball v. Merrick*, 20 Ark. 12.

2. *Dudley v. Lindsey*, 9 B. Mon. (Ky.) 486.

3. *Gay v. Lloyd*, 1 Greene (Iowa) 78.

4. *East St. Louis v. Canty*, 65 Ill. App. 325.

Except where the record shows a judgment apparently satisfied. *Blair v. Caldwell*, 3 Mo. 353.

5. Payment or satisfaction cannot be shown under *nul tiel record*. *Stephens v. Roby*, 27 Miss. 744; *Tunstall v. Robinson*, Hempst. (U. S.) 229.

6. *Marx v. Logue*, 71 Miss. 905, holding that this defense must be specially pleaded, and that it is too late to object in the Supreme Court for the first time that there was no evidence showing the transfer of the judgment to the plaintiff.

7. *Hindman v. Mackall*, 3 Greene (Iowa) 170.

8. *Snoddy v. Maupin*, 7 T. B. Mon. (Ky.) 51, holding, however, that such error may be shown in diminution of the sum to be recovered.

9. *Georgia.* — *Thornton v. Lane*, 11 Ga. 459.

Illinois. — *Foltz v. Prouse*, 15 Ill. 434.

11 Encyc. Pl. & Pr. — 73

Indiana. — *Hooker v. State*, 7 Blackf. (Ind.) 272.

Iowa. — *Hindman v. Mackall*, 3 Greene (Iowa) 170.

Kentucky. — *Dudley v. Lindsey*, 9 B. Mon. (Ky.) 486; *Stevenson v. Flournoy*, 89 Ky. 561.

Massachusetts. — *M'Rae v. Mattoon*, 13 Pick. (Mass.) 53; *Carleton v. Bickford*, 13 Gray (Mass.) 594; *Hall v. Williams*, 6 Pick. (Mass.) 232.

Mississippi. — *Wright v. Weisinger*, 5 Smed. & M. (Miss.) 210; *Cannon v. Cooper*, 39 Miss. 784; *Thompson v. Williams*, 7 Smed. & M. (Miss.) 270.

New York. — *Hoffheimer v. Stiefel*, 17 Misc. Rep. (N. Y. Supreme Ct.) 236. Compare *Fasnacht v. Stehn*, 53 Barb. (N. Y.) 650.

Tennessee. — *Barrett v. Oppenheimer*, 12 Heisk. (Tenn.) 298; *Ridley v. Buchanan*, 2 Swan (Tenn.) 555; *Hill v. State*, 2 Yerg. (Tenn.) 248; *Coffee v. Neely*, 2 Heisk. (Tenn.) 304.

Texas. — *Weathered v. Mays*, 4 Tex. 387.

Vermont. — *Stevens v. Fisher*, 30 Vt. 200.

United States. — *Wittmore v. Malcomson*, 28 Fed. Rep. 605.

10. *Rush v. Cobbett*, 2 Johns. Cas. (N. Y.) 256; *Fitch v. Porter*, 8 Ired. L. (N. Car.) 511; *Walton v. McKesson*, 64 N. Car. 77; *Wright v. Fletcher*, 12 Vt. 431.

As to the sufficiency of the record produced, its authentication, and other matters of evidence, see the title *Judgments*, Am. and Eng. Encyc. of Law.

Upon a plea of *nul tiel record* a record or copy must be exhibited for the inspection of the court. A deposition of facts independent of a docket cannot be received. *Silver Lake Bank v. Hardin*, *Wright* (Ohio) 430.

Where the record of a judgment has

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The original record need not be produced; a copy will be sufficient.¹

(4) *Conclusion by Verification or to the Country*.—A plea of *nul tiel record* should conclude with a verification, and not to the country, as such plea is tried by the court and not by the jury.² An error in this regard, however, being a matter of form, and subject formerly to a special demurrer, is amendable under the present practice.³

d. NIL DEBET — *Domestic Judgment*.—*Nil debet* is not a good plea in an action of debt upon a judgment of a domestic court of record.⁴ So in an action in a federal court upon a judgment rendered in a federal court of another circuit,⁵ or upon a

been destroyed, the first step towards obtaining a remedy is by proceeding in the court where it was given to the end that the record may be supplied. *Walton v. McKesson*, 64 N. Car. 77, wherein Reade, J., says: "In an action on a former judgment, the record of the judgment is the proper evidence thereof. Its production cannot be dispensed with, or supplied by any other evidence. The reason is that upon plea of *nul tiel record* the court decides upon the inspection of the record itself."

1. *Rathbone v. Rathbone*, 10 Pick. (Mass.) 1.

Upon an issue of *nul tiel record* upon a judgment of the Common Pleas, the Supreme Court does not direct the original record to be sent up, but receives copies attested by the clerk. *Ladd v. Blunt*, 4 Mass. 402.

"Upon the issue of *nul tiel record*, you must exhibit a record that we can receive—one either authenticated according to the Act of Congress or an examined copy." *Silver Lake Bank v. Hardin*, *Wright* (Ohio) 430.

2. *Hall v. Williams*, 6 Pick. (Mass.) 232; *Cannon v. Cooper*, 39 Miss. 784; *Wittemore v. Malcomson*, 28 Fed. Rep. 605; *Mills v. Duryee*, 7 Cranch (U. S.) 481.

The plea concludes with a verification, although it is a direct denial of the allegation in the declaration that there is such a record. *Wilbur v. Abbott*, 59 N. H. 132. Compare *Wright v. Weisinger*, 5 Smed. & M. (Miss.) 210, wherein it is said: "The rule is that in a plea of *nul tiel record* a verification is unnecessary, because the plea is in the negative. 1 Ch. Pl. 556; *Fanshaw v. Morrison*, 2 Salk. 520; 3 Ch. Pl. 994. An unnecessary averment may be rejected as surplusage, and does not viti-

ate. *Thrasher v. Ely*, 2 Smed. & M. (Miss.) 149."

3. *Wittemore v. Malcomson*, 28 Fed. Rep. 605

Where the declaration is on a domestic judgment rendered in a court of record, the plea of *nul tiel record* should conclude with a verification to the court only; otherwise where the record is of a foreign judgment, or if the court which rendered the judgment is not a court of record; then the plea should conclude to the country. But this is defect of form only and may be amended. *Thornton v. Lane*, 11 Ga. 459, citing *Dyson v. Wood*, 3 B. & C. 449, 10 E. C. L. 149.

4. *Adair v. Rogers*, *Wright* (Ohio) 428; *Chippis v. Yancey*, 1 Ill. 19; *Bullis v. Giddens*, 8 Johns. (N. Y.) 82; *Wheaton v. Fellows*, 23 Wend. (N. Y.) 375; *Sackett v. Andross*, 5 Hill (N. Y.) 327.

Reason for Rule.—*Nil debet* is a bad plea in an action on a domestic judgment for the reason that the merits cannot be re-examined. *Tappan v. Heath*, 16 N. H. 34.

Justice of the Peace.—In some states, justices' courts are regarded as courts of record, and where this is true *nil debet* is a bad plea in an action upon a justice's judgment. *Adair v. Rogers*, *Wright* (Ohio) 428.

In *Stevens v. Fisher*, 30 Vt. 202, the court said: "Justices' courts, with us, have always been regarded as courts of record, and in an action of debt on a justice judgment *nul tiel record* is the proper plea, and not *nil debet*." Ordinarily, justices' courts are not courts of record, and where this is true *nil debet* is a good plea in an action upon a justice's judgment. See *infra*, p. 1158.

5. *Reed v. Ross*, 1 Baldw. (U. S.) 36.

judgment rendered in a state court of record,¹ *nil debet* is a bad plea.

Judgments of Sister States. — Under the Constitution and Acts of Congress the judgment of a court of record in one state is entitled to full faith and credit in every other state; therefore it is held that *nul tiel record* is the only proper form of the general issue in an action upon a judgment of a court of record of a sister state, and a plea of *nil debet* is bad because the judgment is regarded as a record, and such plea would permit a re-examination of the merits.² Inasmuch, however, as judgments of courts of sister

1. *Bastable v. Wilson*, 1 Cranch (C. C.) 124; *Short v. Wilkinson*, 2 Cranch (C. C.) 22, holding that *nil debet* is not a good plea to an action of debt upon a judgment of a court of one of the states, but that the defendant may, by leave of court, withdraw it and plead *nul tiel record* upon payment of the costs of the term and a continuance of the cause, if the plaintiff should desire it.

2. *Alabama*. — *Andrews v. Flack*, 88 Ala. 294.

Arkansas. — *Hensley v. Force*, 12 Ark. 756.

Connecticut. — *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683. But see *Aldrich v. Kinney*, 4 Conn. 380.

Illinois. — *Chippis v. Yancey*, 1 Ill. 19; *Giles v. Shaw*, 1 Ill. 219; *Knickerbocker L. Ins. Co. v. Barker*, 55 Ill. 241; *Zepp v. Hager*, 70 Ill. 223; *Lawrence v. Jarvis*, 32 Ill. 304.

Indiana. — *Buchanan v. Port*, 5 Ind. 264; *Davis v. Lane*, 2 Ind. 548, 54 Am. Dec. 458; *Holt v. Alloway*, 2 Blackf. (Ind.) 108; *Indianapolis, etc., R. Co. v. Risley*, 50 Ind. 60; *Cline v. Crump*, 11 Ind. 125.

Maryland. — *Hughes v. Davis*, 8 Md. 271.

Mississippi. — *Marx v. Logue*, 71 Miss. 905.

Missouri. — *Wilson v. Jackson*, 10 Mo. 330.

New York. — *Shumway v. Stillman*, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374. See also *Starbuck v. Murray*, 5 Wend. (N. Y.) 148.

Ohio. — *Pelton v. Platner*, 13 Ohio 209.

Pennsylvania. — *Evans v. Tatem*, 9 S. & R. (Pa.) 252, 11 Am. Dec. 717; *Benton v. Burgot*, 10 S. & R. (Pa.) 240; *Baxley v. Linah*, 16 Pa. St. 248.

Tennessee. — *Earthman v. Jones*, 2 Yerg. (Tenn.) 484; *Coffee v. Neely*, 2

Heisk. (Tenn.) 304; *Turley v. Taylor*, 6 Baxt. (Tenn.) 376; *Glasgow v. Lowther*, *Cooke (Tenn.)* 464.

Vermont. — *Blodget v. Jordan*, 6 Vt. 580; *Newcomb v. Peck*, 17 Vt. 302.

Virginia. — *Kemp v. Mundell*, 9 Leigh (Va.) 12; *Clarke v. Day*, 2 Leigh (Va.) 172. Compare *Draper v. Gorman*, 8 Leigh (Va.) 628.

United States. — *Armstrong v. Carson*, 2 Dall. (U. S.) 302; *Mills v. Dur-yea*, 7 Cranch (U. S.) 481; *Hampton v. M'Connel*, 3 Wheat. (U. S.) 234; *M'Elmoyle v. Cohen*, 13 Pet. (U. S.) 312; *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Maxwell v. Stewart*, 22 Wall. (U. S.) 77; *Jacquette v. Hugunon*, 2 McLean (U. S.) 129; *Westerwelt v. Lewis*, 2 McLean (U. S.) 511.

Waiver of Objections to Plea — Proving Record. — "The question is, whether, under the plea of *nil debet*, the record of the judgment in Pennsylvania ought to have been proved. 1. If the plea of *nil debet* had any effect or operation, I think it was incumbent on the plaintiff to prove the record. It is the general issue, which admits nothing, and is a total and general denial of the plaintiff's right of action. 2. The question whether the plea was proper arises on the face of the record, and if improper it ought to have been answered by demurrer, or not to have been answered at all, and treated as a nullity. By taking issue upon it the plaintiff has treated it as a regular and competent plea. Having done this, he cannot afterwards consider it as a nullity, and on that ground dispense with proof which would otherwise be required. It is unnecessary here to determine whether *nil debet* or *nul tiel record* is the proper plea to an action of debt on a judgment given in another state." *Rush v. Cobbett*, 2 Johns. Cas. (N. Y.) 257.

Debt with Common Counts. — In an

states are not absolutely conclusive, but are subject to impeachment for want of jurisdiction, and perhaps for fraud, it is held in some states that *nil debet* is a good plea to an action upon such a judgment;¹ but the plea is not allowed to have its full effect in

action of debt upon a judgment of a sister state it seems that *nil debet* is a good plea to the common counts. Thus in an action against two defendants, where the common counts alleged that both defendants were in debt to the plaintiffs, and the plea averred as a traverse that one of the defendants, that is the one who pleaded, "does not owe," etc., the court said: "This is irregular, and the plea would, it may be, have been struck out on motion. Nevertheless, it is an argumentative denial of the truth of the counts to which it relates. If this defendant does not owe this money, it follows, as a necessary conclusion, that the two defendants do not. The vice of argumentativeness is not fatal on general demurrer." Mackay v. Gordon, 34 N. J. L. 286.

District of Columbia. — In Draper v. Gorman, 8 Leigh (Va.) 628, it was held, in an elaborately reasoned opinion, that a judgment of the District of Columbia must be regarded as a foreign judgment in an action on which *nil debet* would be a good plea. This was on the ground that the full faith and credit clause of the Constitution and Acts of Congress did not apply to the District of Columbia, but only to states. Compare Hughes v. Davis, 8 Md. 271, where a directly opposite conclusion was reached.

1. *Iowa.* — Hindman v. Mackall, 3 Greene (Iowa) 170.

Kentucky. — Williams v. Preston, 3 J. J. Marsh. (Ky.) 600.

Massachusetts. — Bissell v. Briggs, 9 Mass. 462; Hall v. Williams, 6 Pick. (Mass.) 247; Warren v. Flagg, 2 Pick. (Mass.) 448; Brainerd v. Fowler, 119 Mass. 265; M'Rae v. Mattoon, 13 Pick. (Mass.) 53.

New Hampshire. — Thurber v. Blackburne, 1 N. H. 242; Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319; Judkins v. Union Mut. F. Ins. Co., 37 N. H. 470.

New Jersey. — Beale v. Berryman, 30 N. J. L. 216; Curtis v. Gibbs, 2 N. J. L. 377.

But see Com. v. Green, 17 Mass. 515, where the court bowed to the rule thought to be laid down in Mills v.

Duryee, 7 Cranch (U. S.) 481, and Hampton v. McConnel, 3 Wheat. (U. S.) 234, and said that *nil debet* was not a good plea, thus overruling the opinion of Chief Justice Parsons in Bissell v. Briggs, 9 Mass. 462. This was in a criminal case, however, and may be regarded as *obiter dictum*. See Hall v. Williams, 6 Pick. (Mass.) 246.

Argument in Support of Rule — Mills v. Duryee Considered. — "The decision in Mills v. Duryee, 7 Cranch (U. S.) 481, so far as it seems to apply to the case of a judgment rendered without notice or appearance, was extrajudicial. No question of that kind arose in the case. The judgment there in suit was one in which, in the language of the judge who delivered the opinion, 'the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also.' The decision, if understood as it should be, with reference to the case before the court, has no application to a case where it did not appear that the defendant had notice. The marginal note, if corrected, should be that *nil debet* is not a good plea to an action founded on a judgment of another state, where it appears that the defendant had full notice of the action by being arrested and giving bail. This is clearly all that was decided, and the broad terms used are to be regarded, as to all beyond this, as loose flourishes or *obiter dicta* of a single judge. Thus limited, the decision is not in conflict with Thurber v. Blackburne, 1 N. H. 242, and other decisions of state courts. Gleason v. Dodd, 4 Met. (Mass.) 337. * * * But if the Supreme Court of the United States had, in terms, decided that the plea of *nil debet* was not good when pleaded in the state court to an action of debt on a judgment rendered in another state, their decision has not the weight of authority when cited in a state court. * * * The question what is the proper mode of pleading in a given case is a matter of remedy merely, as to which the local law al-

opening up the merits of the case, but only the jurisdiction of the court, fraud, or matters in discharge of the judgment can be inquired into. Even in those jurisdictions where *nil debet* is not regarded as a good plea on demurrer, it is held that such plea is good after verdict.¹

ways governs. *M'Elmoyle v. Cohen*, 13 Pet. (U. S.) 312. Congress, by their act, prescribed what was the faith and credit to be given in one state to judgments rendered in another; or, as is said in some cases, what was the effect and operation of such judgments; but they were not authorized, and did not assume, to direct anything as to the course of proceedings or the forms of pleadings in the courts of the states. And in order to settle what was the effect of a judgment of another state, or the faith and credit to be given to it, it was not necessary to interfere with the rules of pleading. Those rules were matters of purely municipal regulation, to be governed in each state by its own laws. It would surely be a great stretch of construction to hold that, by the statute of the United States relating to the authentication of judgments of other states, and to the faith and credit to be given to them, the state of New York was debarred from abolishing special pleading, or that the state of Louisiana, where special pleading was never admitted, should be compelled to allow the plea of *nil tiel record*. * * * All these decisions, and every decision which holds that the want of jurisdiction, as to the parties, may be shown under any form of pleading whatever, strike at the foundation of the early decisions in the United States court that *nil debet* is not a sufficient plea." *Judkins v. Union Mut. F. Ins. Co.*, 37 N. H. 470.

In *Thompson v. Whitman*, 18 Wall. (U. S.) 462, Bradley, J., said: "It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each state equivalent to domestic judgments in every other state, or at least of giving to them in every other state the same effect, in all respects, which they have in the state where they are rendered. And the language of this court in *Mills v. Duryee*, 7 Cranch (U. S.) 484, seemed to give countenance to this idea. The court in that case held that the act gave to the judgments

of each state the same conclusive effect, as records, in all the states, as they had at home; and that *nil debet* could not be pleaded to an action brought thereon in another state. This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed." Further on the learned justice quotes with approval the following language of Chancellor Kent: "'The doctrine in *Mills v. Duryee*, 7 Cranch (U. S.) 484,' says he, 'is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another state is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit.'" See also *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 606.

In *Starbuck v. Murray*, 5 Wend. (N. Y.) 158, it was remarked by the court that "so long as the question of jurisdiction is in issue, the judgment of a court of another state is, in its effect, like a foreign judgment; it is *prima facie* evidence; but for all the purposes of sustaining that issue, it is examinable into to the same extent as a judgment rendered by a foreign court. If the jurisdiction of the court is not impeached, it has the character of a record, and for all purposes should receive full faith and credit." This seems to be the necessary result of the course of decision on this subject. *Warren v. Flagg*, 2 Pick. (Mass.) 448.

In *Beale v. Berryman*, 30 N. J. L. 216, it was held under a statute that it is regular in an action upon a judgment of a sister state to plead *nil debet* and give notice of the facts relied upon to show want of jurisdiction.

1. *Wright v. Boynton*, 37 N. H. 9; *Rush v. Cobbett*, 2 Johns. Cas. (N. Y.)

Judgments of Justices in Other States. — *Nil debet* is a proper plea in an action of debt on a judgment recovered before a justice of the peace of a sister state.¹

Foreign Judgments. — *Nil debet* is a good plea to an action of debt on a foreign judgment.²

Nil Debet and *Nul Tiel Record* have been held to be inconsistent pleas,³ but nevertheless they have often been pleaded together without question,⁴ and it has been held that where *nul tiel record* and *nil debet* are both pleaded, it is error for the court to render final judgment on the plea of *nul tiel record* while the plea of *nil debet* remains undisposed of.⁵

Variance. — Advantage may be taken of a variance, under a plea of *nil debet*, where such plea is proper.⁶

Issue of Fact. — *Nil debet* raises an issue of fact to be tried by a jury.⁷

e. AFFIDAVIT OF DEFENSE. — Actions on judgments of sister states are within the affidavit-of-defense law of *Pennsylvania*.⁸

256; *Meyer v. M'Clean*, 2 Johns. (N. Y.) 183; *Swank v. State*, 3 Ohio St. 429.

1. *Warren v. Flagg*, 2 Pick. (Mass.) 448; *Graham v. Grigg*, 3 Harr. (Del.) 408.

In *Silver Lake Bank v. Harding*, 5 Ohio 545, it was held, in an action of debt in Ohio upon a judgment of a justice of the peace in Pennsylvania, that *nil debet* was not a good plea, a justice's court in Pennsylvania not being a court of record within the meaning of the constitution and laws of the United States. Compare *Adair v. Rogers, Wright (Ohio)* 428, which was an action of debt upon a judgment of a domestic justice. It was held that *nil debet* was not a good plea in such case, because "justices' courts in Ohio are regarded as courts of record. In *Silver Lake Bank v. Harding*, 5 Ohio 545, it was expressly approved.

2. *Beale v. Berryman*, 30 N. J. L. 216; *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 606, 20 Am. Dec. 179; Big. on Estop. (4th ed.) 671.

Nil debet is a plea of the general issue in debt on a foreign judgment. *Beale v. Berryman*, 30 N. J. L. 216.

The plea of "never indebted" is applicable to a declaration upon a foreign judgment, and puts the plaintiff to the proof of a judgment sufficient to support his action. *Graham v. Harrison*, 6 Manitoba L. Rep. 210.

3. "If the defendant has a right to plead *nil debet*, he has no right to plead that and *nul tiel record* also. They are inconsistent pleas, and the court, on

motion, will put the defendant to his election, and strike one of the pleas out." *Adair v. Rogers, Wright (Ohio)* 428.

4. See, for example, *Buford v. Kirkpatrick*, 13 Ark. 33; *M'Rae v. Mattoon*, 13 Pick. (Mass.) 53; *Judkins v. Union Mut. F. Ins. Co.*, 37 N. H. 470.

5. "The main question presented by the argument and record in this case is: Did the court err in rendering judgment on the plea of *nul tiel record* while the plea of *nil debet*, verified by affidavit, remained on the file and undisposed of? * * * While the court were right in trying the issue upon the plea of *nul tiel record*, yet they should not have rendered judgment upon the merits of the case on that issue while another issue was pending which could only have been tried by the jury, except by the defendant to submit it to the court." *Hindman v. Mackall*, 3 Greene (Iowa) 170. This action was debt on a judgment of a sister state, in which there had been no personal service on the defendant. See also *Buford v. Kirkpatrick*, 13 Ark. 33.

6. *Giles v. Shaw*, 1 Ill. 219.

7. *Hindman v. Mackall*, 3 Greene (Iowa) 170.

8. *Mink v. Shaffer*, 124 Pa. St. 289; *McCleary v. Faber*, 6 Pa. St. 476.

The record of a judgment of another state is an instrument requiring an affidavit of defense. *McCleary v. Faber*, 6 Pa. St. 476; *Hogg v. Charlton*, 25 Pa. St. 200; *Moore v. Fields*, 42 Pa. St. 467; *Luckenbach v. Anderson*,

In such case the plaintiff is entitled to a judgment for want of a sufficient affidavit of defense.¹

f. WANT OF JURISDICTION — (1) *Right to Plead*. — The right to impeach a judgment for want of jurisdiction has been elsewhere considered.² A summary statement of the rule is that in the majority of states want of jurisdiction cannot be set up as a defense against a domestic judgment.³ In a few states, however, want of jurisdiction may be pleaded in an action upon a domestic judgment.⁴ But where the judgment sued on is one of a foreign or a sister state, the jurisdiction of the court to render the judgment is always open to inquiry.⁵

(2) *How Pleaded* — (a) *Special Plea*. — Where want of jurisdiction is an available defense, it is usually held that such defense must be specially pleaded, and is not available under the general issue of *nul tiel record* or a general denial.⁶

47 Pa. St. 123; *Palmer v. March*, 64 Pa. St. 239; *Winner v. Carter*, 16 Leg. Int. (Pa.) 20.

1. *Luckenbach v. Anderson*, 47 Pa. St. 123.

The absence from the statement of the plaintiff in an action on a foreign judgment of some of the jurisdictional facts is not alone sufficient to prevent judgment for want of sufficient affidavit of defense, where an affidavit filed does not deny the existence of such jurisdictional facts. *Omaha First Nat. Bank v. Crosby*, 179 Pa. St. 63.

Sufficiency of Affidavit — Appeal With Supersedeas. — "The affidavit asserts that the appeal from the New Jersey judgment operated as a supersedeas, but this averment is of a legal conclusion; and the facts upon which the correctness of that conclusion depends are not alleged. It is not stated that the security required to suspend execution was entered. Moreover, even if it appeared that the appeal superseded the judgment, it is, to say the least, extremely doubtful whether the rule which was unqualifiedly laid down in *Union Trust Co. v. Rochester, etc., R. Co.*, 29 Fed. Rep. 609, would not still be applicable. The rule for judgment is made absolute." *Woodbridge, etc., Engineering Co. v. Ritter*, 70 Fed. Rep. 677.

2. See article *JURISDICTION*, vol. 12, p. 114.

3. *Miller v. Dungan*, 35 N. J. L. 391; *Kittredge v. Martin*, 141 Mass. 410; *Holt v. Thacher*, 52 Vt. 592.

A Domestic Judgment Against a Non-resident stands on no different grounds from other domestic judgments. A

judgment such as the court has competency to pronounce cannot, in an action thereon in the same jurisdiction, be impeached by citizen or foreigner by averment and proof that the court had not jurisdiction of the person of the defendant. There is no maxim of natural justice or principle of comity which requires the court to allow a nonresident to aver a fact contrary to the record while the same privilege is denied to resident citizens. *Miller v. Dungan*, 35 N. J. L. 390. And a plea of such facts will be stricken out on motion. *McCahill v. Equitable L. Assur. Soc.*, 26 N. J. Eq. 531.

4. See *Clark v. Little*, 41 Iowa 497; *Salladay v. Bainhill*, 29 Iowa 555; *Ferguson v. Crawford*, 70 N. Y. 253.

5. In such case, as has been seen, *nul tiel record* is not the only plea available, but a special plea setting up want of jurisdiction is permissible. See *supra*, p. 1158.

6. *Alabama*. — *Hunt v. Mayfield*, 2 Stew. (Ala.) 124; *Foster v. Glazener*, 27 Ala. 391; *Andrews v. Flack*, 88 Ala. 294; *Lucas v. Copeland*, 2 Stew. (Ala.) 151.

Arkansas. — *Nunn v. Sturges*, 22 Ark. 389; *Buford v. Kirkpatrick*, 13 Ark. 33.

Connecticut. — *Aldrich v. Kinney*, 4 Conn. 380.

Illinois. — *Bimeler v. Dawson*, 5 Ill. 538.

Indiana. — *Holt v. Alloway*, 2 Blackf. (Ind.) 108.

Iowa. — *Hindman v. Mackall*, 3 Greene (Iowa) 170.

New Jersey. — *Beale v. Berryman*, 30 N. J. L. 216; *Moulin v. Trenton Mut.*

Great Strictness Is Required in the plea. It is held that the plea must negative by certain and positive averments every fact on which jurisdiction can be legally predicated. If by any reason-

L., etc., Ins. Co., 24 N. J. L. 222; *Gilman v. Lewis*, cited in *Moulin v. Trenton Mut. L., etc., Ins. Co.*, 24 N. J. L. 246; *Mackay v. Gordon*, 34 N. J. L. 290.

New York. — *Hoffheimer v. Stiefel*, 17 Misc. Rep. (N. Y. Supreme Ct.) 236; *Crane v. Powell*, 139 N. Y. 388; *Brown v. Balde*, 3 Lans. (N. Y.) 283; *Ferguson v. Crawford*, 86 N. Y. 609; *Shumway v. Stillman*, 4 Cow. (N. Y.) 292, 6 Wend. (N. Y.) 448; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148; *Kerr v. Kerr*, 41 N. Y. 272; *Harrod v. Barretto*, 2 Hall (N. Y.) 302.

Ohio. — *Bennett v. Morley*, 10 Ohio 100.

Pennsylvania. — *Fritz v. Fisher*, 5 Clark (Pa.) 350.

Vermont. — *Price v. Hickok*, 39 Vt. 292.

Virginia. — *Wilson v. Mount Pleasant Bank*, 6 Leigh (Va.) 570; *Bowler v. Huston*, 30 Gratt. (Va.) 266.

United States. — *Mills v. Duryee*, 7 Cranch (U. S.) 481; *Biddle v. Wilkins*, 1 Pet. (U. S.) 686; *Hill v. Mendenhall*, 21 Wall. (U. S.) 453.

Reason for Rule. — The question came up squarely in *Hill v. Mendenhall*, 21 Wall. (U. S.) 453, and the court (at page 455), said: "*Nul tiel record* puts in issue only the fact of the existence of the record, and is met by the production of the record itself, valid upon its face, or an exemplification duly authenticated under the Act of Congress. A defense requiring evidence to contradict the record must necessarily admit that the record exists as a matter of fact, and seek relief by avoiding its effect. It should, therefore, be formally pleaded, in order that the facts upon which it is predicated may be admitted or put in issue. Under the common-law system of pleading this would be done by a special plea. The equivalent of such a plea is required under any system. The precise form in which the statement should be made will depend upon the practice of the court in which it is used, but it must be made in some form. Defects appearing on the face of the record may be taken advantage of upon its production under a plea of *nul tiel record*, but those which require extrinsic evidence to make them apparent must be

formally alleged before they can be proven. This we believe to be in accordance with the practice of all courts in which such defenses have been allowed, and it is certainly the logical deduction from the elementary principles of pleading."

In *Hoffheimer v. Stiefel*, 17 Misc. Rep. (N. Y. Supreme Ct.) 236, it was held that in order to make proof admissible, in an action on a judgment of a sister state, that such judgment was rendered without jurisdiction of the person, the defendants were bound to plead the facts upon which they relied in order to impeach the judgment, in order that the plaintiff might be prepared to meet the issue tendered, and that such facts could not be shown under a general denial. It seems from the opinion in this case that the reason why the facts could not be shown under a general denial is that a general or specific denial in the answer controverts only material allegations, or such facts as the plaintiff is compelled to prove in order to establish his cause of action. In this case, under a general denial in the defendants' answer, the defendants were not bound to prove service of process in the Missouri action otherwise than by a production of the record properly authenticated, and the affirmative was then cast upon the defendants of impeaching the record (*Ferguson v. Crawford*, 86 N. Y. 609), and this could not be done except by an affirmative plea setting up this defense. In other words, a general denial puts in issue nothing more than a plea of *nul tiel record* would put in issue. See, as to this last proposition, *Hill v. Mendenhall*, 21 Wall. (U. S.) 453; *Brown v. Balde*, 3 Lans. (N. Y.) 283.

In *Brown v. Balde*, 3 Lans. (N. Y.) 283, it is held that under the code a general denial to a complaint found upon a record puts in issue nothing more than a plea of *nul tiel record*, and if the defendant seeks to impeach the record he must give notice setting forth the facts specially. Cited in *Hoffheimer v. Stiefel*, 17 Misc. Rep. (N. Y. Supreme Ct.) 236.

In *New Jersey*, by statute, the general issue with notice of the subject-matter to be pleaded takes the place of a

able intendment the facts alleged in the plea can exist and the court rendering the judgment could still have had jurisdiction, the plea is bad.¹ Pleas of this character must present strong

special plea. *Beale v. Berryman*, 30 N. J. L. 216, holding, however, that the general issue in the case of an action upon the judgment of a sister state is *nul debet*.

1. *Alabama*. — *Foster v. Glazener*, 27 Ala. 391; *Puckett v. Pope*, 3 Ala. 552; *Bigger v. Hutchings*, 2 Stew. (Ala.) 445.

Arkansas. — *Barkman v. Hopkins*, 11 Ark. 157.

Connecticut. — *Smith v. Rhoades*, 1 Day (Conn.) 168.

Florida. — *Sammis v. Wightman*, 31 Fla. 10.

Illinois. — *Welch v. Sykes*, 8 Ill. 197; *Shufeldt v. Buckley*, 45 Ill. 223.

Iowa. — *Struble v. Malone*, 3 Iowa 586; *Lattourett v. Cook*, 1 Iowa 1.

New Jersey. — *Price v. Ward*, 25 N. J. L. 225; *Moulin v. Trenton Mut. L., etc., Ins. Co.*, 24 N. J. L. 222.

New York. — *Holbrook v. Murray*, 5 Wend. (N. Y.) 162; *Harrod v. Barretto*, 2 Hall (N. Y.) 302; *Shumway v. Stillman*, 4 Cow. (N. Y.) 129, 15 Am. Dec. 374; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; *Hoffheimer v. Stiefel*, 17 Misc. Rep. (N. Y. Supreme Ct.) 236.

Pennsylvania. — *Home Friendly Soc. v. Tyler*, 2 Pa. Dist. Rep. 693; *Polk County Bank v. Fleming*, 33 W. N. C. (Pa.) 75.

Washington. — *Aultman v. Mills*, 9 Wash. 68.

Canada. — *Montreal Min. Co. v. Cuthbertson*, 9 U. C. Q. B. 78; *McLean v. Shields*, 9 Ont. Rep. 699; *Addams v. Worden*, 6 L. C. Rep. 237.

England. — *Cowan v. Braidwood*, 1 M. & G. 882, 39 E. C. L. 694; *Reynolds v. Fenton*, 3 C. B. 187, 54 E. C. L. 187; *Smith v. Nicolls*, 5 Bing. N. Cas. 208, 35 E. C. L. 88.

The objection cannot be raised for the first time on appeal. *Lattourett v. Cook*, 1 Iowa 1.

Absence of Process or Legal Notice must be averred, or the plea will be bad. *Hoffheimer v. Stiefel*, 17 Misc. Rep. (N. Y. Supreme Ct.) 236; *Holbrook v. Murray*, 5 Wend. (N. Y.) 162; *Smith v. Rhoades*, 1 Day (Conn.) 168.

Appearance Either in Person or by Attorney must be negatived. *Foster v. Glazener*, 27 Ala. 391; *Struble v. Ma-*

lone, 3 Iowa 586; *Harrod v. Barretto*, 2 Hall (N. Y.) 302; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; *Shumway v. Stillman*, 4 Cow. (N. Y.) 292.

In *Sammis v. Wightman*, 31 Fla. 10, it was held that a plea to an action on a judgment obtained in a sister state which sets up that there was no service of summons on the defendant in the action resulting in such judgment is bad, as it does not exclude the possibility that he may have appeared in that action, but that this is not the case where the declaration shows that the court which rendered the judgment sued on obtained jurisdiction solely by service of summons.

In *Home Friendly Soc. v. Tyler*, 2 Pa. Dist. Rep. 693, it was held insufficient to aver that an attorney who appeared for the defendant did so without the defendant's authority, knowledge, or consent, but it must also be averred that such attorney was not the defendant's regularly retained attorney. But see *Wright v. Weisinger*, 13 Miss. 210, where it is held that it is a good plea for the defendant to aver that he had no notice of the proceedings in the former suit, without negating the fact that he appeared, as in such case, if the plaintiff designs to rely on the appearance of the defendant as an answer to the want of notice, he should plead that fact in a reply.

Illustrations of Sufficient Pleas. — A plea that the defendant was not a citizen of the state where the judgment was rendered; that he was not there at any time pending the suit; that he was not notified of its pendency by service of process or otherwise, and that he did not appear or defend the same, either personally or by attorney, is good and sufficient. *Puckett v. Pope*, 3 Ala. 552; *Bigger v. Hutchings*, 2 Stew. (Ala.) 445; *Welch v. Sykes*, 8 Ill. 197; *Shufeldt v. Buckley*, 45 Ill. 223; *Price v. Ward*, 25 N. J. L. 225; *Aultman v. Mills*, 9 Wash. 68.

In *Barkman v. Hopkins*, 11 Ark. 168, speaking of a plea substantially as above, the court said: "We know of no other means by which the court could have acquired jurisdiction of the person."

prima facie defenses. In a plea to the jurisdiction of a court of general jurisdiction, facts showing that the court did not have

Illustrations of Insufficient Pleas. — In a suit on a judgment obtained in another state, it is not a good plea by a domestic corporation to allege that process was not served on any one authorized to act for it in the suit, for it may have had an office and transacted business in such foreign state, and made the contract there, and the process may have been served on its president or other officer while in such state. *Moulin v. Trenton Mut. L., etc., Ins. Co.*, 24 N. J. L. 223.

It is not sufficient, in an action upon a sister state judgment, for a plea to the jurisdiction of the court rendering the judgment to aver that the defendant was not a resident of the state; it must also be shown that he was not in the state. *Wilson v. Jackson*, 10 Mo. 330.

For an illustration of a plea held, upon a very strict construction, insufficient to show want of jurisdiction of the person, see *Cowan v. Braidwood*, 1 M. & G. 882, 39 E. C. L. 604.

Jurisdictional Facts Alleged but Not Denied Are Admitted. — If the complaint avers fully all the facts upon which the jurisdiction of the court rendering it depended, and the answer does not deny them, all questions as to the defendant's liability are at rest, and his liability for the damages in the judgment cannot be disputed. *Pringle v. Woolworth*, 12 N. Y. Wkly. Dig. 554.

Sufficiency of Plea of Want of Jurisdiction of the Person. — See generally *Indianapolis, etc., R. Co. v. Harmless*, 124 Ind. 25; *Stevenson v. Flournoy*, 89 Ky. 561; *Cannon v. Cooper*, 39 Miss. 784; *Mackay v. Gordon*, 34 N. J. L. 286; *Price v. Ward*, 25 N. J. L. 225; *Cassidy v. Leitch*, 2 Abb. N. Cas. (N. Y. C. Pl.) 315; *Evans v. Instine*, 6 Ohio 117; *Waddams v. Burnham*, 1 Tyler (Vt.) 233.

Sufficiency of Plea to Jurisdiction of Subject-matter. — A plea that the court which rendered the judgment sued on had no jurisdiction of the subject-matter of the suit is bad, unless it is alleged that the plaintiff was not served and did not appear. The reason for this is that if the court acquired jurisdiction of the person of the defendant, the question of jurisdiction of the subject-matter was one fit and proper to be tried and determined in the previous action, and therefore it is *res judicata*.

Hensley v. Force, 12 Ark. 756. See also *Wilson v. Mount Pleasant Bank*, 6 Leigh (Va.) 570.

Exhibits in Aid of Answer. — A copy of the summons and indorsement of service thereon in the former action cannot be considered in aid of an answer setting up want of jurisdiction of the person, since only those written instruments which constitute the foundation of the defense can be made exhibits to the answer, and it is only such exhibits as are properly parts of the answer that aid or strengthen it. *Indianapolis, etc., R. Co. v. Harmless*, 124 Ind. 25.

Pleading Want of Jurisdiction Over Codefendant. — In an action against several joint defendants on a joint judgment of a sister state, one of such defendants can plead a want of jurisdiction in the foreign court over his codefendant. *Mackay v. Gordon*, 34 N. J. L. 286. Compare *Bacon v. McBean*, 3 U. C. Q. B. 305, where it was held, in assumpsit on a foreign judgment against two defendants, that a plea that one of them had never been served with process, and that he had no notice of the proceedings in a foreign court, was bad as setting up a defense for both which applied to one only.

Harmless Error. — Sustaining a demurrer to a plea to the jurisdiction is harmless error where the record produced shows that the court had jurisdiction. *Wright v. Weisinger*, 5 Smed. & M. (Miss.) 210.

Duplicity in Plea. — In *Waddams v. Burnham*, 1 Tyler (Vt.) 233, the plea alleged that the defendant at the time of the service of the writs in the former suit was not an inhabitant of the state of Connecticut, where the judgment was rendered, and it also alleged that the property attached in the former suit was not his property. The plaintiff demurred for duplicity, but the demurrer was overruled. "In this case the two facts set forth in the plea in bar go to show that the court in Connecticut had no jurisdiction of the causes in which the several judgments declared upon were rendered; and this is one entire defense, and no duplicity in pleading."

In *Wilson v. Mount Pleasant Bank*, 6 Leigh (Va.) 570, the defendants

jurisdiction must be alleged with absolute certainty in every particular.¹

The Plea Need Not State a Defense to the cause of action on which the judgment is founded.²

Waiver of Right to Bring Error. — Appearing in a suit upon a judgment and pleading want of jurisdiction do not constitute a waiver of the right to bring a writ of error in the original judgment.³

Question for Jury. — Where the issue on a plea of want of jurisdiction is as to the authority of an attorney to appear for the defendant, the question is for the jury.⁴

(b) **General Denial or General Issue.** — In some states it is held that

pleaded that they never executed the power of attorney under which the judgment sued on was confessed, and that they had no notice of the commencement or pendency of the suit in the state where the judgment was rendered. The court held that an objection to the plea on the ground of duplicity was not sustainable.

1. *Illinois.* — *Diblee v. Davison*, 25 Ill. 486.

Mississippi. — *Barringer v. Boyd*, 27 Miss. 473.

New Jersey. — *Mackay v. Gordon*, 34 N. J. L. 286.

New York. — *Storms v. Storms*, 1 Edw. Ch. (N. Y.) 586; *Pringle v. Woolworth*, 12 N. Y. Wkly. Dig. 554.

Pennsylvania. — *Motter v. Welty*, 12 Pa. Co. Ct. Rep. 82, 2 Pa. Dist. Rep. 39.

Washington. — *Ritchie v. Carpenter*, 2 Wash. 512.

A plea of want of jurisdiction in the court which rendered the judgment sued on must set forth the facts showing that the action was *coram non iudice*. *Storms v. Storms*, 1 Edw. Ch. (N. Y.) 586.

Averments of Legal Conclusions. — Averments in an answer to an action upon a foreign judgment, that it was "an irregular and void judgment," and "without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings," are mere averments of legal conclusions, and are insufficient to impeach the judgment without specifying the grounds upon which it is supposed to be irregular and void or without jurisdiction or authority. *Ritchie v. McMullen*, 159 U. S. 235.

"An averment that a party was not within the jurisdiction of a court is a mere expression of opinion as to the effect in law of such party's situation

or privilege. If the statement had been, as in the case of *Price v. Ward*, 25 N. J. L. 225, that this defendant was not served with process; that he did not appear; that he was not a resident or present within the jurisdiction of the court at any time pending the suit, or when the judgment was rendered, this court could see from such facts an apparent absence of jurisdiction in the court rendering the judgment; but the defect of the plea is that it states no facts, but in lieu of them instructs the court with an opinion." *Mackay v. Gordon*, 34 N. J. L. 286. An averment similar to this was discarded by Judge Marcy, in *Starbuck v. Murray*, 5 Wend. (N. Y.) 148.

An affidavit of defense in an action on a foreign judgment which avers want of jurisdiction in that "no process was legally served" must also state ground of such defense, *i. e.*, wherein the service was insufficient, especially where the record shows that the defendants were summoned. *Motter v. Welty*, 12 Pa. Co. Ct. Rep. 82, 2 Pa. Dist. Rep. 39.

Answer Showing Error but Not Want of Jurisdiction. — In an action on a judgment of a sister state, an answer alleging error in the exercise of jurisdiction, but not want of jurisdiction, is demurrable; and therefore an answer alleging that the judgment sued on was rendered on a complaint stating no cause of action is demurrable. *Williams v. Renwick*, 52 Ark. 160.

As to Constructive Admission of Jurisdiction in Answer, see *Ritchie v. McMullen*, 159 U. S. 235.

2. *Kingsborough v. Tousley*, (Ohio 1897) 47 N. E. Rep. 541.

3. *Eliot v. McCormick*, 144 Mass. 10.

4. *Kahn v. Lesser*, (City Ct.) 16 N. Y. Supp. 154, 28 Abb. N. Cas. (N. Y. C. Pl.) 77.

want of jurisdiction to render the judgment sued on may be taken advantage of under a general denial,¹ or under the general issue of *nil debet*.² Indeed, it has been seen, the one case in which *nil debet* is a good plea in an action upon a judgment of a court of record of a sister state is where it is sought to impeach such judgment for want of jurisdiction.³

(c) **Other Methods.** — In many states, by statute, a denial that the judgment sued on was “duly given or made” is sufficient to put the jurisdiction in issue.⁴ A denial of the jurisdiction alleged in the complaint necessitates its proof.⁵ In an action upon a judgment of a sister state the jurisdiction will be inquired into, whether pleaded or not, when the facts appear on the face of the record.⁶

g. DISCHARGE, PAYMENT, AND SATISFACTION. — Matters in discharge of a judgment sued on must be specially pleaded.⁷

1. *Crone v. Dawson*, 19 Mo. App. 214.

“We hold, then, that the jurisdiction of the Illinois court, rendering the judgment in suit, of the person of the defendant was put in issue by the general denial. And this is in accordance with reason, for the defendant, by proving that the court rendering the judgment against him had no jurisdiction of his person, would establish the fact that there was no judgment as alleged in the petition. The petition alleges a judgment. Such proof would establish that there was no judgment.” *Crone v. Dawson*, 19 Mo. App. 214, citing *Greenway v. James*, 34 Mo. 326.

Unauthorized Appearance of an attorney in the previous action may be shown under a general denial in an action on such judgment. *Hays v. Merkle*, 67 Mo. App. 55.

2. *Connecticut.* — *Aldrich v. Kinney*, 4 Conn. 380.

Iowa. — *Hindman v. Mackall*, 3 Greene (Iowa), 170.

Kentucky. — *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600.

Massachusetts. — *Bissell v. Briggs*, 9 Mass. 462; *Hall v. Williams*, 6 Pick. (Mass.) 247; *Warren v. Flagg*, 2 Pick. (Mass.) 448; *M’Rae v. Mattoon*, 13 Pick. (Mass.) 53. But see *Com. v. Green*, 17 Mass. 515.

Missouri. — *Crone v. Dawson*, 19 Mo. App. 214.

New Hampshire. — *Thurber v. Blackburne*, 1 N. H. 242; *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319; *Judkins v. Union Mut. F. Ins. Co.*, 37 N. H. 470.

New Jersey. — *Beale v. Berryman*,

30 N. J. L. 216; *Curtis v. Gibbs*, 2 N. J. L. 377.

New York. — *Starbuck v. Murray*, 5 Wend. (N. Y.) 148; *Shumway v. Stillman*, 6 Wend. (N. Y.) 447.

Virginia. — *Wilson v. Mount Pleasant Bank*, 6 Leigh (Va.) 570; *Draper v. Gorman*, 8 Leigh (Va.) 628.

United States. — *Thompson v. Whitman*, 18 Wall. (U. S.) 457.

Where the Record Does Not Show Jurisdiction. — Ordinarily, in debt on a foreign judgment, a plea averring that the defendant was without the jurisdiction of the court and had no notice should also allege that he did not, either in person or by attorney, appear to the action; but this rule only applies to cases in which the record shows that the court had jurisdiction of the person, and where this does not appear the defendant may, under the general issue, show that the court had no jurisdiction. *Foster v. Glazener*, 27 Ala. 391.

3. See *supra*, XVIII. 6. *d. Nil Debet*.

4. *Draggou v. Graham*, 9 Ind. 212; *Willey v. Strickland*, 8 Ind. 453. *Compare American Emigrant Co. v. Fuller*, 83 Iowa 599.

5. *Toledo, etc., R. Co. v. McNulty*, 34 Ind. 531. See also *Willey v. Strickland*, 8 Ind. 453.

6. *Kelly v. Hooper*, 3 Yerg. (Tenn.) 395.

7. *Stephens v. Roby*, 27 Miss. 744; *Tunstall v. Robinson*, Hempst. (U. S.) 229.

Discharge in Insolvency. — In an action on a foreign judgment, a plea of a discharge in insolvency under the law of the country in which the judgment was rendered should set out the law,

Thus, payment or satisfaction is a good defense, but it must be specially pleaded and cannot be proved under the plea of *nul tiel record*.¹

Nul Tiel Record and Payment Inconsistent. — Indeed, it has been held that *nul tiel record* and payment are inconsistent pleas, and that while a defendant may plead either, he cannot plead both.²

A Plea of Accord and Satisfaction is a good plea to debt on a judgment.³

so that it can be seen whether the discharge was from the indebtedness or from imprisonment for the debt. *Baker v. Palmer*, 83 Ill. 568.

1. *Tunstall v. Robinson*, Hempst. (U. S.) 229; *Baker v. Stonebraker*, 36 Mo. 338; *Hardwick v. King*, 1 Stew. (Ala.) 312.

"To an action on a record, a plea of payment was not good at common law. But if a judgment of record had been paid, the defendant had a right to demand a warrant to some attorney of the court, authorizing him to enter up satisfaction on the roll. 1 Archb. Pr. 325; 2 Saund. Pr. Cas. 713. But by the statute of 4 Anne, c. 16, § 12, payment may be pleaded to an action on a judgment, if the whole judgment be satisfied. 1 Chitty's Pl. 426." *Briley v. Sugg*, 1 Dev. & B. Eq. (N. Car.) 366, 30 Am. Dec. 172.

Partial Payment. — In debt on a judgment, under a plea of payment the defendant cannot properly be allowed the benefit of a partial payment. A plea of payment is one in bar, and should go to the entire amount of the judgment. Where, however, under such a plea, evidence of a partial payment was given without objection, and the jury allowed it, the Court of Appeals refused to set aside the verdict and order a new trial. *Colclough v. Rhodus*, 2 Rich. L. (S. Car.) 76. In this case the court said that the most approved and regular course of proceeding to obtain credit for a partial payment was by a rule to show cause.

Plea of Arrest and Imprisonment. — To an action of debt upon a judgment it is a good plea in bar that execution issued upon the judgment declared upon, and the defendant, by virtue thereof, was arrested and committed to prison, without averring that the defendant remained in prison until the commencement of the present action. Any facts which show that the debtor has been discharged from imprisonment without satisfaction of the judgment should be replied by the plaintiff.

Kinsman v. Page, 22 Vt. 628. See also *Day v. Abbott*, 15 Vt. 632; *Coburn v. Palmer*, 10 Cush. (Mass.) 273.

Issue on Plea of Satisfaction by Levy. — Where the defendant pleaded that the plaintiff had caused the amount of the judgment and all interest, costs, and charges to be levied and fully satisfied of the lands and estate of the defendant, and this plea was traversed and the issues joined, it was held that the only issue was whether the execution appeared to be satisfied by a levy regular upon its face, and that no question as to the validity of the levy was raised by the plea. *Pratt v. Jones*, 22 Vt. 341.

Under a Plea of Nul Tiel Record the plaintiff must produce a judgment that does not appear to be satisfied. *Blair v. Caldwell*, 3 Mo. 353.

2. *Riley v. Riley*, 20 N. J. L. 114. Compare *Stevens v. Fisher*, 30 Vt. 200, where *nul tiel record* and payment were both pleaded without any question as to the propriety of so doing.

3. *Hardwick v. King*, 1 Stew. (Ala.) 312.

Insufficient Accord and Satisfaction. — Under a plea that the judgment sued on has been compromised and discharged by the payment of a sum named to the judgment plaintiffs jointly, it is not competent to show an accord and satisfaction as to a part of the judgment under an agreement with one or both of such parties. To constitute a complete bar or defense the accord must have been fully executed. *Jackson v. Olmstead*, 87 Ind. 92.

Sufficiency of Plea. — To an action on judgment, the defendant pleaded that in consideration that the defendant would make and deliver at his shop, by a time named, certain winnowing mills, the plaintiff promised to receive the same in full payment and discharge of the judgment: and averred that, relying on such promise, the defendant did make said mills by the time named, and had them ready

h. FRAUD. — Fraud as a defense to an action on a judgment must be specially pleaded.¹ The facts constituting the fraud must be distinctly averred in the plea.²

7. **Replication.** — To a plea of *nul tiel record* in an action of debt on a judgment, the replication must state that there is such a record and conclude *prout patet per recordum*, with a prayer that it may be inspected by the court.³ To a special plea setting up want of jurisdiction to render the judgment sued upon, a replication is necessary.⁴ Where the defendant pleads payment, and

at his shop for delivery to the plaintiff. This was held a good plea in bar of the action. *Downer v. Sinclair*, 15 Vt. 495.

1. *Stevens v. Gaylord*, 11 Mass. 265.

As to the availability of fraud as a defense, see articles EQUITABLE DEFENSES, vol. 7, p. 799; JURISDICTION, vol. 12, p. 114. See also the title *Judgments*, Am. and Eng. Encyc. of Law. And see *infra*, XXI. *Equitable Relief Against Judgments*.

2. *Ritchie v. McMullen*, 159 U. S. 235; *Ambler v. Choteau*, 107 U. S. 589; *Miller v. Lovell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 835; *Wallingford v. Mutual Soc.*, L. R. 5 App. 685; *White v. Hall*, 12 Ves. Jr. 321. See also article FRAUD, vol. 9, p. 675.

Allegations that no legal judgment has been rendered, and charging fraud, without stating facts evidencing fraud, are mere conclusions of law, and demurrable. *Sammis v. Wightman*, 31 Fla. 10.

A plea of fraud in an action of debt on a judgment is insufficient, even on demurrer, unless it sets out the facts in which the fraud consists. *Hopkins v. Woodward*, 75 Ill. 62.

3. *Bone v. McGinley*, 7 How. (Miss.) 671; *Pearl v. Wellman*, 8 Ill. 311.

The omission of such conclusion is cured by verdict, and will not affect the judgment. *Pearl v. Wellman*, 8 Ill. 311.

Similiter Unnecessary. — The plea of *nul tiel record* does not present new matter, and the absence of a *similiter* to it is not ground for setting aside a verdict or arresting judgment. *Sammis v. Wightman*, 31 Fla. 10.

Estoppel to Plead Nul Tiel Record. — Special replication of matter estopping the defendant to deny that there was such a judgment as the one sued on will be rejected on motion, because the plaintiff can prove such matters upon the issue of *nul tiel record* without such special replication. *Wilbur v. Abbott*,

59 N. H. 132. Compare *Puckett v. Pope*, 3 Ala. 552.

Sufficiency of Replication. — Where a plea consists solely of matter of record, as, for example, "There is no such judgment," in a *scire facias post annum et diem*, the replication should reassert the record and conclude by praying that it may be inspected by the court; if it conclude to the contrary, it is error. "The second plea of the plaintiff in error, the defendant below, was *nul tiel record*, informally and shortly drawn up. In practice, it is not usual to conclude pleas either to the court or country, but if a plaintiff requires it the court will direct them to be put in a legal form. If this had been required, the defendant would have concluded this plea to the court, and the plaintiff below should have replied by reasserting his record, and concluded with a prayer that it might be viewed and inspected by the court and a day given to the parties. 1 Chitty's Pl. 480, 571; 2 Chitty's Pl. 625; 3 Black. Com. 330, 331." *Share v. Becker*, 8 S. & R. (Pa.) 239.

4. In *Zepp v. Hager*, 70 Ill. 223, it was held that the replication to a plea setting up want of jurisdiction of the court of a sister state over the defendant's person should properly reply that the record shows a personal service, and that the issue should be determined simply by an inspection of the record. See also *Lapham v. Briggs*, 27 Vt. 26. And as to sufficiency of replication to plea of no jurisdiction, see *Long v. Long*, 1 Hill (N. Y.) 597; *Buchanan v. Port*, 5 Ind. 264.

Replication of Appearance. — In *Wright v. Weisinger*, 5 Smed. & M. (Miss.) 210, it was held to be a good plea to an action of debt founded upon a judgment rendered in another state, that the defendant had no notice of the proceedings in the suit in which the judgment was rendered; and if, in such case, the

the plaintiff neglects to reply thereto, the defendant is entitled to judgment.¹

8. Judgment. — The judgment in an action upon a judgment is governed by ordinary principles.² The judgment is *quod recuperet*, and not a mere award of execution.³

9. Costs. — In an action upon a judgment, costs are in the main governed by ordinary principles,⁴ although, as has been seen, in

plaintiff relies on the appearance of the defendant as an answer to the want of notice, he should plead that fact in reply. But to the effect that a plea of want of jurisdiction must negative appearance, see *supra*, p. 1159.

Where the defendant pleads residence out of the state and no submission to the jurisdiction, and the record shows an appearance by attorney, such appearance is matter for a replication; and want of authority in the attorney is matter for a rejoinder. *Welch v. Sykes*, 8 Ill. 197.

Estoppel to Plead Want of Jurisdiction.

— In *Puckett v. Pope*, 3 Ala. 552, a plea setting up want of jurisdiction over the person of the defendant was held sufficient on demurrer, and it was further held that if there was anything in the record which would estop the defendant from interposing such a plea, the plaintiff should set it up in a reply.

Replication of Foreign Law. — Where, in an action on a foreign judgment, in reply to a plea of lack of jurisdiction, the plaintiff avers the foreign court to be possessed of powers which it did not have at common law, the plaintiff must set forth the statute conferring such powers. *Kohn v. Haas*, 95 Ala. 478.

1. *Pearl v. Wellman*, 8 Ill. 311.

2. Necessity of Re-entering. — In *Lander v. Rounsaville*, 12 Tex. 195, it was held that where an application was made in the District Court to enforce a judgment of the District Court against any special property or right in property, the judgment need not be re-entered; but that where the application was upon judgments before a magistrate, and especially where a portion of a claim still existed in contract, then a judgment should be rendered in form for the amount of the claim, with specific directions to meet the prayer of the petition and the exigencies of the case.

Conformity to Former Judgment. — In *Sanguinetti v. Roche*, (Supreme Ct.) 15 N. Y. Supp. 185, the action was

upon an English judgment against a married woman, which judgment contained a provision limiting its execution to her separate estate. It was held to be error in a suit thereon in New York to render a general judgment *in personam* without adding a limitation imposed by the English judgment. The court said: "A party may ask to have a foreign judgment enforced, but the enforcement must be in accordance with its precise terms. He may be entitled to have it enforced as written, but he can be entitled to nothing more. If it be replied that there is no such judgment *in personam* known to our laws as the judgment here sought to be enforced, that, surely, is no reason why the plaintiff should be granted another and a different judgment, merely because the latter is known to our laws. He must stand or fall upon the exact terms of his foreign judgment."

Judgment by Default. — In *Sturtevant v. Milwaukee, etc., R. Co.*, 11 Wis. 63, it was held that a default in an action upon a judgment admitted the existence of the judgment sued upon, and was conclusive although the first judgment was afterwards reversed. See also generally, as to judgments by default, *Mabry v. Erwin*, 78 N. Car. 45. And see article DEFAULTS, vol. 6, p. 1.

Findings. — In an action upon a judgment and upon promissory notes the court found that no part of the judgment had ever been appealed from, set aside, or paid, and that the balance of the notes, after deducting certain payments, remained unpaid. It was held that these findings were equivalent to a specific finding that the amount of the judgment and of the balance of the notes was due. *Turner v. Mahoney*, 56 Cal. 215.

3. *Duff v. Wynkoop*, 74 Pa. St. 300.

4. See article COSTS, vol. 5, p. 100.

Costs in Original Action. — If costs taxed against a judgment defendant, or any of the items thereof, be illegal charges against him, he cannot, in an action on the judgment, impeach the

some states the plaintiff may not be entitled to costs if the action on the judgment is prosecuted without leave of court or any necessity for suit.¹

10. Joinder of Actions. — Causes of action on several judgments cannot be united in one action, unless all the debtors in the judgments are the same and are made defendants.²

11. Splitting Demand. — An action cannot be maintained to collect part of a judgment for an entire sum payable at one time.³

XIX. OPENING, AMENDING, AND VACATING. — See article OPENING, AMENDING, AND VACATING JUDGMENTS.

XX. REVIVAL AND SCIRE FACIAS. — See article SCIRE FACIAS AND REVIVAL.

XXI. EQUITABLE RELIEF AGAINST JUDGMENTS — 1. History of the Remedy. — The common law of an early day had no practical machinery by which a litigant might be relieved from unconscionable and false judgments. There were no appellate courts where a case might be reviewed, and the only escape was by an attain of the assize, whereby a verdict was declared false and another substituted.⁴ This was attended with much difficulty, and soon

judgment for costs therein by parol evidence, though he might have had a taxation of the costs by a motion therefor in the original action. *Palmer v. Glover*, 73 Ind. 529.

An action upon a judgment for the damages and costs recovered therein is not a suit on a fee bill. *Palmer v. Glover*, 73 Ind. 529.

In *Missouri*, where the costs of an action go to the clerk, the plaintiff in an action upon a judgment who seeks to recover the costs incurred in obtaining such judgment must show that he or his assignor has paid such costs. *Meyer v. Mehrhoff*, 19 Mo. App. 682.

Cost of Transcript. — The cost of the transcript of the record of a judgment is properly recoverable as damages in a suit on the judgment; but if not embraced in the verdict, it will be no ground for setting aside the judgment that the cost is embraced in it. *Stephens v. Roby*, 27 Miss. 744.

The Costs of a Fruitless Execution upon a judgment may be recovered in a subsequent action upon such judgment. *Miller v. Miller*, 5 N. J. L. 586.

1. See *supra*, XVIII. 1. a. (1) (c) *Leave of Court to Sue*.

In *Whelpley v. Nash*, 46 Mich. 25, it was held that where a justice awards excessive and illegal costs, the plaintiff may remit such costs and sue upon such judgment for the damages, and in such case he has "good cause" for

so doing and recovery by How. Stat. Mich., § 6941, and is therefore entitled to recover the costs of the second action.

2. *Barnes v. Smith*, 16 Abb. Pr. (N. Y. Super. Ct.) 420, 1 Robt. (N. Y.) 699. See also *Sims v. Herzfeld*, 95 Ala. 145.

Several judgments of a justice's court, amounting in the aggregate to one hundred dollars, may be joined and sued on in the District Court. *Lander v. Rounsaville*, 12 Tex. 195; *Ende v. Spencer*, 38 Tex. 114.

Misjoinder of Actions. — Where the cause of action on a promissory note against one maker has already, and prior to the commencement of an action against the other makers, been merged in a judgment in a court of competent jurisdiction of the state, it is a misjoinder of actions to unite with an action upon the note against the makers not before sued an action against the party upon the judgment rendered. *Lindh v. Crowley*, 26 Kan. 47.

3. *Fullmer Western Wheeled Scraper Co. v. Pine Tp.*, 17 Pa. Co. Ct. Rep. 482.

In a *scire facias* in favor of one who has only a partial interest in the judgment, judgment should be entered only for the amount of his interest, if the defendant may have a defense against the equitable owners of the residue. *Peterson v. Lothrop*, 34 Pa. St. 223.

4. See 2 *Pollock & Maitland's Hist.*

fell into disuse.¹ The absence of legal remedies forced litigants to seek relief from the chancellor. The authority of chancery, acting *in personam*, to enjoin that which would be inequitable, or against conscience, was generally well established. But in this class of cases the indirect effect was to annul the solemn decisions of the common-law courts; and it was not permitted without a bitter contest had in the time of Lord Coke. The jurisdiction of chancery was, however, finally sustained.² The antagonism of the law courts, though unsuccessful, made chancery cautious in interfering against the operation of judgments. That a bill may be entertained, it must present a strong case.³

Eng. Law, pp. 661; 662; *Bright v. Eynon*, 1 Burr. 390.

1. "The writ of attaint is now a mere sound, in every case; in many, it does not pretend to be a remedy." *Bright v. Eynon*, 1 Burr. 390. See also 2 Tidd's Pr. (1st Am. ed.) 815.

"In the early history of the common law the principal remedy for the reversal of a verdict unduly given was by writ of attaint, but the hardships connected therewith seem to have led the courts first to modify verdicts, and afterwards to grant new trials." Horn v. Queen, 4 Neb. 108, 5 Neb. 472.

2. *Crowley's Case*, 2 Swanst. 22, note b; Crabb's Hist. Eng. Law, 543-545; 3 Cooley's Black. Com. (3d ed.) 54; 1 Spence's Eq. Jur. 411.

"It has always been the theory of the English and American chancery that the court does not, by injunction, interfere with the common-law courts or their judges, but that its restraining power is exercised upon the suitor, who is within the jurisdiction of the court of equity. This theory has not always accomplished its purpose. It has not served at all times to avert strife and collision between the two judicial systems. It is well known that a flagrant quarrel raged in the reign of James I. between the Lord Chancellor Ellesmere and Chief Justice Coke, growing out of the issuing of injunctions by the chancellor to restrain certain suitors from proceeding with their causes in the Court of King's Bench. This controversy grew to such violence that it was carried before the king in council, where it was settled in favor of the chancellor's jurisdiction." *Wagner v. Drake*, 31 Fed. Rep. 849. And that the jurisdiction is now beyond controversy, see also *Albert v. Winn*, 7 Gill (Md.) 446; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Rowland v. Jones*, 2

Heisk. (Tenn.) 321, where the court said "The real difficulty is in the application of the rule in each particular case in which the exercise of the judgment is invoked."

3. *District of Columbia*. — *Bohrer v. Fay*, 3 MacArthur (D. C.) 145.

Georgia. — *Booth v. Stamper*, 6 Ga. 172; *Robuck v. Harkins*, 38 Ga. 174.

Illinois. — *Holmes v. Stateler*, 57 Ill. 209; *Guthrie v. Doud*, 33 Ill. App. 68; *Telford v. Brinkerhoff*, 163 Ill. 439.

Kentucky. — *M'Connel v. Ficklin*, 4 Bibb (Ky.) 413.

Maryland. — *Fowler v. Lee*, 10 Gill & J. (Md.) 359.

New York. — *Floyd v. Jayne*, 6 Johns. Ch. (N. Y.) 479.

Oregon. — *Galbraith v. Barnard*, 21 Oregon 67.

Tennessee. — *Seay v. Hughes*, 5 Sneed (Tenn.) 155; *Prater v. Robinson*, 11 Heisk. (Tenn.) 391.

Vermont. — *Warner v. Conant*, 24 Vt. 351.

Virginia. — *Wynne v. Newman*, 75 Va. 811.

"A bill seeking relief of this nature is scrutinized with extreme jealousy, and the grounds upon which the interference will be allowed are confessedly somewhat narrow and restricted." *Ross v. Banta*, 140 Ind. 120. See also *Hanna v. Morrow*, 43 Ark. 107; *Hannon v. Maxwell*, 31 N. J. Eq. 318; *Heiser v. New York*, 104 N. Y. 68; *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320; *Burgess v. Lovengood*, 2 Jones Eq. (N. Car.) 457; *Johnson v. Templeton*, 60 Tex. 238; *Wood v. Lenox*, 5 Tex. Civ. App. 318.

"The great abuse which might take place under this doctrine, by drawing within the jurisdiction of this court, as by a side wind, almost all causes decided at law, has made the chancellors extremely cautious and even reserved

Bills for New Trial. — Bills in equity of this character are commonly denominated bills for a new trial.¹ For some time after the jurisdiction of chancery to interfere was established they were in constant use. It would seem from some cases that anciently bills brought for slight grounds, as errors and irregularities of a technical nature, were sustained.² But by the better

in the use of it. Well knowing that the high powers with which they are intrusted are to promote the purposes of justice, and do not give a wild, unsettled discretion, they are anxious these powers should not be abused to the vexation of the citizen and the unsettling solemn decisions of other courts, where full justice has been done. Hence we find the chancellors extremely guarded in their expressions as to the exercise of this power." *Winthrop v. Lane*, 3 Desaus. (S. Car.) 310. See also *Whitaker v. Wickersham*, 5 Del. Ch. 187; *Pearce v. Chastain*, 3 Ga. 226; *Union Gold Gravel Co. v. Chambers*, 75 Ga. 890; *Hines v. Beers*, 76 Ga. 9; *Nevins v. McKee*, 61 Tex. 412; *Branch v. Burnley*, 1 Call (Va.) 147; *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Barbone v. Brent*, 1 Vern. 177, note.

1. *Alabama*. — *Beadle v. Graham*, 66 Ala. 105.

Arkansas. — *Whitehill v. Butler*, 51 Ark. 341.

California. — *Reagan v. Fitzgerald*, 75 Cal. 230.

Mississippi. — *Lapiece v. Hughes*, 24 Miss. 69.

Tennessee. — *Holcomb v. Canady*, 2 Heisk. (Tenn.) 610; *Powell v. Cyfers*, 1 Heisk. (Tenn.) 526; *Schwab v. Mount*, 4 Coldw. (Tenn.) 60; *White v. Cahal*, 2 Swan (Tenn.) 550; *Seay v. Hughes*, 5 Sneed (Tenn.) 155; *Armstrong v. Thompson*, 3 Hayw. (Tenn.) 128; *Click v. Gillespie*, 4 Hayw. (Tenn.) 4.

Texas. — *Goss v. McClaren*, 17 Tex. 118.

Wisconsin. — *Ableman v. Roth*, 12 Wis. 90.

United States. — *Trefz v. Knickerbocker L. Ins. Co.*, 8 Fed. Rep. 177.

"Courts of equity relieved against judgments obtained by fraud, not by bill of review, but by original bill, generally by injunction." *Nealis v. Dicks*, 72 Ind. 374.

2. *Ford v. Wilson*, 2 Bibb (Ky.) 538; *Armstrong v. Thompson*, 3 Hayw. (Tenn.) 128; *Click v. Gillespie*, 4 Hayw.

(Tenn.) 5; *Ambler v. Wyld*, 2 Wash. (Va.) 36; *Pickett v. Morris*, 2 Wash. (Va.) 255; *Branch v. Burnley*, 1 Call (Va.) 147. But see the case of *Terrell v. Dick*, 1 Call (Va.) 546, where the foregoing Virginia cases were discussed and dissented from in so far as they did not conform to the general doctrine.

"The early English cases which have been brought to our notice, and which we have before had occasion to examine, and some of the American cases, and especially the case of *Colyer v. Langford*, 1 A. K. Marsh. (Ky.) 237, seem to go upon the ground that a bill will be entertained for a new trial, in an action determined at law, upon very much the same grounds that new trials are granted at law, where the courts of law have no means of granting a new trial in the case, either for defect of powers or from lapse of time." *Burton v. Wiley*, 26 Vt. 430.

"The history of this branch of equity jurisdiction is briefly this: The first instance to be met with in any book of legal authority, of a new trial with reference to the merits of the case on the evidence, is in the year 1665, *temp.* Charles II. (Style's R. 462, 466). It is supposed to be owing to the fact that motions were not reported before that time. For many years afterwards new trials were grudgingly granted at common law; and for that very reason courts of equity were liberal in granting relief against common-law judgments, and the Court of Chancery was induced to take to itself the decision of legal questions in many cases which now appear to have been beyond the legitimate bounds of its jurisdiction. For it is now universally admitted that trials by jury, in civil cases, could not subsist without a power residing somewhere to grant new trials. Misconduct, mistake, surprise, and prejudice, and the other grounds of failure which are now provided against by this expedient, must have operated in ancient times equally as now." *Taylor v. Sutton*, 15 Ga. 103.

opinion, established grounds for relief were necessary in this as in other equitable actions.¹ Eventually courts of law began to grant new trials more freely;² and in modern times the amalgamation of law and equity in code states and the universal addition to the defenses available at law have unsettled relations theretofore existing. Many equitable defenses may be made at law; while for relief after judgment, on equitable grounds, a remedy is provided by motion or direct action.³ The effect of this change upon the power of courts of equity to give relief has been variously estimated.⁴ When there is no remedy at law, or when all remedy has been lost, without fault or negligence, equitable jurisdiction to give relief is unquestioned. But when a remedy at law on the equitable grounds disclosed is open, there is a decided difference of opinion. The jurisdiction, however, remains important, and the cases in which it is exercised are numerous, as will more fully appear hereafter.⁵

1. "Anciently, courts of equity exercised a familiar jurisdiction over trials at law, and compelled the successful party to submit to a new trial, or to be perpetually enjoined from proceeding on his verdict. This relief was not granted unless the application was founded upon some clear case of fraud or injustice, or upon newly discovered evidence which could not possibly have been made use of upon the first trial." *Floyd v. Jayne*, 6 Johns. Ch. (N. Y.) 479. See also *Doubleday v. Makepeace*, 4 Blackf. (Ind.) 10; *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91; *Goss v. McClaren*, 17 Tex. 107; *Vardeman v. Edwards*, 21 Tex. 737; *Plummer v. Power*, 29 Tex. 6; *Metzger v. Wendler*, 35 Tex. 378.

2. See *Bright v. Eynon*, 1 Burr. 390; *Powers v. Butler*, 4 N. J. Eq. 465.

3. "Many of the strong barriers which separated the two jurisdictions of law and equity in the march of liberal ideas have been swept away; and law tribunals are now clothed by statute with many of the powers to grant new trials and to set aside hard judgments, which formerly belonged to the courts of chancery. At no very remote period the want of such a power in law courts sent the suitor to another tribunal, only to multiply actions and increase his costs." *Wells v. Wall*, 1 Oregon 295. See also cases cited in the next note.

4. "Applications to a court of chancery for a new trial, after a trial at law, are in our time very rare. The practice, except in cases the most extraordinary, has long since gone out

of use, because courts of law are now competent to grant new trials, and are in the constant exercise of that right to a most liberal extent." *Doubleday v. Makepeace*, 4 Blackf. (Ind.) 10. See also *Ratliff v. Stretch*, 130 Ind. 282; *Hannon v. Maxwell*, 31 N. J. Eq. 318; *Powers v. Butler*, 4 N. J. Eq. 465; *Floyd v. Jayne*, 6 Johns. Ch. (N. Y.) 479; *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320; *Oliver v. Pray*, 4 Ohio 176; *Wells v. Wall*, 1 Oregon 295; *Marsh v. Edgerton*, 1 Chand. (Wis.) 198; *Railroad Co. v. Neal*, 1 Woods (U. S.) 353.

"One reason of this jurisdiction going out of use, particularly in the American courts, was, as it may be reasonably supposed, that the verdict and judgment were rendered in the same court, and a very short time usually intervened between the verdict and the judgment, whereas in the English courts it was different." *Taylor v. Fore*, 42 Tex. 258.

In *Larabie v. Brown*, 1 De G. & J. 204, decided in 1857, *Turner, L. J.*, said: "This bill is in the nature of a bill for a new trial. Such bills appear to have been filed in former times; but I believe that no such attempt has been made for the last two or three hundred years."

5. "Formerly bills in equity were constantly filed to obtain new trials in actions at law, a practice which still obtains in Kentucky, and perhaps in some other jurisdictions; but the firmly settled practice by which courts of law entertain motions for new trial, and the dislike of one court unnecessarily to interfere with proceedings in an-

2. General Limitations. — Generally speaking, equity will prevent enforcement of a judgment where the complainant has a good defense to the action of which he could not have availed himself at law, or of which, through fraud, accident, or mistake, unmixed with negligence or fault on his part, he did not avail himself.¹

3. Parties — *a.* **PARTIES PLAINTIFF** — **Judgment Debtor or Privies.** — A bill for equitable relief against judgments, as thus defined, can only be brought by the judgment debtor or his privies,² even though those not parties to the judgment have an interest in the result of the litigation.³

other, has caused an almost total disuse of that jurisdiction. Courts of equity, however, still entertain bills to set aside judgments obtained by fraud, accident, or mistake." *Metcalf v. Williams*, 104 U. S. 93. See also *Cox v. Mobile*, etc., R. Co., 44 Ala. 611; *Kansas*, etc., R. Co. v. *Fitzhugh*, 61 Ark. 341; *Newman v. Taylor*, 69 Miss. 670; *Railroad Co. v. Neal*, 1 Woods (U. S.) 353; *Bateman v. Willoe*, 1 Sch. & Lef. 201.

1. Alabama. — *Stevens v. Hertzler*, (Ala. 1897) 22 So. Rep. 121; *Governor v. Barrow*, 13 Ala. 540.

Arkansas. — *Lester v. Hoskins*, 26 Ark. 63.

California. — *Mastick v. Thorp*, 29 Cal. 445; *Reagan v. Fitzgerald*, 75 Cal. 230.

Connecticut. — *Carrington v. Holabird*, 17 Conn. 531, 19 Conn. 84.

Delaware. — *Kersey v. Rash*, 3 Del. Ch. 321.

Illinois. — *Holmes v. Stateler*, 57 Ill. 209.

Iowa. — *Kriechbaum v. Bridges*, 1 Iowa 14.

Maryland. — *Briesch v. McCauley*, 7 Gill (Md.) 190.

Missouri. — *Wilhite v. Ferry*, 66 Mo. App. 453.

Montana. — *Boley v. Griswold*, 2 Mont. 447.

Nevada. — *Royce v. Hampton*, 16 Nev. 25.

New Hampshire. — *Wingate v. Haywood*, 40 N. H. 437; *Hibbard v. Eastman*, 47 N. H. 507.

New Jersey. — *Brick v. Burr*, 47 N. J. Eq. 189; *Moore v. Gamble*, 9 N. J. Eq. 246; *Herbert v. Herbert*, 47 N. J. Eq. 11.

New York. — *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351.

Oregon. — *Handley v. Jackson*, (Oregon 1897) 50 Pac. Rep. 915.

Pennsylvania. — *Gordinier's Appeal*, 89 Pa. St. 528.

Tennessee. — *Schwab v. Mount*, 4 Coldw. (Tenn.) 60.

Texas. — *Johnson v. Templeton*, 60 Tex. 238; *Harrison v. Crumb*, 1 Tex. App. Civ. Cas., § 991.

Vermont. — *Emerson v. Udall*, 13 Vt. 477; *Fletcher v. Warren*, 18 Vt. 45.

Virginia. — *Wallace v. Richmond*, 26 Gratt. (Va.) 67.

West Virginia. — *Alford v. Moore*, 15 W. Va. 597.

United States. — *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Hendrickson v. Hinckley*, 17 How. (U. S.) 443.

2. Markley v. Rand, 12 Cal. 275; *Mulford v. Cohn*, 18 Cal. 42; *Keifer v. Summers*, 137 Ind. 106; *Mayo v. Chiles*, 3 T. B. Mon. (Ky.) 260; *Lazarus v. McGuirk*, 42 La. Ann. 194; *Rotzein v. Cox*, 22 Tex. 62; *Stone v. Towne*, 91 U. S. 341.

No person can enjoin a judgment at law to which he is not a party, but if he is aggrieved he should pray an injunction to the execution. *Jordan v. Williams*, 3 Rand. (Va.) 501.

3. Wilkins v. Judge, 14 Ala. 135; *Tucker v. Holley*, 20 Ala. 426.

In *Minnesota*, under Gen. Stat. 1878, c. 66, § 285, authorizing "the party aggrieved" to prosecute the action, one not a party to the judgment, although directly interested in the result, cannot sue. *Stewart v. Duncan*, 40 Minn. 410.

In *Illinois*, section 135 of the Criminal Code, giving a right of action for equitable relief against a judgment on a gambling contract to a "person interested," does not include a voluntary surety on an appeal bond given on an appeal from such judgment. *West v. Carter*, 129 Ill. 249.

Contra. — *Webster v. Skipwith*, 26 Miss. 341, where persons not parties to the judgment who were interested in the subject-matter were held properly joined.

A Receiver or Assignee in whom is vested title to the judgment debtor's estate is a proper party.¹

A Taxpayer is a party to a judgment against a public corporation for the purpose of suing for equitable relief.²

Joinder of Parties. — Judgment debtors having a joint and common interest must join in the bill;³ or, if there are those who cannot be joined as complainants, they should be made parties defendant.⁴

b. PARTIES DEFENDANT — In General. — All persons interested in the judgment adversely to any relief against its operation should be made parties defendant.⁵

Where the payee of a note which has been paid, but not taken up, is induced to indorse it to another, who obtains judgment on it against the maker, the payee may maintain a bill for equitable relief against the judgment. *Hager v. Buechler*, 6 Ill. App. 462.

A wife may join with her husband to obtain equitable relief from a judgment against him, where it is sought to subject her separate estate to its payment. *Biggins v. Brockman*, 63 Ill. 316.

A purchaser of real estate after a final judgment in ejectment may have relief against it, but only where the remedy existed in favor of his grantor. *Ross v. Banta*, 140 Ind. 120.

1. *Tiffany v. Norris*, 28 Abb. N. Cas. (N. Y. Supreme Ct.) 97; *Monroe v. Delavan*, 26 Barb. (N. Y.) 16.

2. *Nevil v. Clifford*, 55 Wis. 161; *Corney v. Marseilles*, 136 Ill. 401; *Skirving v. National L. Ins. Co.*, 19 U. S. App. 442.

3. *Macey v. Brooks*, 4 Bibb (Ky.) 238.

Where the defense to a suit at law is common to all the defendants in such suit, they are all necessary parties to a bill for an injunction to stay the proceedings at law. *Paterson v. Bangs*, 9 Paige (N. Y.) 627; *Emmons v. McKesson*, 5 Jones Eq. (N. Car.) 92.

But where one of several joint judgment debtors sues to restrain the enforcement of the judgment against himself alone, he need not join the others as parties plaintiff. *Merriman v. Walton*, 105 Cal. 403.

4. "The bill was filed by only one of two co-obligors, and the other is not made a party, either complainant or defendant, nor any reason suggested why he was not. The decree is on this ground, therefore, clearly erroneous; for if one co-obligor may in such a case file a bill, another might, and suits be thus multiplied, equally contrary to

the maxims of sound policy and to the principles which govern a court of equity." *Macey v. Brooks*, 4 Bibb (Ky.) 238.

"If he was an actual party to the suit, it would not be very material, except as a question of form, whether he joined in the suit as a complainant, or was made a defendant therein, under the usual allegation in the bill, in such cases, that he would not consent to join in the suit as a complainant." *Boughton v. Allen*, 11 Paige (N. Y.) 321, holding that a party jointly interested with the plaintiff should be joined with him, or a sufficient excuse should be alleged in the bill for omitting to join him as a plaintiff, in which case he should be made a defendant.

5. The party for whose use the action at law was brought is a necessary party to a bill for relief against it. *Turner v. Cox*, 5 Litt. (Ky.) 175.

A bill for equitable relief against a judgment recovered by a minor, since deceased, at the suit of his guardian, must join as parties defendant such guardian and the administrator of the minor's estate. *Harper v. Seely*, *Wright* (Ohio) 390.

A bill perpetually to stay proceedings on a judgment granted on equities existing between the parties previous to an assignment of the original indebtedness must bring in the assignee. *Mumford v. Sprague*, 11 Paige (N. Y.) 438. The assignee is the only necessary party. *Ellis v. Kerr*, (Tex. Civ. App. 1893) 23 S. W. Rep. 1050. The assignor of a note upon which a judgment has been obtained by the assignee should not be made a party defendant. *Craig v. Whips*, 1 Dana (Ky.) 375.

Purchasers of land sold under a judgment are necessary parties defendant to a bill for equitable relief against it. *Buchanan v. Torrance*, 11 Gill & J. (Md.) 342; unless such purchasers have

Participants in Fraud. — All parties charged with participating in fraud by means of which a judgment is obtained, are necessary parties defendant.¹

Judges and Officers of Court. — Judges by whom judgments are rendered and persons who perform official duties in the course of their execution are not usually proper parties.²

4. Bills for New Trial and Injunction — *a. EQUITABLE DEFENSES*³ — (1) *Not Available at Law* — **In General.** — Notwithstanding the encroachment of law courts upon those of equity, there are many rights which can only be litigated in equity. And when a bill which exhibits such a right is proved, a judgment obtained because it could not be set up as a defense at law will be enjoined to make the relief complete. The only allegations

tailed and refused to comply with the conditions of their purchase, *Swan v. Thompson*, 36 Mo. App. 155.

Separate Judgment Plaintiffs — Multifariousness. — Where several separate judgment plaintiffs were joined as defendants in a suit to enjoin the judgments, it was held that the bill was not multifarious. The court said: "The judgments against plaintiffs originated in the same transaction. The questions with regard to their validity and interpretation are the same. The executions were levied upon the same property, and the question upon which it is sought to restrain them was common to all the cases, and substantially affected them all alike; and, in addition to that, the litigation has heretofore been conducted as if the different proceedings were but one cause." *Wills Point Bank v. Bates*, 76 Tex. 329. See also *Quick v. Van Auker*, 3 Penny. (Pa.) 469; and generally article MULTIFARIOUSNESS.

1. *Tarver v. New England Mortg. Security Co.*, 96 Ga. 536; *Elston v. Blanchard*, 3 Ill. 421; *Huggins v. King*, 3 Barb. (N. Y.) 616.

"The bill distinctly charges that they participated in the alleged fraud in obtaining the judgment, and therefore they are necessary and proper parties defendants." *Hill v. Reifsnider*, 39 Md. 429.

2. *Swan v. Thompson*, 36 Mo. App. 155; *Smalley v. Line*, 28 N. J. Eq. 348; *Edney v. King*, 4 Ired. Eq. (N. Car.) 465; *McLane v. Manning*, 1 Winst. Eq. (N. Car.) 60; *Wessell v. Sharp*, (Tenn. 1897) 39 S. W. Rep. 543; *Gulf, etc., R. Co. v. Blankenbeckler*, (Tex. Civ. App. 1896) 35 S. W. Rep. 331.

"The process of injunction, in a

proper case for staying judgment, goes against the parties, and not against the tribunal or its judges." *Western R. Co. v. Nolan*, 48 N. Y. 513.

When Officers Are Necessary Parties. — Officials interested in the proceeds of a judgment levying a fine, and not the state, are necessary parties defendant. *Smith v. State*, 26 Tex. App. 49. See also *Bramlett v. McVey*, 91 Ky. 151; *Harris v. Beaven*, 11 Bush (Ky.) 254.

Under the *Ohio Rev. Stat.*, § 5015, the sheriff holding an execution is not a necessary party to an action for equitable relief against the judgment, except where the creditor is a nonresident of the state, or has left it to avoid service, or so conceals himself that process cannot be served upon him. *Howard v. Levering*, 8 Ohio Cir. Ct. Rep. 614.

Fraud. — "It is a common practice, in some parts of the state, to make a sheriff who has in his hands an execution a party defendant to a bill to enjoin the judgment upon which execution was issued; and there can be no doubt that this, as a general rule, is entirely wrong. A sheriff is an officer of the law. He is in no shape interested in the judgment upon which the execution has been issued. But still, if the sheriff unlawfully combines with the creditor, unnecessarily to oppress and harass the debtor, he may with propriety be made a defendant. In the case before the court Medill is charged with being the active agent in the commission of the fraud. He was, therefore, with propriety made a defendant." *Allen v. Medill*, 14 Ohio 445.

3. See generally article EQUITABLE DEFENSES, vol. 7, p. 799.

necessary in such cases are those which suffice in equity to set out the particular equitable ground taken, with a showing of the existence of the judgment.¹ Since the ground relied upon could not have been set up as a defense at law, no excuse for failure to

1. Actions for Specific Performance, or Rescission of Contract. — *Mason v. Jones*, 7 D. C. 247; *Oldham v. Woods*, 3 T. B. Mon. (Ky.) 47; *Walker v. Ogden*, 1 Dana (Ky.) 253; *Thompson v. Tilton*, 34 N. J. Eq. 306; *Cox v. Jerman*, 6 Ired. Eq. (N. Car.) 526; *Lewis v. Brooks*, 6 Yerg. (Tenn.) 167; *Page v. Winston*, 2 Munf. (Va.) 298. See also *Bomeisler v. Forster*, 154 N. Y. 229; *Prout v. Gibson*, 1 Cranch (C. C.) 389; *Edwards v. Morris*, 1 Ohio 524.

"As to the idea that a court of equity will never interfere after the vendee has exercised his privilege of electing damages at law, this, we have seen, is not so. Even in executory contracts, the authorities are numerous where the vendee has been compelled to give up damages recovered upon a rescission of the contract in a suit at law, and accept performance in lieu thereof. This is usually done, and indeed always done, where time is not of the essence of the contract, and the lapse of time has not arisen from any default of the vendor, and the situation and value of the property has not materially changed. And if this will be done in executory contracts, there is much more reason why the power should be exercised where the contract has been executed." *Reese v. Smith*, 12 Mo. 344.

Where the bill shows that the complainant was the first party to break an agreement, he cannot be relieved from the judgment because thereafter the judgment creditor put it out of his power to perform his covenants. *Tiffany v. Norris*, 28 Abb. N. Cas. (N. Y. Supreme Ct.) 97. *Contra*, *Galena*, etc., R. Co. v. Ennor, 116 Ill. 55.

Action to Have Deeds, etc., Delivered Up and Canceled. — *Mahone v. Central Bank*, 17 Ga. 111; *Taylor v. Sutton*, 15 Ga. 103; *Rickle v. Dow*, 39 Mich. 91.

"In all cases like this the course of this court is to restrain proceedings at law while a suit here involving the same question is depending and the equity of the bill is not sufficiently denied by the answer. * * * The injunction to prevent suits and trials at law, in such cases, is a measure of course in the practice of courts of equity." *Apthorpe v. Comstock*, Hopk.

(N. Y.) 143, 2 Paige (N. Y.) 482, *affirmed* in 8 Cow. (N. Y.) 386.

Marshaling Assets. — *Harding v. Fiske*, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 348; *Varnum v. Hart*, 119 N. Y. 101; *Barhorst v. Armstrong*, 42 Fed. Rep. 2.

Trusts. — *Fairfax v. Hopkins*, 2 Cranch (C. C.) 134; *Wilson v. Cheshire*, 1 M'Cord Eq. (S. Car.) 235.

A bill for the determination of trust matters will be entertained though all the debts are paid, and, by statute, under such circumstances the defense could have been made at law, since the equitable relief is more effectual. *Justice v. Scott*, 4 Ired. Eq. (N. Car.) 108; *Henderson v. Hoke*, 1 Dev. & B. Eq. (N. Car.) 119. See also *Harwood v. Jones*, 10 Gill & J. (Md.) 404.

Accounts and Accounting. — *Franklin Mill Co. v. Schmidt*, 50 Ill. 208; *Gregg v. Brower*, 67 Ill. 525; *Jones v. Slubey*, 5 Har. & J. (Md.) 372; *Billups v. Sears*, 5 Gratt. (Va.) 31.

"It is not like the case of a judgment which concludes the parties and which cannot be collaterally inquired into. It is in the predicament of one which has been obtained because certain equities, cognizable in a court of equity, could not be availed of in a court of law. In all such cases a court of equity will enjoin the execution of the judgment at law until right and justice be done between the parties." *Young v. Reynolds*, 4 Md. 375.

Ejectment. — *Johnson v. Christian*, 128 U. S. 374; *Wildy v. Bonney*, 35 Miss. 77; *Nibert v. Baghurst*, 47 N. J. Eq. 201; *Noland v. Cromwell*, 4 Munf. (Va.) 155.

Federal Not Controlled by State Practice. — Rev. Stat. U. S., § 914, which provides that the practice, pleading, etc., in the Circuit and District Courts of the United States shall conform as nearly as may be to the practice, pleading, etc., in the state courts, does not authorize the federal courts to disregard the established distinctions between law and equity, nor to permit equitable defenses in actions at law, although the state statutes permit such defenses to be made in the state courts. *Davis v. Hargrave*, 30 U. S. App. 723.

prevent the judgment need be alleged.¹ Where, however, the complainant purchased land, for the price of which a judgment has been rendered against him, relying on a warranty of title, to entitle him to equitable relief the insolvency of the warrantor must appear.² Under the peculiar practice existing in *Pennsylvania* every equitable defense may be set up in an action at law, and there can be no relief in equity against the judgment except on the ground that the complainant was unavoidably prevented from making the defense at law.³

Doubtful or Inadequate Remedy at Law. — A ground for relief which as yet remains exclusively within the control of courts of equity is the inadequate or imperfect nature of the remedy at law available in the particular case. Therefore, where the facts make out a

See also *La Mothe Mfg. Co. v. National Tube Works Co.*, 15 Blatchf. (U. S.) 432.

1. *Greenlee v. Gaines*, 13 Ala. 198; *Stevens v. Hertzler*, (Ala. 1897) 22 So. Rep. 121; *Wray v. Furniss*, 27 Ala. 471; *Pollock v. Gilbert*, 16 Ga. 398; *White v. Crew*, 16 Ga. 416; *Dunn v. Miller*, 96 Mo. 324; *Lamb v. Anderson*, 1 Chand. (Wis.) 224, 2 Pin. (Wis.) 251.

"It is quite immaterial whether the party defends at law or not, for in either event he is not barred from asserting his right in equity as to his equitable defense, by which expression is intended a defense not available at law in any contingency whatever." *Conway v. Ellison*, 14 Ark. 361. See also *Gregg v. Brower*, 67 Ill. 525; *Hughes v. Nelson*, 29 N. J. Eq. 547; *Smalley v. Line*, 28 N. J. Eq. 348.

2. *Walton v. Bonham*, 24 Ala. 513; *Wray v. Furniss*, 27 Ala. 471; *Greenlee v. Gaines*, 13 Ala. 198; *Ponder v. Cox*, 26 Ga. 485; *Hardwick v. Forbes*, 1 Bibb (Ky.) 212; *Kelly v. Kelly*, 2 Duv. (Ky.) 363; *Henry v. Elliott*, 6 Jones Eq. (N. Car.) 175. See also *Fitch v. Polke*, 7 Blackf. (Ind.) 564; *Gillett v. Sullivan*, 127 Ind. 327; *Robinson v. Gilbreth*, 4 Bibb (Ky.) 183; *Marshall v. Welsh*, 2 Luz. L. Reg. (Pa.) 14.

Particular Instances where Relief Has Been Granted. — Where the bill shows an equitable right in a wife to redeem her husband's property from a tax sale, under a statutory provision, and the defense could not have been pleaded at law, equity will grant an injunction at her suit against a judgment in ejectment for possession against her husband, based on the tax title. *Sperry v. Gibson*, 3 W. Va. 522.

Where it appeared that pending gar-

nishment proceedings in another state, the debtor prosecuted his demand against the garnishee to judgment, and that a judgment was afterwards rendered in the other state against the garnishee, which judgment was paid, it was held that equity would enjoin the collection of the judgment recovered by the debtor, there being no remedy whatever at law. *Allen v. Watt*, 79 Ill. 284.

Where a bill for an injunction against a judgment has been dismissed, and a judgment obtained upon the injunction bond, such judgment will be enjoined where relief is finally granted against the original judgment upon another bill brought for that purpose. *Weaver v. Poyer*, 79 Ill. 417.

3. In *Wistar v. McManes*, 54 Pa. St. 318, the contrary view was taken by the court, which said: "Opening a judgment in a court of law is always *ex gratia*. Restraining a plaintiff from proceeding upon it, if the defendant has an equitable defense, and has not been guilty of laches by failing to set it up when he had an opportunity, is demandable of right." This case was followed by *Hetzell v. Bentz*, 8 Phila. (Pa.) 261, and *Cheyney v. Wright*, 7 Phila. (Pa.) 431. But these decisions were overruled by *Wilson v. Buchanan*, 170 Pa. St. 14, the court saying: "The decision in *Wistar v. McManes*, 54 Pa. St. 318, is in harmony with the doctrine that a purely equitable defense, which could not be considered in a legal forum, although made and overruled at law, is ground for an injunction, but it overlooks the fact that in this state a court of law can consider every equity set up." To the same effect see *Gordinier's Appeal*, 89 Pa. St. 528.

case from which it appears doubtful whether there is any remedy at law, or show an existing remedy to be inadequate to do complete justice, the issues will be re-examined and the judgment enjoined.¹ In such cases, failure to make defense at law, or failure to defend successfully, need not be excused.²

Judgment on False Return of Service. — A wide difference of opinion exists as to the sufficiency of a bill asking relief against a judgment obtained on a return of service which is false. In some states this is considered to be a valid ground, the courts holding that the remedy at law by motion, or in damages for false return, is adequate.³ Facts showing that the enforcement of the judgment would be against conscience should, however, be alleged; as that an existing valid defense was kept out by the false return.⁴

1. *Carter v. Bennett*, 6 Fla. 214; *Hill v. Crosby*, 2 Humph. (Tenn.) 545; *Newborn v. Glass*, 5 Humph. (Tenn.) 520; *Drew v. Clarke, Cooke* (Tenn.) 374; *Richardson v. Williams*, 3 Jones Eq. (N. Car.) 116; *Dobbin v. Wybrants*, 3 Tex. 457.

"Now I do not say that the County Court, sitting as a court of law, could not upon motion, in a summary way, try these questions; but I do say that in that mode it would not have afforded as safe or as convenient a tribunal for the trial of them as a court of equity upon regular pleadings and proofs. And this consideration, it will be recollected, forms one of the grounds in equity for assuming jurisdiction. But there is another, perhaps a stronger ground. The indorsement of the execution for Crawford's benefit gave him nothing but an equitable right, which could have no weight in a court of law, belonged exclusively to equity, and must finally have brought the cause there for decision." *Crawford v. Thurmond*, 3 Leigh (Va.) 85.

"We do not wish to limit or question the remedy or writ of error, *coram nobis*, as far as it has been adopted and applied in this state; nor do we hold that the bill of equity is a concurrent remedy with it in those cases. But we hold that in the case of such a judgment as this, as we have described it, upon its grounds and its facts, the equitable jurisdiction is free from doubt, although it may be possible that the writ of error *coram nobis* might have availed to revoke the judgment; yet in this case that remedy is not free, unembarrassed, and adequate." *Isler v. Turner*, 7 Humph. (Tenn.) 116.

Necessary Allegation. — "It is further to be observed, that as to the complexity

of the case and the difficulty of defending themselves at law they have not made that fact an allegation in their bill, and that they should have done so appears to have been necessary." *Dilly v. Barnard*, 8 Gill & J. (Md.) 171.

Usury. — The principles stated in the text were applied where relief against a judgment was sought on the ground of usury. *Buchanan v. Nolin*, 3 Humph. (Tenn.) 63; *Frierson v. Moody*, 3 Humph. (Tenn.) 561; *McKoin v. Cooley*, 3 Humph. (Tenn.) 559; *Lindsay v. James*, 3 Coldw. (Tenn.) 477.

2. *Graham v. Gray*, 87 Ala. 446; *Carrington v. Holabird*, 17 Conn. 531, 19 Conn. 84.

3. *Hauswirth v. Sullivan*, 6 Mont. 203; *Truett v. Wainwright*, 9 Ill. 418.

"We may conclude, then, that in the circumstances of this case there is no remedy at law against the judgment in question. The action for a false return is an inadequate remedy for such an injury; for it might be that after a ruinous sacrifice suffered in the payment of a judgment so recovered, and the delay and expense of litigation with the officer who made the false return, he might be unable to make the proper indemnity, or succeed in evading his liability. The fact that there is no remedy, or no sufficient remedy at law, for this admitted injury, is a strong reason why there should be remedy in equity." *Ridgeway v. State Bank*, 11 Humph. (Tenn.) 523; *Kempner v. Jordan*, 7 Tex. Civ. App. 275.

In *Kentucky*, by Gen. Stat., c. 81, § 17, an allegation of fraud on the part of the person benefited by a false return, or of mistake on the part of the officer, states a good ground for relief. *Bramlett v. McVey*, 91 Ky. 151.

4. *Raisin Fertilizer Co. v. McKenna*,

In many jurisdictions the remedy at law is considered adequate and precludes equitable relief.¹

Judgment on Unauthorized Appearance of Attorney. — The same difference of opinion exists as to the propriety of granting relief against a judgment obtained on appearance by an attorney acting wholly without authority.² Where the judgment is considered as absolutely void, no other showing need be made in the bill.³ Elsewhere facts must be alleged which show not only a just defense to the cause of action, but also the absence or inadequacy of legal remedies.⁴

(2) *Available Either at Law or in Equity* — (a) **In General.** — In former times, when defenses which could be made at law were confined within very strict limits, equity had exclusive cognizance over many which to-day, generally by virtue of statutory provisions, are litigated at law. Whether such jurisdiction at law is exclusive, or only concurrent with that of equity, is a matter about which the authorities differ. In many states the jurisdiction is looked upon as concurrent, and the complainant is entitled to make an election. Therefore, if the bill shows such a defense, and, in addition, that the complainant wholly refrained from making any contest at law, he is entitled to relief against the judgment.⁵ But in others the complainant must make defense

(Ala. 1897) 21 So. Rep. 816; *Gregory v. Ford*, 14 Cal. 139; *Gibbons v. Scott*, 15 Cal. 285; *Owens v. Ranstead*, 22 Ill. 161; *Weaver v. Poyer*, 70 Ill. 567; *Jones v. Neely*, 82 Ill. 71; *Kempner v. Jordan*, 7 Tex. Civ. App. 275. *Contra*, *Bell v. Williams*, 1 Head (Tenn.) 229.

1. *Stites v. Knapp*, Ga. Dec., pt. ii. 36; *Thomas v. Ireland*, 88 Ky. 581; *Taylor v. Lewis*, 2 J. J. Marsh. (Ky.) 400; *Mason v. Miles*, 63 N. Car. 564.

"In cases of false returns affecting the defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made; and if relief cannot be had there, the party injured must seek his remedy against the marshal." *Walker v. Robbins*, 14 How. (U. S.) 584.

Fraud. — Where the allegations in the bill make out fraudulent collusion between the plaintiff and the officer of the law, a good ground for relief is shown. *Hamblen v. Knight*, 60 Tex. 36.

2. As to the binding effect of an unauthorized appearance by an attorney, see generally article APPEARANCES, vol. 2, pp. 682, 684, 685.

3. *Baker v. O'Riordan*, 65 Cal. 368; *Handley v. Jackson*, (Oregon 1897) 50 Pac. Rep. 915; *Glass v. Smith*, 66 Tex. 548.

"In the case under consideration we regard the judgment as absolutely void, and the person against whom it was rendered had the right to question its validity, either directly or collaterally." *Anderson v. Hawhe*, 115 Ill. 33. See also *Mills v. Scott*, 43 Fed. Rep. 452.

4. *Hollinger v. Reeme*, 138 Ind. 363; *Piggott v. Addicks*, 3 Greene (Iowa) 427; *Harris v. Gwin*, 10 Smed. & M. (Miss.) 563; *Bunton v. Lyford*, 37 N. H. 512; *Critchfield v. Porter*, 3 Ohio 518; *Masterson v. Ashcom*, 54 Tex. 324, where the court said: "There was no allegation in the present case denying the truth of the recital in the judgment of the appearances by attorney of Ashcom, or that he did not have notice, in fact, of the rendition of the judgment against him; and no direct allegation or evidence why he delayed nearly eight years before he sought to set it aside; and certainly the testimony is not of that clear and satisfactory character which should be required to impeach the return of a sworn officer and the recitals in the judgment."

5. "It is true that where courts of law and equity have concurrent jurisdiction, a party may take his election as to the tribunal in which he will

at law, when suit is brought against him, and can have no relief on the simple ground that it was originally a defense cognizable only in equity.¹

bring forward his defense. If he prefers submitting it to a court of chancery he must neither make nor attempt a defense at law, because the tribunal to which he first submits himself must of necessity determine the matter conclusively between the parties." *Conway v. Ellison*, 14 Ark. 361.

"Although a party may set up an equitable defense to an action at law, his remedy is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief. Our practice, while it enlarges the field of remedy, does not take away pre-existing remedies by implication." *Lorraine v. Long*, 6 Cal. 452.

"When the remedy is complete at law there never can be relief in chancery, unless the chancellor has concurrent jurisdiction, or satisfactory reasons for not appealing to law are furnished." *Thomas v. Ferqueran*, 2 J. J. Marsh. (Ky.) 28. See also *Saunders v. Jennings*, 2 J. J. Marsh. (Ky.) 513.

"The inability of a defendant to avail himself in a court of law, of matters which the chancellor regarded as a sufficient equitable defense to the demand asserted against him, constitutes the foundation upon which a considerable part of the jurisdiction of a court of equity has been erected. But the rule is well established, that when a court of equity has thus acquired jurisdiction it still retains it, notwithstanding the subsequent exercise of jurisdiction in similar cases, by a legal tribunal, either by its own assumption of power, or by the authority of legislative enactments. The fact, then, that the code authorizes equitable defenses to be made in actions upon legal demands, does not of itself deprive a party of the right to waive this privilege and resort to an equitable action for relief; and as the exercise of this right is not expressly or by implication prohibited by anything contained in the code, but on the contrary is sustained by some of its provisions, the conclusion seems to be inevitable that the right still exists." *Dorsey v. Reese*, 14 B. Mon. (Ky.) 127. The doctrine of this case was changed shortly after in Kentucky by a statute which provided that "a judgment obtained in an action by ordinary proceedings shall not be an-

nulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered." See *Chinn v. Mitchell*, 2 Metc. (Ky.) 92.

Accord and Satisfaction. — *Andrews v. Fenter*, 1 Ark. 186; *Bently v. Dillard*, 6 Ark. 80.

Payments After the Day. — *Ward v. Chiles*, 3 J. J. Marsh. (Ky.) 486; *Harlan v. Wingate*, 2 J. J. Marsh. (Ky.) 138; *Whittington v. Roberts*, 4 T. B. Mon. (Ky.) 173.

Surety Released by Acts of Judgment Creditor. — *Arrington v. Washington*, 14 Ark. 218; *Burton v. Hynson*, 14 Ark. 32; *Hempstead v. Watkins*, 6 Ark. 317; *Smith v. Hays*, 1 Jones Eq. (N. Car.) 321; *King v. Baldwin*, 17 Johns. (N. Y.) 384 [*dissented from in Schroeppe v. Shaw*, 3 N. Y. 446]. See also *Hamer v. Sears*, 81 Ga. 288; *Viele v. Hoag*, 24 Vt. 46; *Dailey v. Wynn*, 33 Tex. 614.

Failure of Consideration. — *Dickson v. Richardson*, 16 Ark. 114; *Ragsdale v. Gossett*, 2 Lea (Tenn.) 729; *Merriman v. Cannovan*, 7 Coldw. (Tenn.) 571.

Equitable Defenses in Partition Suits. — *Hopkins v. Medley*, 99 Ill. 509. See also *Gash v. Ledbetter*, 6 Ired. Eq. (N. Car.) 183.

Usury. — *Greer v. Hale*, (Va. 1898) 28 S. E. Rep. 873; *Exchange, etc., Bank v. Fugate*, 93 Va. 821; *Young v. Scott*, 4 Rand. (Va.) 415.

By Statute. — *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Chester v. Aperson*, 4 Heisk. (Tenn.) 639.

By Statute in Some States certain defenses, as failure of consideration, fraud in procuring a note, and breach of warranty of title to personal property, are made grounds for equitable relief, if the party elects so to sue. *Jarrett v. Goodnow*, 39 W. Va. 602; *Knott v. Seamands*, 25 W. Va. 99; *Bias v. Vickers*, 27 W. Va. 456; *Penn v. Reynolds*, 23 Gratt. (Va.) 518; *Sanders v. Branson*, 22 Gratt. (Va.) 364.

1. *Ratliff v. Stretch*, 130 Ind. 282; *Ross v. Banta*, 140 Ind. 120.

"If, on the contrary, the plaintiff had any defense to the action, legal or equitable, it might have been interposed, and if made out the plaintiff therein would have been defeated.

(b) **Fraud, Accident, and Mistake** — *aa. IN GENERAL.* — Where a judgment has been obtained by the use of fraud or through unavoidable accident or mistake, a ground for equitable relief is presented which has been deemed one of the most important. Fraud, accident, or mistake, under this head is unconnected in any way with fraud, accident, or mistake as a defense to the cause of action, but consists in acts or circumstances interfering from without to fasten upon a party an unjust judgment.¹

bb. OF THE ALLEGATIONS — **In Cases of Fraud** — **General Allegations.** — The fraudulent acts and circumstances must be positively and specifically alleged in the bill. General charges and insinuations of fraud and statements or conclusions on belief are, in every case,

The proposition that a separate action may, under our present system, be maintained to restrain by injunction the proceedings in another suit, in the same or in another court, between the same parties, where the relief sought in the later suit may be obtained by a proper defense to the former one, has long since been exploded, or if not, should be without delay." *Savage v. Allen*, 54 N. Y. 458. See also *Curtis v. Cisna*, 1 Ohio 430; *Smith v. M'Iver*, 9 Wheat. (U. S.) 532; *New York L. Ins. Co. v. Bangs*, 103 U. S. 780.

"It is now well settled that if a defendant at law neglect to avail himself of a defense which might be there made, he cannot be permitted to make it in equity, and this whether the defense were purely legal or from its nature both legal and equitable." *Galbrath v. Martin*, 5 Humph. (Tenn.) 50.

Usury. — *Lucas v. Spencer*, 27 Ill. 14; *Smith v. Walker*, 8 Smed. & M. (Miss.) 131; *Vilas v. Jones*, 1 N. Y. 274; *Lansing v. Eddy*, 1 Johns. Ch. (N. Y.) 49 [and see *Campbell v. Morrison*, 7 Paige (N. Y.) 157]; *McKoin v. Cooley*, 3 Humph. (Tenn.) 559; *Buchanan v. Nolin*, 3 Humph. (Tenn.) 63; *Greenfield v. Frierson*, 7 Heisk. (Tenn.) 633; *Crawford v. Wingfield*, 25 Tex. 414.

By Statute. — *Chinn v. Mitchell*, 2 Metc. (Ky.) 92.

1. "The petition in this case assails the judgment on none of the grounds contemplated by said statute. It is predicated of the fraud alleged to have been perpetrated by defendant in procuring the false recitals in the entries. It is essentially a proceeding on the equity side of the court, and invokes that especial branch of equity jurisprudence which constitutes its 'most

ancient foundation,' the undoing of judgments of courts of record obtained contrary to good morals and conscience, and affected with fraud in their procurement." *Hyatt v. Wolfe*, 22 Mo. App. 191.

"The acts for which a court of equity will, on account of fraud, set aside or annul the judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." *U. S. v. Throckmorton*, 98 U. S. 61. To the same point see *Matter of Griffith*, 84 Cal. 107; *Irvine v. Leyh*, 102 Mo. 200; *Link v. Link*, 48 Mo. App. 345.

"The fraud which will justify equitable interference in setting aside judgments and decrees must be actual and positive, and not merely constructive. It must be that which occurs in the very concoction or procuring of the judgment or decree, and something not known to the opposite party at the time, and for not knowing which he is not chargeable with negligence." *Ross v. Wood*, 70 N. Y. 8, *affirming* 8 Hun (N. Y.) 185, 51 How. Pr. (N. Y.) 196. To the same effect see *Hazard v. Cole*, 1 Idaho 276; *McClanahan v. West*, 100 Mo. 309; *Stratton v. Allen*, 16 N. J. Eq. 229; *New York v. Brady*, 115 N. Y. 599. Compare *Trefz v. Knickerbocker L. Ins. Co.*, 8 Fed. Rep. 177, where the court said: "There is no question about the jurisdiction of a court of equity to grant relief against a judgment at law on the ground of fraud, whether the fraud was in the transaction or the instrument on which the action arose, or in the trial and the manner of obtaining the judgment."

insufficient.¹ Where the fraud charged consists in acts of third persons, it must appear from the bill that the judgment creditor was a party to it.²

Acts and Representations. — Acts and representations of the creditor or his attorney, whereby the debtor is persuaded not to make any defense, or only a perfunctory one, constitute such fraud.³ But

1. *Alabama*. — Spence *v.* Duren, 3 Ala. 251.

Connecticut. — Gates *v.* Steele, 58 Conn. 316.

Georgia. — Bellamy *v.* Woodson, 4 Ga. 175.

Idaho. — Hazard *v.* Cole, 1 Idaho 276.

Illinois. — Henkleman *v.* Peterson, 40 Ill. App. 540.

Indiana. — Clay County *v.* Markle, 46 Ind. 96.

Louisiana. — Rooks *v.* Williams, 13 La. Ann. 374.

Maryland. — Fowler *v.* Lee, 10 Gill & J. (Md.) 359.

Missouri. — Smith *v.* Sims, 77 Mo. 269.

Nebraska. — Shufeldt *v.* Gandy, 25 Neb. 602.

New York. — Heiser *v.* New York, 104 N. Y. 68.

North Carolina. — McLane *v.* Manning, 1 Winst. Eq. (N. Car.) 60; Witherspoon *v.* Carmichael, 6 Ired. Eq. (N. Car.) 143; Edney *v.* King, 4 Ired. Eq. (N. Car.) 465.

Ohio. — Lieby *v.* Ludlow, 4 Ohio 493.

Oregon. — Snyder *v.* Vannoy, 1 Oregon 344.

Tennessee. — Wessell *v.* Sharp, (Tenn. 1897) 39 S. W. Rep. 543.

Texas. — Martin *v.* Sykes, 25 Tex. Supp. 197.

Virginia. — Wynne *v.* Newman, 75 Va. 811.

United States. — Patton *v.* Taylor, 7 How. (U. S.) 132; Cotzhausen *v.* Kerting, 29 Fed. Rep. 821.

See also articles **BILLS TO IMPEACH DECREES AND JUDGMENTS**, vol. 3, p. 607; **FRAUD**, vol. 9, p. 675.

"A distinction has always been taken between general charges of combination and particular allegations of fraud. The former are not sufficient to maintain a bill, but in the latter case the party may be called upon to answer the particular facts charged." Huggins *v.* King, 3 Barb. (N. Y.) 616. To the same point see French *v.* Garner, 7 Port. (Ala.) 549.

"While it is not necessary or proper that he should spread out in his pleading the evidence on which he relies, he

must aver fully and explicitly the facts constituting the alleged fraud. Mere conclusions will not avail." New York, etc., Transp. Co. *v.* Tyroler, (Supreme Ct.) 48 N. Y. Supp. 1095, quoting Butler *v.* Viele, 44 Barb. (N. Y.) 169.

"Fraud must be shown by the allegation of facts from which it is the necessary or probable inference. Fraud cannot be made out by the profuse interpolation of adjectives, characterizing acts alleged to be done as fraudulently done." Calman *v.* Stuckart, 70 Ill. App. 310, quoting Fowler *v.* Loomis, 37 Ill. App. 363.

Sufficiency of Averments. — That the defendants jointly obligated with the complainant connived with the judgment creditors in obtaining the judgments, in consideration of which they were released from all liability, is a good allegation. Wills Point Bank *v.* Bates, 76 Tex. 329; Young *v.* Sigler, 48 Fed. Rep. 182.

Allegations that municipal bonds were stolen and judgment obtained thereon by fraudulent methods and cunning are sufficient where it further appears that the defendant municipality had no knowledge that the particular bonds had already been put in judgment by the rightful owners, and had no reason to suspect it. Taylor *v.* Nashville, etc., R. Co., 86 Tenn. 228.

A bill which alleges that a guardian, fraudulently colluding with the purchaser for his own profit, sold and transferred to him, under a prior order of court, valuable lands for a small consideration, there being no existing necessity for the sale, states good ground for relief. Arrowsmith *v.* Gleason, 129 U. S. 86.

2. Ramseur *v.* Brownell, (Ark. 1889) 12 S. W. Rep. 200.

3. Lee *v.* Arnsdorff, 86 Ga. 264; Lazarus *v.* McGuirk, 42 La. Ann. 194; Webster *v.* Skipwith, 26 Miss. 341; Holland *v.* Trotter, 22 Gratt. (Va.) 141. See also Farmers', etc., Bank *v.* Ruse, 27 Ga. 391.

"The allegations in the bill that the complainants neglected to make a de-

where it appears that negligence in not defending at law was responsible for the judgment rather than the fraudulent acts or representations of the creditor, the bill exhibits no ground for relief.¹ That a defense was prevented by acts or remarks of the court, is not generally a good allegation, unless a fraudulent intent is charged.²

Breach of Agreements. — As of acts and representations of the judgment creditor, so of agreements between the parties. Where the plaintiff at law has prevented a contest and obtained judgment by breaking such agreements, a court of equity will grant relief on the ground of fraud.³ It must appear from the bill that the

fense in consequence of the promise of the attorney in the suit to continue the cause on a replevin bond would, if true, be sufficient ground for a court of equity to grant relief." *Beams v. Denham*, 3 Ill. 58.

That the plaintiffs at law had no notice of the suit, it having been brought in their behalf by persons unauthorized, is a sufficient ground for relief in equity. *Sayles v. Mann*, 4 Ill. App. 516; *Marchman v. Sewell*, 93 Ga. 653.

A bill is good which shows that advantage was taken of the plaintiff's absence to enforce secretly a stale and invalid claim by *ex parte* proceedings in foreign attachment, whereby a valuable property was acquired by the plaintiffs at an inadequate price. *Herbert v. Herbert*, 47 N. J. Eq. 11, 49 N. J. Eq. 70, 49 N. J. Eq. 565; *Schroer v. Pettibone*, 163 Ill. 42 [*affirming* 58 Ill. App. 436]; *Truesdale v. Morrison*, 84 Ill. 420; *Moore v. Gamble*, 9 N. J. Eq. 246; *Tomkins v. Tomkins*, 11 N. J. Eq. 512.

Where it appears that a defense was not made by a surety, because the judgment creditor informed him that he did not expect to hold him, and would not enforce the judgment against him, good ground for relief is shown. *Kelley v. Kriess*, 68 Cal. 210; *Dew v. Hamilton*, 23 Ga. 414; *Roberts v. Miles*, 12 Mich. 297.

Where a bill shows that judgments against the administrator are uncollectible, because of no assets, and that they are not binding upon him personally, no relief is necessary, and the fact that they were obtained by such acts and representations on the part of the judgment creditor is immaterial. *Richardson v. Lumsden*, 83 Ga. 391.

1. *National Fertilizer Co. v. Hinson*, 103 Ala. 532; *Phelps v. Peabody*, 7 Cal. 50; *Bellamy v. Woodson*, 4 Ga. 175;

Amherst College v. Allen, 165 Mass. 178; *Langley v. Ashe*, 38 Neb. 53; *Devlin v. Boyd*, (Supreme Ct.) 16 N. Y. Supp. 37.

Where the complainant's presence at the trial was unnecessary, and would not have brought about a different result, the fact that his absence was due to false promises made by the judgment creditor is immaterial. *Deaver v. Erwin*, 7 Ired. Eq. (N. Car.) 250.

2. *Morris v. Morris*, 76 Ga. 733; *Carr v. Trainor*, 36 Ill. App. 587; *Risher v. Roush*, 2 Mo. 95, 1 Mo. 702; *Herwick v. Koken Barber Supply Co.*, 61 Mo. App. 454; *Proctor v. Pettitt*, 25 Neb. 96; *White v. Cahal*, 2 Swan (Tenn.) 550; *Halcomb v. Kelly*, 57 Tex. 618.

"A court * * * enters into no contracts to do business, and it can only speak by its record." *Green v. Dodge*, 6 Ohio 80.

For Allegations Held Sufficient, see *Woodlock v. Meyerstein*, 5 Mo. App. 591; *Austin v. Carpenter*, 2 Greene (Iowa) 131; *Dady v. Brown*, 76 Iowa 528.

3. *Arkansas*. — *Sneed v. Town*, 9 Ark. 535; *Pelham v. Moreland*, 11 Ark. 443.

California. — *Kelley v. Kriess*, 68 Cal. 210.

Maine. — *Devoll v. Scales*, 49 Me. 320.

Maryland. — *Kent v. Ricards*, 3 Md. Ch. 393.

Nebraska. — *Cadwallader v. McClay*, 37 Neb. 359.

New Hampshire. — *Hibbard v. Eastman*, 47 N. H. 507.

North Carolina. — *Hadley v. Rountree*, 6 Jones Eq. (N. Car.) 107.

Ohio. — *Allen v. Medill*, 14 Ohio 446.

Texas. — *Dickenson v. McDermott*, 13 Tex. 248.

For Allegations Held Insufficient, see *Hetzell v. Bentz*, 8 Phila. (Pa.) 261;

complainant relied upon the agreement and acted in accordance with its terms;¹ and where it was made with an attorney, it must be shown to have been within his general authority, or to have received the sanction of the judgment creditor.² Allegations that the plaintiff at law is insolvent and unable to respond in damages are unnecessary.³ Where the agreement is a mutual obligation entered into in consideration of the judgment, a breach is actionable at law, and the case does not present elements of fraud.⁴

Perjury. — As a general rule, a bill for relief based on perjured testimony given at the law trial, or on false or forged documentary evidence introduced there, will not be entertained;⁵ and the allegation that the complainant was surprised by the perjury or forged evidence does not change the rule.⁶ But where the bill sets out a good ground for relief because of newly discovered evidence, its sufficiency will not be destroyed by the fact that the

Jarboe v. Kepler, 4 Ind. 177; *Stein v. Burden*, 30 Ala. 270.

Breach of an agreement not to take a personal judgment in actions relating to land, relied on by the defendant, is good ground for relief. *Heim v. Butin*, (Cal. 1895) 40 Pac. Rep. 39; *Brake v. Payne*, 137 Ind. 479. Or breach of a contract not to enforce the judgment except on the happening of a certain contingency, whereby the judgment was confessed. *Moore v. Barclay*, 16 Ala. 158.

A judgment obtained in the absence of the defendant, through failure to notify him of the time of trial according to an arrangement made by the plaintiff's attorney, will be set aside in equity. *Footte v. Despain*, 87 Ill. 28; *Sanderson v. Voelcker*, 51 Mo. App. 328; *Gulf, etc., R. Co. v. Stephenson*, (Tex. Civ. App. 1894) 26 S. W. Rep. 236.

Breach of such agreements will not constitute a ground for relief where the suit at law was in pursuance of an illegal act participated in by the complainant. *Blackburn v. Bell*, 91 Ill. 434; *Noble v. Butler*, 25 Kan. 645; *Aston v. Barnett*, 2 Bibb (Ky.) 318; *Wells v. Smith*, 13 Gray (Mass.) 207; *Barnett v. Barnett*, 83 Va. 504.

1. *Reed v. Bansemer*, 28 Ind. 470; *Anderson v. Oldham*, 82 Tex. 228; *Knapp v. Snyder*, 15 W. Va. 434. But see *Bresnehan v. Price*, 57 Mo. 422.

2. *Gamble v. Campbell*, 6 Fla. 347; *Anderson v. Oldham*, 82 Tex. 228. But see *Phillips v. Kuhn*, 35 Neb. 187.

3. *Sanderson v. Voelcker*, 51 Mo. App. 328.

4. *Mays v. Taylor*, 7 Ga. 338; *Lump-*

kin v. Snook, 63 Iowa 515; *Peck v. Kirtz*, (Supreme Ct.) 15 N. Y. St. Rep. 598; *Rollins v. National Casket Co.*, 40 W. Va. 590.

5. *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320; *Turley v. Taylor*, 6 Baxt. (Tenn.) 376, 394; *Metzger v. Wendler*, 35 Tex. 378.

It is a rule at law, on the subject of new trials, that a party going voluntarily to trial goes at his peril, and he cannot have a new trial merely to give him an opportunity of impeaching the testimony of a witness of whom he was apprised beforehand, and of the very purpose for which he was to be called. He must, at least, show that he had since discovered testimony of which he had no knowledge before the trial. *Woodworth v. Van Buskerk*, 1 Johns. Ch. (N. Y.) 432. See also *Gott v. Carr*, 6 Gill & J. (Md.) 309.

"The mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." *U. S. v. Throckmorton*, 98 U. S. 61. See also *Galena, etc., R. Co. v. Ennor*, 116 Ill. 55.

6. *Cotzhausen v. Kerting*, 29 Fed. Rep. 821; *Cleveland Iron Min. Co. v. Husby*, 72 Mich. 61; *Gray v. Barton*, 62 Mich. 186; *Miller v. Morse*, 23 Mich. 368; *Briesch v. McCauley*, 7 Gill (Md.) 190.

evidence will impeach the testimony given at the trial at law.¹ Where a judgment thus obtained will be set aside in equity, the bill must allege in detail all the facts and circumstances of the fraud;² and it must be charged that the judgment creditor knew that the evidence was false or perjured.³

In Cases of Accident and Mistake.—Cases where equity has granted relief on the ground of accident or mistake are not common. In order that a bill may be entertained on such ground it must generally show an unusual combination of circumstances, resulting in an unjust judgment.⁴

1. *McGehee v. Gold*, 68 Ill. 215; *Peagram v. King*, 2 Hawks (N. Car.) 295; *Marshall v. Holmes*, 141 U. S. 589.

"So it is agreed that to set aside the verdict on the ground of its being obtained by perjury, there must be an allegation that the party who used the testimony knew it to be false. So there must not only be newly discovered evidence, but such evidence must bear directly upon the merits of the case, and must be decisive of it, and not tend simply to impeach the testimony of a witness at a former trial, or to add cumulative evidence as to a matter before controverted." *Burgess v. Lovengood*, 2 Jones Eq. (N. Car.) 457.

2. "It is not enough that a party asking the aid of a court of chancery to set aside a judgment shall show that it is unjust, but he must show, if he could have had a fair trial at law, he would have had a verdict. In this case that would be difficult, if not impossible, for appellant does not state he has witnesses to prove the testimony of appellee to have been false. The case, if tried by a jury, would be tried on the testimony of the parties. In such case it would be idle to charge the winning party with perjury." *Ames v. Snider*, 55 Ill. 498.

"The complainant's case upon this bill is defective in two respects. (1) The allegation is not of any facts or circumstances showing, or even tending to show, perjury. It amounts only to the complainant's suspicion, based upon the circumstance that the damages as laid in the *narr.* were increased by amendment at the trial term. This is a circumstance wholly inconclusive. To lay a sufficient ground of relief against perjury and surprise, the bill should name the witnesses, and wherein they swore falsely, and set forth facts tending to show that their

testimony was false. But (2) were the allegations sufficient in this respect, still it does not appear that on the ground of perjury and surprise relief might not have been had at law. It is not alleged that perjury was discovered too late to enable the complainant to move for a new trial. On the contrary, the amendment of the *narr.*, which is the only alleged ground to suspect it, occurred before the trial." *Kersey v. Rash*, 3 Del. Ch. 342. See also *Ross v. Wood*, 70 N. Y. 8, *affirming* 8 Hun (N. Y.) 185, 51 How. Pr. (N. Y.) 196.

Where it appears from a bill that the judgment could have been rendered without taking into consideration the evidence claimed to have been false, no ground for relief is shown. *Nelson v. Killingley First Nat. Bank*, 70 Fed. Rep. 526.

3. *Burgess v. Lovengood*, 2 Jones Eq. (N. Car.) 457.

An allegation that the plaintiff at law "knew, or ought to have known," that the evidence was false is insufficient to charge either subornation of perjury or knowledge of the falsity. *Camp v. Ward*, 69 Vt. 286.

4. "Mere accident or mistake on his own part is rather to be accounted his misfortune than imputed as a wrong to the other party; and it must be a strong case when this alone can be made the ground of equitable interference at so late a stage." *Fletcher v. Warren*, 18 Vt. 45; *Ratliff v. Stretch*, 130 Ind. 282.

Accident or Surprise.—For allegations held sufficient, see *Leigh v. Armor*, 35 Ark. 123; *Saunders v. Jennings*, 2 J. J. Marsh. (Ky.) 513; *Myers v. Daniels*, 6 Jones Eq. (N. Car.) 1; *Bell v. Cunningham*, 1 Sumn. (U. S.) 89.

In *Illinois* a continuance takes a case from "the short cause calendar," which is a statutory encroachment upon the general practice. Should it

Allegations Common to All Cases. — The difference of opinion as to the right to relief in equity against a judgment procured through fraud, accident, or mistake, where the law provides a statutory remedy, is marked. Equitable jurisdiction on these grounds is said to be coeval with the existence of chancery;¹ and courts of equity are slow to recognize an exclusive jurisdiction in the courts of law as the result of legislation. In many states it is held that the jurisdiction is concurrent, and the complainant may elect to proceed in equity. In such states it is unnecessary to negative in the bill the existence of a statutory remedy at law.² And

afterwards, during the term, appear on such calendar of another judge of the same court, and be tried without the knowledge of the defendants, equity will relieve on the ground of surprise. *Gudgeon v. Casey*, 62 Ill. App. 599.

Allegations Held Insufficient. — Averments of accident or surprise in the course of the trial resulting from conditions which might have been reasonably anticipated. *Ex p. Christian*, 23 Ark. 641; *Fowler v. Roe*, 11 N. J. Eq. 367; *Johnson v. Langhead*, Tappan (Ohio) 93; *Turley v. Taylor*, 6 Baxt. (Tenn.) 376, 394; *White v. Washington*, 5 Gratt. (Va.) 645.

Mistake. — Where the mistake alleged was due to ignorance of law, no relief can be had. *Dickerson v. Ripley County*, 6 Ind. 128; *Morton v. Nunnelly*, 3 Hayw. (Tenn.) 210; *Richmond, etc., R. Co. v. Shippen*, 2 Patt. & H. (Va.) 327. *Contra*, *Smith v. Wallace*, 1 Wash. (Va.) 254.

In some cases it has been held that ignorance of the unconstitutionality of an act is excusable, and mistake caused by proceeding under such a law is a ground for relief. *Stetson v. Goldsmith*, 31 Ala. 649; *Miller v. Hall*, 12 Tex. 556; *Cobbs v. Coleman*, 14 Tex. 594. But the general rule was applied in *Cassel v. Scott*, 17 Ind. 514.

Mistake of Fact. — It is good ground for relief that a judgment, rendered on an agreed statement of facts, included more land than was intended by the parties, and that the mistake was discovered too late to obtain a review at law. *Currier v. Esty*, 110 Mass. 536.

Or that the clerk of the court inadvertently added the words, "with leave to reinstate," to an order striking off the cause, whereby two years later the case was brought to trial and judgment obtained, without knowledge on the part of the defendant. *Fisher v. Tribby*, 5 Ill. App. 335.

1. 2 Story's Eq. Jur. (13th ed.) 195.

2. *California*. — *Thompson v. Laughlin*, 91 Cal. 313; *Wickersham v. Comberford*, 96 Cal. 433.

Connecticut. — *Gainty v. Russell*, 40 Conn. 450.

Illinois. — *Propst v. Meadows*, 13 Ill. 157; *Babcock v. McCamant*, 53 Ill. 214; *Foote v. Despain*, 87 Ill. 28; *Sayles v. Mann*, 4 Ill. App. 516; *Hager v. Buechler*, 6 Ill. App. 462; *Wierich v. De Zoya*, 7 Ill. 385.

Kansas. — *Kimble v. Short*, 2 Kan. App. 130.

Michigan. — *Wright v. Hake*, 38 Mich. 525.

Wisconsin. — *Brown v. Parker*, 28 Wis. 21.

"Under the system of procedure which obtains in this state, where the various kinds of relief are administered by the same tribunal, and where there is but one form of civil action for the enforcement or protection of civil rights (Code Civ. Pro., § 307), a party who presents a complaint showing his right to the relief asked is not to be denied that relief because he might have sought it under a different form of action." *Merriman v. Walton*, 105 Cal. 403.

"Fraud is one of the broadest grounds of equity recognized by the courts, and relief may be obtained against a judgment at law although the party might find a remedy in the court of law. It is the fraud which gives jurisdiction to this court, and the aggrieved party is not obliged to resort to another tribunal, possessed of less power and appliances to ascertain the truth, and grant the requisite remedy, although the other tribunal may have jurisdiction." *Nelson v. Rockwell*, 14 Ill. 375.

"In our opinion this statutory remedy is merely cumulative. It is not disputed that courts of equity,

there are cases where it has been held that relief will be given though it appears that the remedy at law has been unsuccessfully invoked.¹ In other states a bill will not be entertained unless the facts alleged show that no relief could have been had at law by prompt use of legal remedies.² Facts must be set out which constitute a valid defense to the indebtedness sued upon.³

b. LEGAL DEFENSES — (1) *Of the Allegations* — (a) *In General* — *Laches*. — The complainant must be prompt in asking relief against

prior to the statute, had jurisdiction to impeach judgments for fraud, and enjoin proceedings thereon. It is a fundamental principle that when such courts have once been legitimately vested with jurisdiction they retain it, notwithstanding courts of law subsequently acquire jurisdiction by statute or otherwise, unless the legislature abolish or restrict it." *Darst v. Phillips*, 41 Ohio St. 514. See also *Irvine v. Leyh*, 102 Mo. 200.

1. So held in *Stanton v. Embry*, 46 Conn. 65, 595; but this case was reversed in the Supreme Court of the United States *sub nom. Embry v. Palmer*, 107 U. S. 3, on the ground that the judgment creditor was enabled to perpetrate the fraud because of the negligence of the complainants in defending the suit. In a case where the remedy invoked was by way of motion, after judgment, for a new trial, the court said, in *Metcalf v. Williams*, 104 U. S. 93: "When a party has been deprived of his right by fraud, accident, or mistake, and has no remedy at law, a court of equity will grant relief. Perhaps, in view of the equitable control over their own judgments which courts of law have assumed in modern times, the judgment might have been set aside, on motion, for the cause set forth in the bill; but if this were true, the remedy in equity would still be open; and the fact that the court declined to exercise the power upon motion rendered the resort to a bill necessary and proper." To the same effect, see *Young v. Sigler*, 48 Fed. Rep. 182.

2. *Fraud*. — *Sanders v. Fisher*, 11 Ala. 812; *Kelley v. Kriess*, 68 Cal. 210; *Morris v. Morris*, 76 Ga. 733; *Muse v. Wafer*, 29 Kan. 279; *Searle v. Fairbanks*, 80 Iowa 307; *Gravenstine's Appeal*, 49 Pa. St. 310; *Frauenthal's Appeal*, 100 Pa. St. 290.

"If the judgment was fraudulently obtained, and Sanderson had a good

defense in the replevin suit and was prevented from making it either by the fraud of Voelcker or his attorney, he has a right to invoke the aid of chancery for his protection. It is his only adequate remedy." *Sanderson v. Voelcker*, 51 Mo. App. 328.

"It is claimed by the counsel for the respondent that this right to go into the court which rendered the judgment and ask for a new trial, a remedy which it is claimed is open to the petitioners under the laws of the District of Columbia, is an adequate legal remedy, and that this court cannot assume equitable jurisdiction over the matter while the petitioners have this remedy. But no legal remedy can be considered as adequate which a party is compelled to go into a foreign jurisdiction to avail himself of. It must be a remedy which our own courts can apply." *Stanton v. Embry*, 46 Conn. 595, 46 Conn. 65; *sub nom. Embry v. Palmer*, 107 U. S. 3.

Perjury. — *Guthrie v. Doud*, 33 Ill. App. 68; *Woodruff v. Johnston*, 61 N. Y. Super Ct. 348; *Cotzhausen v. Kerting*, 29 Fed. Rep. 821.

Mistake. — *Reagan v. Fitzgerald*, 75 Cal. 230.

Accident. — *Whitehill v. Butler*, 51 Ark. 341.

3. *Georgia*. — *Engel v. Scheuerman*, 40 Ga. 206.

Indiana. — *Johnson v. Unversaw*, 30 Ind. 435; *Hollinger v. Reeme*, 138 Ind. 363; *Nealis v. Dicks*, 72 Ind. 374.

Kansas. — *Muse v. Wafer*, 29 Kan. 279; *Poor v. Tuston*, 53 Kan. 86.

Missouri. — *Dobbs v. St. Joseph F. & M. Ins. Co.*, 72 Mo. 189.

Nebraska. — *Lininger v. Glenn*, 33 Neb. 187.

New York. — *Huggins v. King*, 3 Barb. (N. Y.) 616.

Utah. — *Bailey v. Stevens*, 11 Utah 175.

United States. — *White v. Crow*, 110 U. S. 183.

a judgment, and a bill which shows an unreasonable delay without excuse will not be entertained.¹

General Allegations.—As in every case where equitable relief is sought against a judgment, the bill should set out clearly and in detail all the facts necessary to constitute a ground for equitable relief because of a pretermitted legal defense.² General statements and inconclusive or ambiguous allegations are insufficient

1. *Doubleday v. Makepeace*, 4 Blackf. (Ind.) 10; *Thomas v. Bush*, 1 Bibb (Ky.) 506; *Terry v. Dickinson*, 75 Va. 475; *Barnett v. Barnett*, 83 Va. 504; *U. S. v. County Ct.*, 39 Fed. Rep. 757.

"But it has often been held that where a bill in equity discloses gross laches, the court will, on its own motion, refuse relief, even without such laches having been pleaded." *Coon v. Seymour*, 71 Wis. 340. See generally article LACHES.

Where neglect and delay in prosecuting a claim appear from the bill, a judgment in favor of an insolvent will not be restrained to allow time for the claim to reach judgment and be in a position to be used as a set-off. *Boley v. Griswold*, 2 Mont. 447.

2. *Neal v. Henderson*, 72 Ga. 209; *Scotts v. Hume*, Litt. Sel. Cas. (Ky.) 378; *Rust v. Faust*, 15 La. Ann. 477; *Ficks v. Vick*, 50 Neb. 401; *Brick v. Burr*, 47 N. J. Eq. 189; *Herbert v. Herbert*, 47 N. J. Eq. 11; *Kidwell v. Masterson*, 3 Cranch (C. C.) 52; *U. S. v. Throckmorton*, 98 U. S. 61. See also *Masterson v. Ashcom*, 54 Tex. 324; *Wheeler v. Gray*, 5 Tex. Civ. App. 12; *Bailey v. Stevens*, 11 Utah 175; *Massachusetts Ben. L. Assoc. v. Lohmiller*, 74 Fed. Rep. 27.

"Whatever is essential to the rights of the complainant and within his knowledge ought to be alleged with such a degree of certainty as to give the defendant full information of the case he is called on to answer; or on his failure to appear and defend, that the court may decree on the face of the bill in favor of the complainant. * * * The same precision of statement is neither required or attainable in equity as in pleadings at law, but the meaning of the rule is that the substantial grounds of relief must be stated with such general certainty and precision as to apprise the defendant of the true nature of the case, and the points to which testimony should be applied; and justice demands that in all cases

the rule should be observed." *Conway v. Ellison*, 14 Ark. 361.

"The petition for injunction should state all, and negative all, which is necessary to establish a right, and to show diligence. *Carter v. Griffin*, 32 Tex. 212; *Bryan v. Knight*, 1 Tex. 180. The rule of pleading that the statements of a party are to be taken most strongly against himself is reinforced in injunction suits by the further requirement that the material and essential elements which entitle him to relief shall be sufficiently certain to negative every reasonable inference arising upon the facts so stated, from which it might be deduced that he might not, under other supposable facts connected with the subject, thus be entitled to relief." *Harrison v. Crumb*, 1 Tex. App. Civ. Cas., § 991. See also *Marshall v. Shueber*, 3 Tex. App. Civ. Cas., § 370.

"It is insisted that as the appellant has obtained a judgment at law, and the appellee comes into equity for relief, he is as much bound to negative facts which would entitle the plaintiff at law to recover as to affirm those which it is necessary for himself to prove. This would be against all the rules of pleading in chancery, and would be imposing on the plaintiff an impracticable duty. He may not be cognizant of the facts upon which the plaintiff at law relies to entitle himself to recover, notwithstanding the matter relied upon by the party seeking relief in equity might, if standing alone, make out a proper case for the interposition of that court. The appellee had a right to rest his case upon the averment of such fraud as vitiates the contract; and of the fact that the security so fraudulently procured had come to the possession of the holder by assignment. If the circumstances under which the holder acquired the paper are such as still entitle him to recover from the maker, they must be shown in his answer, and, not being responsive to any allegation in the bill,

in setting up either a valid legal defense¹ or matter in excuse for not defending at law.²

Setting Out Proceedings at Law. — Whenever it is necessary for the court to consider what was done at law, in determining the suffi-

must be proved." *Vathir v. Zane*, 6 Gratt. (Va.) 246.

1. *Davis v. Chalfant*, 81 Cal. 627; *Elston v. Blanchard*, 3 Ill. 421; *Wilson Sewing Mach. Co. v. Curry*, 126 Ind. 161; *Cummings v. Bradford*, (Ky. 1895) 29 S. W. Rep. 747; *Osborn v. Gehr*, 29 Neb. 661; *New York v. Brady*, 115 N. Y. 599, *affirming* 57 N. Y. Super. Ct. 14.

"It is said that the plaintiff has a defense to the action, but no facts are stated showing in what the alleged defense consists. This is necessary in order that the facts may be put in issue, and a mere statement of a conclusion is not sufficient to authorize the granting of an injunction." *Chicago, etc., R. Co. v. Manning*, 23 Neb. 552.

"It should appear how the defense arises, so that the court may see that the complainant has been deprived of a substantial right without any fault on his own part." *Bohrer v. Fay*, 3 MacArthur (D. C.) 145.

Sufficiency of Averment. — Where the debt was to be paid out of the proceeds of the goods for which it was contracted, the bill must show that all these conditions have been fulfilled, or the defense is not made out. *Mellendy v. Austin*, 69 Ill. 15.

An averment that at the time of the entry of the judgment no cause of action existed against the complainant in favor of the judgment creditor is a sufficient averment of a valid defense. *Harnish v. Bramer*, 71 Cal. 155.

In *Davis v. Tilston*, 6 How. (U. S.) 114, general allegations were held good as against a demurrer.

2. *Jamison v. May*, 13 Ark. 600; *Cadwalader v. Atchison*, 1 Mo. 659; *Smith v. Sims*, 77 Mo. 269; *Greenfield v. Frierson*, 7 Heisk. (Tenn.) 633; *White v. Cahal*, 2 Swan (Tenn.) 550; *Fisk v. Miller*, 20 Tex. 572; *Reiley v. Johnston*, 22 Wis. 280.

"It is not averred that the party did not know of the judgment rendered against him until after the term. That inference may be deduced argumentatively from the averment that he understood that the cause was to be continued. It ought to have been distinctly averred, and not left to infer-

ence merely." *Caperton v. Wanslow*, 18 Tex. 125.

"A bill such as this, to be sufficient, must not rest on the simple averment that there was a valid defense, of which defendant had no knowledge until after judgment. Suitors must be diligent; and to make a case for relief, it must appear in the averred facts that the complainant was prevented from making his defense by fraud, accident, or the act of the opposite party, unmixed with fault or neglect on his part." *Headly v. Bell*, 84 Ala. 346. See also *Ewing v. Nickle*, 45 Md. 413; *Buntain v. Blackburn*, 27 Ill. 406; *Bateman v. Willoe*, 1 Sch. & Lef. 204.

An allegation that the complainant went to California "on important business," and was taken sick and detained "a long time," is too general to excuse a failure to procure evidence and make defense at law. *Fisher v. Greene*, 5 Colo. 541.

So strict a showing of diligence in defending at law is not required to obtain relief against a judgment obtained upon a gambling contract as in other cases. *White v. Washington*, 5 Gratt. (Va.) 645.

Inconsistent Averments. — "General averments in a pleading are of no avail when inconsistent with facts specially averred in the same pleading." *Stein v. Benedict*, 83 Wis. 603. To the same point see *Celina v. Eastport Sav. Bank*, 37 U. S. App. 164; *Norwegian Plow Co. v. Bollman*, 47 Neb. 186; *Boley v. Griswold*, 2 Mont. 447, where the court said: "The complaint also alleges that Griswold is the sole and exclusive owner of the judgment recovered by Mrs. Griswold, that Mrs. Griswold died and owed no debts, that Griswold has paid all the demands against her estate, and that the sheriff, Bullock, will pay to Griswold the amount of this judgment and the costs, if he is not enjoined by the court. It appears that the amount of the judgment, costs, and interest exceeds \$7,500. Can the appellants aver that Griswold is 'utterly insolvent,' when they pray that he may be restrained from collecting over \$7,500 on which there is no incumbrance? A court can-

ciency of the ground alleged, the proceedings must either be pleaded in the bill or attached as an exhibit.¹

Relief Against Part Only of a Judgment. — Where relief is asked against a portion of the judgment, the bill must state specifically the amount claimed to be unjust, and contain an offer to pay the balance.²

not tolerate this conduct by the parties that are seeking equitable relief. Under the authorities which have been cited we must disregard the allegations of the appellants that Griswold is 'utterly insolvent,' and deny the prayer for any relief which could be granted on this ground."

1. *Dickson v. Richardson*, 16 Ark. 114; *Whitehill v. Butler*, 51 Ark. 341; *Buntain v. Blackburn*, 27 Ill. 406; *Parsons v. Wilkerson*, 10 Mo. 713; *Neville v. Pope*, 95 N. Car. 346; *Ratto v. Levy*, 63 Tex. 278. See also *Bias v. Vickers*, 27 W. Va. 456; *Saunders v. Pike*, 6 Oregon 312, where the court said: "The bill prays the annulling of this judgment and stay of execution, but does not set out the matters in controversy in the justice's court in a manner and form that would enable the court, after annulling this judgment, to proceed and adjust the rights of the parties in the action in which the judgment was rendered. A court of equity will not annul a judgment and open up matters that were settled by it, and leave the parties with their rights unadjusted; for the court sets aside the judgment, if at all, for the purpose of searching after and settling the rights of the parties which were wrongfully adjusted by the judgment." But compare *Collins v. Fraiser*, 27 Ind. 477; *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158.

In *Johnson v. Templeton*, 60 Tex. 238, the court said: "The injustice of the judgment sought to be enjoined is not made clearly manifest. The nature and character of the original proceeding in which the judgment sought to be enjoined was obtained are not set out in the pleadings of the plaintiff in error with sufficient fulness. It is stated, in the most general terms, that there was in that suit no cause of action set up against the plaintiffs in error, and that no sum of money was stated in the pleadings to be due or owing, but it is also averred in the same connection that there were in the original petition certain averments as to various items of indebtedness set up, or at-

tempted to be set up, as due by the plaintiffs in error to the defendant in error, in her representative capacity. The contents or substance of the pleadings in the original suit are not sufficiently set out or disclosed to enable the court to determine with reasonable certainty what was really there the issuable matter in controversy on which the plaintiffs in error relied to make out their defense. Neither the dates, the amounts, nor the character of the items of indebtedness charged against them are given. All the averments on this subject, as well as those relating to the grounds of defense relied on, are manifestly insufficient in a proceeding of this kind, addressed to the court sitting as a court of equity. They are at last nothing more than the conclusions of the pleader. They do not set out with the requisite fulness and clearness the particulars of the original suit, nor fully and satisfactorily disclose the nature of the defense relied on. Nor do the allegations sufficiently connect the plaintiffs in error with the alleged fraud. Nor do the averments that there was collusion between the attorneys of the plaintiffs and defendant in error sufficiently set out the facts in that behalf. It does not appear clearly that these matters did not originate before the attorneys became associated in business. Nor does it appear clearly that the attorneys on either side sought in any manner to deceive or mislead the defendants in error. They seem, according to their own statement of the matter in their pleadings, to have trusted too fully in their codefendant, Leftwich."

2. *Alabama*. — *Governor v. Barrow*, 13 Ala. 540.

California. — *Gregory v. Ford*, 14 Cal. 139.

Georgia. — *Hill v. Harris*, 42 Ga. 412.

Illinois. — *Duncan v. Morrison*, 1 Ill. 151; *Weaver v. Poyer*, 70 Ill. 567; *Colson v. Leitch*, 110 Ill. 504; *Duncan v. Morrison*, 1 Ill. 151.

Indiana. — *Baragree v. Cronkhite*, 33 Ind. 192; *Russell v. Cleary*, 105 Ind. 502; *Keifer v. Summers*, 137 Ind. 106.

(b) **No Adequate Remedy at Law.** — When there exists an adequate remedy at law for the matters set forth in the bill, whether by way of defense, either before or after judgment, or by prosecution of a separate action, no ground for relief is shown.¹ So

Iowa. — *Parsons v. Nutting*, 45 Iowa 404.

Kentucky. — *Thomas v. Bush*, 1 Bibb (Ky.) 506.

Maryland. — *Fowler v. Lee*, 10 Gill & J. (Md.) 359; *Gardner v. Jenkins*, 14 Md. 58.

Missouri. — *Overton v. Stevens*, 8 Mo. 623; *Herwick v. Koken Barber Supply Co.*, 61 Mo. App. 454, 1 Mo. App. Rep. 696; *Stroeh v. Doggett Dry Goods Co.*, 65 Mo. App. 103.

Nebraska. — *Norwegian Plow Co. v. Bollman*, 47 Neb. 186.

New Jersey. — *Reeves v. Cooper*, 12 N. J. Eq. 223.

New York. — *Christie v. Bogardus*, 1 Barb. Ch. (N. Y.) 167.

Ohio. — *Shelton v. Gill*, 11 Ohio 417.

Texas. — *Roller v. Wooldridge*, 46 Tex. 486; *Smith v. Smith*, 75 Tex. 410; *Anderson v. Oldham*, 82 Tex. 228.

Wisconsin. — *Riley v. Johnston*, 22 Wis. 279; *Stokes v. Knarr*, 11 Wis. 389.

"In cases of this kind there should be specific and definite statements to satisfy the court that injury and injustice have been done, especially where knowledge of the subject-matter can scarcely be supposed to be in its possession. That this is indefinite, it is only necessary to say that the denial of these statements presents no issue, and their ascertainment brings us no nearer to a conclusion as to the merits of the contest than without it. The merits of the case depend upon this position, for if the judgment is not for too large an amount then complainant is not injured." *Gamble v. Campbell*, 6 Fla. 347.

"Although the plaintiff concedes that more than five-sixths of the judgment rendered against him is justly due he does not offer in his petition to pay the amount thus due, nor did he make any tender of the amount conceded to be due. He who seeks equity must do equity." *Herwick v. Koken Barber Supply Co.*, 61 Mo. App. 454.

A bill which asks an injunction against the whole of a judgment exhibits no ground for relief when the allegations show a defense to a part only. *Baggett v. Watson*, 70 Miss. 64.

Whether Payment into Court Necessary, Query. — "When a bill like the present

one admits an indebtedness past due, promised and incurred in compromise of a larger claim, is a simple offer to pay enough to authorize a restraining order, enjoining the collection of an execution in the hands of the sheriff. Should not the sum admitted to be due have been paid into court? The Roebbling Sons Co. was clearly entitled to the \$805, less the costs of the suit; and as to that sum there is no pretense of a defense." *Roebbling Sons Co. v. Stevens Electric Co.*, 93 Ala. 39.

Where Usury Is the Alleged Defense. — *Hill v. Reifsnider*, 39 Md. 429; *Neurath v. Hecht*, 62 Md. 221; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Campbell v. Morrison*, 7 Paige (N. Y.) 157; *Williams v. Lockwood*, Clarke Ch. (N. Y.) 172; *Shelton v. Gill*, 11 Ohio 417. See also *Brockway v. Clark*, 6 Ohio 45.

"But the bill itself does not, by its allegations, present a case to entitle the complainants to an injunction to restrain the execution of the judgment. It does not allege, with any exactness, the amount of the usury, over and above the principal sum advanced, with legal interest thereon, or the real amount due, principal and interest, after deducting the usury retained. Even at law, every plea of usury is required to state the sum of money or the value of the goods and chattels lent or advanced, with the time at which the same was so lent or advanced (Code, art. 95, § 5), and there is no reason why less strictness and certainty in this respect should be allowed in equity pleading than at law, especially after a recovery at law, for otherwise the requirement of the statute might be easily evaded." *Neurath v. Hecht*, 62 Md. 221.

Contra. — That no offer to pay the just amount need be made in the bill, the judgment being left in force to that extent, see *Chester v. Apperson*, 4 Heisk. (Tenn.) 639.

1. *Arkansas.* — *Andrews v. Fenter*, 1 Ark. 186; *Bently v. Dillard*, 6 Ark. 80.

California. — *Markley v. Rand*, 12 Cal. 276.

Georgia. — *Bellamy v. Woodson*, 4 Ga. 175; *Vaughn v. Fuller*, 23 Ga. 366;

errors and irregularities at the law trial will not support a bill,

Cleckley v. Beall, 37 Ga. 583; *Robuck v. Harkins*, 38 Ga. 174; *Bailey v. State Sav. Bank*, 97 Ga. 398.

Illinois. — *Crumpton v. Baldwin*, 42 Ill. 165; *Walker v. Kretsinger*, 48 Ill. 502; *Richardson v. Prevo*, 1 Ill. 216; *Greenup v. Brown*, 1 Ill. 252; *Greenup v. Woodworth*, 1 Ill. 254; *State Bank v. Stanton*, 7 Ill. 352; *Palmer v. Gardiner*, 77 Ill. 143; *Elston v. Blanchard*, 3 Ill. 421.

Indiana. — *Hardy v. Stone*, 23 Ind. 597.

Kentucky. — *M'Connel v. Ficklin*, 4 Bibb (Ky.) 414; *Craig v. Whips*, 1 Dana (Ky.) 375; *Casey v. Gregory*, 13 B. Mon. (Ky.) 505.

Louisiana. — *Donnell v. Parrott*, 13 La. Ann. 251; *Todd v. Fisk*, 14 La. Ann. 13; *Lafon v. Desessart*, 1 Martin N. S. (La.) 71.

Maryland. — *Gorsuch v. Thomas*, 57 Md. 334.

Michigan. — *Miller v. Morse*, 23 Mich. 365.

Mississippi. — *Bruner v. Planters' Bank*, 23 Miss. 406; *Shipp v. Wheelless*, 33 Miss. 648; *Mills v. Richards*, 34 Miss. 77; *Semple v. McGatagan*, 10 Smed. & M. (Miss.) 98; *Williams v. Jones*, 10 Smed. & M. (Miss.) 108.

Missouri. — *Ramsey v. Ellis*, 1 Mo. 402.

Nebraska. — *Proctor v. Pettitt*, 25 Neb. 96.

New Jersey. — *Cammack v. Johnson*, 2 N. J. Eq. 163; *Kinney v. Ogden*, 3 N. J. Eq. 168; *Stratton v. Allen*, 16 N. J. Eq. 229.

New York. — *Vilas v. Jones*, 1 N. Y. 274; *Schroeppe v. Shaw*, 3 N. Y. 446; *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436; *Heiser v. New York*, 104 N. Y. 68.

North Carolina. — *Champion v. Miller*, 2 Jones Eq. (N. Car.) 194; *Deaver v. Erwin*, 7 Ired. Eq. (N. Car.) 250.

Ohio. — *Lacy v. Garrard*, 2 Ohio 7; *Reynolds v. Reynolds*, 3 Ohio 268.

Oregon. — *Wells v. Wall*, 1 Oregon 295.

Pennsylvania. — *Smith v. Moyer*, 1 Leg. Gaz. Rep. (Pa.) 86.

Texas. — *Prewitt v. Perry*, 6 Tex. 260; *Jones v. Frosh*, 6 Tex. 202; *York v. Gregg*, 9 Tex. 85; *Gibson v. Moore*, 22 Tex. 611; *Jordan v. Corley*, 42 Tex. 285; *Ivey v. McConnell*, (Tex. Civ. App. 1892) 21 S. W. Rep. 403.

Virginia. — *Richmond Enquirer Co. v. Robinson*, 24 Gratt. (Va.) 548.

"The appellant fails to show in his complaint that he has not a full and adequate remedy at law. Unless he can show that he has not such a remedy, either by appeal, certiorari, application to the court itself which rendered the judgment, or in any other legal and adequate manner, he is not entitled to relief by injunction." *Wingfield v. McLure*, 48 Ark. 514.

Rule Applied and Relief Denied. — Where there is a remedy by action against an administrator and his sureties on their bond, and they are not alleged to be insolvent, or, if so, that a new bond cannot be obtained at law. *Cummings v. Bradford*, (Ky. 1895) 29 S. W. Rep. 747.

Where there is a remedy at law in an ejectment suit to recover the value of improvements. *Asher v. Mitchell*, 9 Ill. App. 335.

Where costs may be retaxed by motion at law, there is no relief against the unjust costs by injunction. *Ross v. McCarty*, 3 Humph. (Tenn.) 169; *Whitesides v. Rayle*, 3 Humph. (Tenn.) 205.

Nor where there was a complete remedy at law by interposing a plea of *non est factum* to an action on a covenant. *Thomas v. Ferqueran*, 2 J. J. Marsh. (Ky.) 28; *Perryville v. Letcher*, 1 J. J. Marsh. (Ky.) 384; *Harrison v. Lee*, 7 J. J. Marsh. (Ky.) 171; *Mershon v. Commonwealth Bank*, 6 J. J. Marsh. (Ky.) 438; *Partin v. Luterloh*, 6 Jones Eq. (N. Car.) 341.

A judgment against a married woman, not impugned for fraud or malpractice, cannot be enjoined because for a debt not inuring to her benefit, where such defense was not pleaded at law, and no excuse is alleged for omission to plead it. *Hall v. Carroll*, 10 La. Ann. 412; *Evans v. Calman*, 92 Mich. 427; *McCurdy v. Baughman*, 43 Ohio St. 78.

Exception to Rule. — "The rule that such matters of defense as might have been pleaded on the merits cannot form legal grounds for an injunction finds an exception in cases of persons incapacitated from contracting generally or specially. As long as the disability lasts a judgment obtained against them, under such circumstances, and which has not acquired

even though responsible for the judgment, as the remedy at law by appeal or writ of error is adequate.¹

(c) **Valid Legal Defense.** — The bill must allege facts which constitute a legal defense to the original cause of action, and one of such a nature that it would be likely to change the result upon a new trial of the issues.² Where the defense set up consists only

the force of the thing adjudged, is liable to the same objection as the obnoxious obligation." *Medart v. Fasnatch*, 15 La. Ann. 621.

1. *Arkansas*. — *Ex p. Christian*, 23 Ark. 641.

District of Columbia. — *Baltimore, etc., R. Co. v. Hetzel*, 3 Mackey (D. C.) 495.

Florida. — *Adams v. White*, 23 Fla. 352.

Georgia. — *Russel v. Slaton*, 38 Ga. 195.

Illinois. — *Parker v. Singer Mfg. Co.*, 9 Ill. App. 383; *Chicago Waifs Mission, etc., School v. Excelsior Electric Co.*, 44 Ill. App. 425; *Calman v. Stuckart*, 70 Ill. App. 310.

Indiana. — *Edgerton v. Comstock*, 3 Ind. 383; *Dunn v. Fish*, 8 Blackf. (Ind.) 408; *Earl v. Matheney*, 60 Ind. 202; *Harrod v. Dinsmore*, 127 Ind. 338.

Kansas. — *Howard v. Eddy*, 56 Kan. 498; *Burke v. Wheat*, 22 Kan. 723.

Kentucky. — *McCown v. Macklin*, 7 Bush (Ky.) 308; *Reynolds v. Horine*, 13 B. Mon. (Ky.) 234.

Maryland. — *Boyd v. Chesapeake, etc., Canal Co.*, 17 Md. 195.

Missouri. — *McGindley v. Newton*, 75 Mo. 115.

Nebraska. — *Petalka v. Fitle*, 33 Neb. 756; *Pollock v. Boyd*, 36 Neb. 369.

New Jersey. — *Reeves v. Cooper*, 12 N. J. Eq. 223, *affirmed* in 12 N. J. Eq. 498; *Cammack v. Johnson*, 2 N. J. Eq. 163; *Holmes v. Steele*, 28 N. J. Eq. 173.

New York. — *Whittemore v. Judd Linseed, etc., Oil Co.*, 16 Daly (N. Y.) 290, *affirmed* in 124 N. Y. 565.

North Carolina. — *Emmons v. McKesson*, 5 Jones Eq. (N. Car.) 92; *Stockton v. Briggs*, 5 Jones Eq. (N. Car.) 309.

Ohio. — *Stiver v. Stiver*, 3 Ohio 19; *Buell v. Cross*, 4 Ohio 327.

Oklahoma. — *Mosely v. Southern Mfg. Co.*, 4 Okla. 492.

Rhode Island. — *Barr v. Carpenter*, 16 R. I. 724.

Tennessee. — *King v. Vaughan*, 8 Yerg. (Tenn.) 59; *Thompson v. Meek*, 3 Sneed (Tenn.) 271; *Nicholson v. Paterson*, 6 Humph. (Tenn.) 394.

Texas. — *Fitzhugh v. Orton*, 12 Tex. 4; *McNeil v. Hallmark*, 28 Tex. 157; *Musgrove v. Chambers*, 12 Tex. 32; *Galveston, etc., R. Co. v. Dowe*, 70 Tex. 1; *Reast v. Hughes*, (Tex. Civ. App. 1896) 33 S. W. Rep. 1003.

Virginia. — *Rosenberger v. Bowen*, 84 Va. 660.

Washington. — *Davis v. Fields*, 9 Wash. 78.

West Virginia. — *Armstrong v. Poole*, 30 W. Va. 666.

Wisconsin. — *McIndoe v. Hazelton*, 19 Wis. 567; *Farmers' L. & T. Co. v. Walworth County Bank*, 23 Wis. 249.

United States. — *Muhlenburg County v. Citizens' Nat. Bank*, 65 Fed. Rep. 537.

That the complainant was a minor, and no guardian *ad litem* was appointed for him, is no ground for relief. *Levystein v. O'Brien*, 106 Ala. 352. See also *Lemon v. Sweeney*, 6 Ill. App. 507. And see article INFANTS, vol. 10, pp. 627, 633.

2. *Alabama*. — *English v. Savage*, 14 Ala. 342.

Arkansas. — *Rotan v. Springer*, 52 Ark. 80, Am. Dig. 1889, p. 2215, § 552.

District of Columbia. — *Bohrer v. Fay*, 3 MacArthur (D. C.) 145.

Georgia. — *Cardin v. Jones*, 23 Ga. 175.

Illinois. — *Blackburn v. Bell*, 91 Ill. 434; *Excelsior Electric Co. v. Chicago Waifs' Mission, etc., School*, 41 Ill. App. 111; *Ames v. Snider*, 55 Ill. 498; *Clark v. Ewing*, 93 Ill. 572.

Indiana. — *Boyd v. Weaver*, 134 Ind. 266; *Wilson Sewing Mach. Co. v. Curry*, 126 Ind. 161.

Iowa. — *Crenshaw v. Wickersham*, 15 Iowa 154.

Michigan. — *Kelleher v. Boden*, 55 Mich. 295.

Mississippi. — *Cole v. Hundley*, 8 Smed. & M. (Miss.) 473.

Missouri. — *Cadwaleder v. Atchison*, 1 Mo. 659; *Hasler v. Schopp*, 70 Mo. App. 469.

Nebraska. — *Petalka v. Fitle*, 33 Neb. 756; *Gould v. Loughran*, 19 Neb. 392; *Horn v. Queen*, 4 Neb. 108, 5 Neb. 472.

New Jersey. — *Davis v. Delaware*

of matters which were litigated at law, either before or after judgment, there can be no relief.¹

(d) **Matters of Excuse — Failure to Defend.** — In every case the bill must allege facts in excuse of the failure to defend at law; and it

Tp., 40 N. J. Eq. 156; Tomkins v. Tomkins, 11 N. J. Eq. 512.

Oregon. — Handley v. Jackson, (Oregon 1897) 50 Pac. Rep. 915; Galbraith v. Barnard, 21 Oregon 67.

South Carolina. — Hunt v. Coachman, 6 Rich. Eq. (S. Car.) 286.

Tennessee. — Rice v. R. R. Bank, 7 Humph. (Tenn.) 39; Seay v. Hughes, 5 Sneed (Tenn.) 155; Holcomb v. Canady, 2 Heisk. (Tenn.) 610; Levan v. Patton, 2 Heisk. (Tenn.) 108.

Texas. — Anderson v. Oldham, 82 Tex. 228; Cobbs v. Coleman, 14 Tex. 594; Roller v. Wooldridge, 46 Tex. 486; Odom v. McMahan, 67 Tex. 292.

Wisconsin. — Marsh v. Edgerton, 1 Chand. (Wis.) 198.

"To say nothing about other defects in the bill and the proofs verifying the fact of the judgment and orders, there is not a single allegation nor a shadow of proof that the complainants had the slightest merits in their defense to the action at law. This is fundamental." Stout v. Slocum, 52 N. J. Eq. 88.

Illustrations. — The defense must not be an inequitable and unjust one. Price v. Reed, 38 Mo. App. 501.

A bill brought by a garnishee must exhibit facts showing that he was not indebted to the judgment debtor and has no property belonging to the debtor in his hands. Hair v. Lowe, 19 Ala. 224.

That the property of a corporation judgment creditor is mortgaged to the state is no defense. Boyd v. Chesapeake, etc., Canal Co., 17 Md. 195. Nor is it a defense that the corporation had no authority to issue notes with warrants of attorney upon which the judgments were confessed. Henkleman v. Peterson, 40 Ill. App. 540.

In *Iowa*, by section 2522 of the code, the facts must show "a defense which has arisen or been discovered since the judgment was rendered." See Lowery v. Greene County, 75 Iowa 338.

That new parties are brought in by the bill in addition to the parties to the suit at law, is not sufficient of itself to call for relief in equity. Robinson v. Veal, 78 Ga. 301.

The Defense Must Be One Which Will Probably Change the Result if a new trial is granted. Hier v. Kaufman, 134 Ill.

215; Fuller v. Little, 69 Ill. 229; Gilcrest v. Nantker, 47 Neb. 58; Dixon v. Bird Varnish Co., 21 Cinc. Wkly. L. Bul. 258; Crocker v. Allen, 34 S. Car. 452.

There must be an averment that the defense alleged will be proved in case a retrial is had. National Fertilizer Co. v. Hinson, 103 Ala. 532; Beadle v. Graham, 66 Ala. 102.

Fraud. — A bill which alleges fraud as a defense to the original cause of action must show that the fraud is attributable to the judgment creditor. Griffith v. Reynolds, 4 Gratt. (Va.) 46.

1. *Alabama.* — Powell v. Stewart, 17 Ala. 719.

California. — Barnett v. Kilbourne, 3 Cal. 327.

Georgia. — Lamar v. Knott, 74 Ga. 379.

Illinois. — Armstrong v. Caldwell, 3 Ill. 419.

Iowa. — Kriechbaum v. Bridges, 1 Iowa 14.

Kentucky. — Hampton v. Dudley, 1 J. J. Marsh. (Ky.) 272.

Maryland. — Miller v. Duvall, 26 Md. 47.

Michigan. — Miller v. Morse, 23 Mich. 365; Wright v. King, Harr. (Mich.) 12;

Wixom v. Davis, Walk. (Mich.) 15.

Mississippi. — Yongue v. Billups, 23 Miss. 407; Smedes v. Ilsley, 68 Miss. 590; Johnson v. Smokey, (Miss. 1888) 4 So. Rep. 788.

Missouri. — Matson v. Field, 10 Mo. 100; Miller v. Bernecker, 46 Mo. 194.

New Jersey. — Vaughn v. Johnson, 9 N. J. Eq. 173; Reeves v. Cooper, 12 N. J. Eq. 223; Amey v. Calkins, (N. J. 1890) 19 Atl. Rep. 388; Brink v. Burr, 47 N. J. Eq. 189; Tomkins v. Tomkins, 11 N. J. Eq. 512.

New York. — Norton v. Woods, 22 Wend. (N. Y.) 520; Simpson v. Hart, 1 Johns. Ch. (N. Y.) 91; Holmes v. Remsen, 7 Johns. Ch. (N. Y.) 286.

Oregon. — Snyder v. Vannoy, 1 Oregon 344; Wells v. Wall, 1 Oregon 295.

Pennsylvania. — Billmeyer v. Insurance Co., 34 Leg. Int. (Pa.) 454.

Tennessee. — Overton v. Searcy, Cooke (Tenn.) 36.

Washington. — Cochrane v. Van de Venter, 13 Wash. 323.

must appear therefrom that under no reasonable circumstances could the defense have been made.¹ The facts alleged must be inconsistent with the least neglect, incompetency, or ignorance in the conduct of the suit, on the part of the complainant² or on

United States. — *Edmanson v. Best*, 18 U. S. App. 288; *Hendrickson v. Hinckley*, 17 How. (U. S.) 443; *Tompkins v. Drennen*, 56 Fed. Rep. 694.

"The plaintiff's petition discloses the existence, before the rendition of the judgment, of all the matters which are alleged as defenses against the claim of the plaintiff in the original action. It is not competent to the party to reopen the case for the purpose of opposing them a second time." *Minor v. Stone*, 1 La. Ann. 283.

"A court of equity will not assume to control a judgment at law for the purpose simply of giving a new trial." *Tompkins v. Drennen*, 13 U. S. App. 308.

1. *Alabama.* — *Wilkins v. Judge*, 14 Ala. 135; *Hair v. Lowe*, 19 Ala. 224.

Connecticut. — *Carrington v. Holabird*, 17 Conn. 531, 19 Conn. 84.

District of Columbia. — *Mason v. Jones*, 7 D. C. 247.

Illinois. — *Elston v. Blanchard*, 3 Ill. 421.

Maryland. — *Falls v. Robinson*, 5 Md. 365.

Tennessee. — *Applewhite v. Shaw*, 4 Humph. (Tenn.) 93; *Rice v. R. R. Bank*, 7 Humph. (Tenn.) 39; *Levan v. Patton*, 2 Heisk. (Tenn.) 108; *Staunton v. Clark*, 9 Heisk. (Tenn.) 669; *Seay v. Hughes*, 5 Sneed (Tenn.) 155; *Kearney v. Smith*, 3 Yerg. (Tenn.) 127; *Schwab v. Mount*, 4 Coldw. (Tenn.) 60.

Texas. — *Melton v. Lewis*, 74 Tex. 411.

Wisconsin. — *Stein v. Benedict*, 83 Wis. 603.

United States. — *Kidwell v. Master-son*, 3 Cranch (C. C.) 52; *Andes v. Millard*, 70 Fed. Rep. 515; *Edmanson v. Best*, 57 Fed. Rep. 531, 18 U. S. App. 288; *Prout v. Gibson*, 1 Cranch (C. C.) 389; *Tompkins v. Drennen*, 13 U. S. App. 308.

In an action on a note, after a finding against a defense set up by a surety, the plaintiff dismissed. Pending an appeal by the surety, suit was brought on the note in another county and a recovery had. The appeal terminated in a reversal of the case and judgment in favor of the surety. It was held that there was a sufficient

ground for injunction against the judgment obtained in the other county, notwithstanding it appeared that the surety did not defend the second suit nor ask that it be stayed pending the appeal. *Walker v. Heller*, 90 Ind. 198. See also *Moore v. Cohen*, 70 Ill. App. 160.

Poverty of the Complainant is no excuse on a bill for relief against a judgment, where its rendition was due to the neglect and incompetency of himself and his attorney. *Harn v. Phelps*, 65 Tex. 592.

2. *Alabama.* — *Slappey v. Hodge*, 99 Ala. 300.

California. — *Barnett v. Kilbourne*, 3 Cal. 327.

District of Columbia. — *Mason v. Jones*, 7 D. C. 247.

Florida. — *Dibble v. Truluck*, 12 Fla. 185.

Georgia. — *Stroup v. Sullivan*, 2 Ga. 275; *Bostwick v. Perkins*, 1 Ga. 136.

Illinois. — *State Bank v. Stanton*, 7 Ill. 352; *Clark v. Ewing*, 93 Ill. 572; *Mellendy v. Austin*, 69 Ill. 15.

Indiana. — *Dickerson v. Ripley County*, 6 Ind. 128; *Hollinger v. Reeme*, 138 Ind. 363; *Shelmire v. Thompson*, 2 Blackf. (Ind.) 270.

Iowa. — *McConkey v. Lamb*, 71 Iowa 636.

Kentucky. — *Hunt v. Boyier*, 1 J. J. Marsh. (Ky.) 484.

Mississippi. — *Love v. Pass*, 14 Smed. & M. (Miss.) 158; *Lott v. Michiel*, (Miss. 1895) 16 So. Rep. 794.

Missouri. — *Yantis v. Burdett*, 3 Mo. 457; *George v. Tutt*, 36 Mo. 141.

Nebraska. — *Kittle v. Wilson*, 7 Neb. 76; *Young v. Morgan*, 9 Neb. 169.

New York. — *Williams v. Lockwood*, *Clarke Ch. (N. Y.)* 173; *Hamel v. Grimm*, 10 Abb. Pr. (N. Y. Supreme Ct.) 150.

Ohio. — *Duckwall v. Zimmerman*, 2 Ohio 23.

Pennsylvania. — *Maher's Appeal*, (Pa. 1886) 2 Cent. Rep. 846; *Burke v. Gibson*, 6 Kulp (Pa.) 310.

Tennessee. — *Holcomb v. Canady*, 2 Heisk. (Tenn.) 610.

Texas. — *Coleman v. Goynes*, 37 Tex. 552; *Gulf, etc., R. Co. v. Henderson*, 83 Tex. 70.

the part of his attorney or agent, the acts and omissions of whom are no more a ground for excuse than his own.¹ It is no sufficient excuse that the complainant relied upon statements made

Wisconsin. — *Nye v. Sochor*, 92 Wis. 40.

"The bill fails to allege that complainant took any steps to prosecute his replevin suit, beyond the employment of an attorney. He did not attend the court; he did not cause his witnesses, if he had any, to attend; he did not have them subpoenaed, or furnish their names to his attorney, that he might have taken the necessary steps to procure their attendance. It fails to allege that any fraud was practiced upon him by the opposite party, or that he was prevented by any accident from obtaining a full and fair trial at law. There is a total failure to show diligence in the prosecution of his suit." *Albro v. Dayton*, 28 Ill. 325.

Where it appears from the bill that the complainant was sued at law in a county other than that of his residence, facts must be alleged which show that he took prompt measures to defend himself by interposing a plea, and intrusting his defense to counsel, or by his attendance at court in person or by an agent informed as to the grounds upon which a recovery was to be resisted. The court of equity will not grant relief against a judgment at law merely because it is inequitable. *Stinnett v. Branch of State Bank*, 9 Ala. 120.

Plaintiff's Deafness. — It is no excuse that because of his deafness the complainant was ignorant that a fact material to his defense had not been presented, where he was present at the trial with counsel. *Stone v. Moody*, 6 Yerg. (Tenn.) 31.

Threats of Violence. — Allegations that the complainant was prevented from making his defense by threats of personal violence are insufficient, unless it appears from the bill that they were made by the judgment creditor or some one acting in his behalf. *Powell v. Cyfers*, 1 Heisk. (Tenn.) 526.

Fraud of Agent, etc. — Allegations from which it appears that the complainant is an aged and infirm woman, and that the judgment creditor was her agent and confidential adviser when he fraudulently procured from her the evidence of the indebtedness and obtained judgment thereon, show a sufficient excuse.

Franklin v. Ridenour, 5 Jones Eq. (N. Car.) 420.

1. *Alabama.* — *Sanders v. Fisher*, 11 Ala. 812.

Arkansas. — *Jamison v. May*, 13 Ark. 600; *Conway v. Ellison*, 14 Ark. 361.

California. — *Quinn v. Wetherbee*, 41 Cal. 247.

Illinois. — *Yates v. Monroe*, 13 Ill. 212; *Bardonski v. Bardonski*, 44 Ill. App. 201, affirmed in 144 Ill. 284; *Ames v. Snider*, 55 Ill. 498; *Lewis v. Firemen's Ins. Co.*, 67 Ill. App. 195; *Newman v. Schueck*, 58 Ill. App. 328; *Calman v. Stuckart*, 70 Ill. App. 310; *Ward v. Durham*, 134 Ill. 195.

Kentucky. — *Harrison v. Lee*, 7 J. J. Marsh. (Ky.) 171; *Payton v. McQuown*, 97 Ky. 757.

Maryland. — *Darling v. Baltimore*, 51 Md. 1.

Massachusetts. — *Amherst College v. Allen*, 165 Mass. 178.

Missouri. — *Miller v. Bernecker*, 46 Mo. 194.

New York. — *Graham v. Stagg*, 2 Paige (N. Y.) 321.

North Carolina. — *Neville v. Pope*, 95 N. Car. 346; *Fentress v. Robins*, Term (N. Car.) 177.

Vermont. — *Burton v. Wiley*, 26 Vt. 430.

Virginia. — *Wallace v. Richmond*, 26 Gratt. (Va.) 67.

Wisconsin. — *Hiles v. Mosher*, 44 Wis. 601.

United States. — *Wynn v. Wilson*, Hempst. (U. S.) 698; *Celina v. Eastport Sav. Bank*, 37 U. S. App. 164; *Barhorst v. Armstrong*, 42 Fed. Rep. 2.

Contra. — *Huebschman v. Baker*, 7 Wis. 542.

Insolvency of Negligent Counsel. — "It is apprehended it can make no difference, in principle, whether the attorney is solvent or insolvent. The cases are decided on the theory the party is himself guilty of laches in relying on the diligence of his attorney, and that he is not excusable for failing to make his defense at law simply because he employed counsel to do it for him. Indeed, the combined diligence of both is required. Otherwise, the party has not availed himself of all the means the law has placed in his hands to en-

by officers of the court, where such statements were unofficial.¹ Where the matters of excuse alleged might have been remedied by obtaining more time pending the trial at law, and no continuance was asked, the bill shows insufficient ground for relief.² Sickness of the complainant is generally an insufficient excuse;³ otherwise when he was totally incapacitated thereby, and his assistance to establish the defense was necessary.⁴

able him to make his defense. This he must do before he can invoke the aid of a court of chancery." *Kern v. Strausberger*, 71 Ill. 413.

Neglect of Codefendant. — In *Robins v. Mount*, 3 Ga. 74, the court said: "The allegation amounts to this, stripped of all the drapery thrown around it by the draughtsman of the bill, that the other defendants intrusted Sutlive, their codefendant, to enter the appeal, and he, being ignorant of the necessity of entering an appeal in the case, though sent for that purpose, failed and neglected to do so. Whose fault was it that the appeal was not entered? Can it be said that the failure to enter an appeal was unmixed with negligence or fault on the part of the defendants to the judgment at law? We apprehend not, and therefore the judgment of the court below must be reversed."

1. *Hanna v. Morrow*, 43 Ark. 107; *Higgins v. Bullock*, 73 Ill. 205; *Elton v. Brettschneider*, 33 Ill. App. 355; *Crumpton v. Baldwin*, 42 Ill. 165.

2. *Alabama*. — *Pharr v. Reynolds*, 3 Ala. 521; *Governor v. Barrow*, 13 Ala. 540.

Delaware. — *Kersey v. Rash*, 3 Del. Ch. 321.

Georgia. — *Hines v. Beers*, 76 Ga. 9.

Illinois. — *Palmer v. Gardiner*, 77 Ill. 143.

Indiana. — *Doubleday v. Makepeace*, 4 Blackf. (Ind.) 10.

Maryland. — *Dilly v. Barnard*, 8 Gill & J. (Md.) 170; *Gott v. Carr*, 6 Gill & J. (Md.) 309.

New Jersey. — *Anglesey v. Colgan*, 44 N. J. Eq. 203.

Tennessee. — *Turley v. Taylor*, 6 Baxt. (Tenn.) 376.

Texas. — *Hatchett v. Conner*, 30 Tex. 104; *Western v. Woods*, 1 Tex. 1.

United States. — *Hendrickson v. Hinckley*, 17 How. (U. S.) 443.

In *Collins v. Jones*, 6 Leigh (Va.) 530, the court said: "He [the plaintiff] does not even say why his material witness was absent. Did he use due

diligence in summoning that witness to appear at the court? If he did, why did he not apply for a continuance of the cause? If he did apply for it, and he was overruled, why did he not except to the opinion of the court, and apply to the appellate tribunal, on the law side, for redress?" See also *Chapman v. Scott*, 1 Cranch (C. C.) 302; *French v. Garner*, 7 Port. (Ala.) 549.

Sufficiency of Averments. — A bill alleging that the defendant received a message from his attorney saying that the latter was sick, and that the case would be continued, without alleging the truth of the message, does not contain a sufficient excuse. *Sasser v. Olliff*, 91 Ga. 84.

An allegation which states that the complainant had formulated a sufficient affidavit for a continuance and forwarded it to the place where the court was sitting is insufficient where it does not also show that the affidavit was presented and passed upon by the court. *Smith v. Allen*, 63 Ill. 474.

Omission to Move for Stay. — Where it appears that there existed a remedy by motion in the original suit, to stay the action until a final decision had been reached in another case, and no use was made of it, there is no ground for relief. *Van Vleck v. Clark*, 38 Barb. (N. Y.) 316.

3. *Jamison v. May*, 13 Ark. 600; *Hopper v. Davies*, 70 Ill. App. 682; *Cole v. Hundley*, 8 Smed. & M. (Miss.) 473; *Griffith v. Thompson*, 4 Gratt. (Va.) 147.

4. *Spencer v. Kinnard*, 12 Tex. 180; *Alford v. Moore*, 15 W. Va. 597.

An allegation that during the complainant's absence in attendance upon a son, who was dangerously ill, the summons was served by leaving a copy at the residence, and that he returned on the day set for trial, but was too sick to attend on that day, or for twenty days thereafter, was held to be sufficient. *Horn v. Queen*, 4 Neb. 108, 5 Neb. 472.

Insanity at the Time of the Trial is a

Failure to Make Direct Attack on Judgment. — The complainant must not only excuse his failure to make a legal defense, but also his failure to attack the judgment at law by any method provided by statute which may be applicable. And this is so whether the statutory grounds are legal or equitable in their nature.¹

sufficient excuse. *Lee v. Heuman*, 10 Tex. Civ. App. 666.

In *Burem v. Foster*, 6 Heisk. (Tenn.) 333, where the grounds alleged were held sufficient, the court said: "The grounds on which he prayed for a new trial were that no summons was ever served on him, or if it was, that it was served when he was so enfeebled by disease, both in body and mind, as to be incapable of comprehending the nature of the service and of giving to the suit any attention. He alleged that he knew nothing of the pendency of the suit until after the judgment was rendered; that he was not present personally or by counsel, and that the imbecility of his mind continued after the judgment, and hence that advantage was taken of his weakness and incompetency. He states that the judgment was wholly unjust; that he had no connection with nor knowledge of the trespasses and injuries for which the judgment was rendered, and that he was in no way responsible therefor."

1. Remedy by Motion for a New Trial, Appeal, or Writ of Error — *Alabama*. — *Garvin v. Squires*, 9 Ark. 533.

Delaware. — *Kersey v. Rash*, 3 Del. Ch. 321.

District of Columbia. — *Bohrer v. Fay*, 3 MacArthur (D. C.) 145.

Georgia. — *Gibson v. Cohen*, 85 Ga. 850.

Illinois. — *Geraty v. Druiding*, 44 Ill. App. 440.

Indiana. — *Baragree v. Cronkhite*, 33 Ind. 192; *Schwab v. Madison*, 49 Ind. 329; *Dunn v. Fish*, 8 Blackf. (Ind.) 407; *Ross v. Banta*, 140 Ind. 120; *Boos v. Morgan*, 140 Ind. 206; *Parsons v. Piereson*, 128 Ind. 479; *Michener v. Springfield Engine, etc., Co.*, 142 Ind. 130.

Iowa. — *Lowery v. Greene County*, 75 Iowa 338.

Kentucky. — *Veech v. Pennebaker*, 2 Bibb (Ky.) 326; *M'Connel v. Ficklin*, 4 Bibb (Ky.) 413; *Ward v. Chiles*, 3 J. J. Marsh. (Ky.) 486; *Yelton v. Hawkins*, 2 J. J. Marsh. (Ky.) 1.

Nebraska. — *Haynes v. Aultman*, 36 Neb. 257; *Woodward v. Pike*, 43 Neb. 777.

New York. — *Moeschler v. Lochte*,

(Supreme Ct.) 12 N. Y. St. Rep. 855; *Harris v. Treu*, 14 Misc. Rep. (N. Y. Super. Ct.) 172, 25 Civ. Pro. Rep. (N. Y.) 92.

North Carolina. — *Houston v. Smith*, 6 Ired. Eq. (N. Car.) 264.

Ohio. — *Shelton v. Gill*, 11 Ohio 417.

Pennsylvania. — *Kountz v. Bank*, 25 Pittsb. Leg. J. (Pa.) 127.

Texas. — *Long v. Smith*, 39 Tex. 160; *Bryorly v. Clark*, 48 Tex. 345; *Holman v. G. A. Stowers Furniture Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1120; *Houston, etc., R. Co. v. Ellis*, (Tex. Civ. App. 1896) 37 S. W. Rep. 972.

Washington. — *Bowman v. McGregor*, 6 Wash. 118.

Wisconsin. — *Stokes v. Knarr*, 11 Wis. 389.

United States. — *Wynn v. Wilson*, *Hempst.* (U. S.) 698; *Cotzhausen v. Kerting*, 29 Fed. Rep. 821; *Edmanson v. Best*, 18 U. S. App. 288; *Folsom v. Ballard*, 36 U. S. App. 75.

That by agreement of the parties the cause was to be tried by another judge, or a change of venue allowed, instead of which judgment was rendered in the complainant's absence, is no excuse, where the complainant did not look after his case, to see what action had been taken at the term, until the time for appeal had gone by. *Renfro v. Renfro*, 54 Mo. App. 429.

Where a party had sufficient time in which to appeal before the office of the justice of peace became vacant by his resignation, omission to appeal will preclude equitable relief, though the full time allowed by statute for taking an appeal had not expired. *Galbraith v. Barnard*, 21 Oregon 67.

In attacking judgments from which no appeal or writ of error will lie, as, for instance, judgments of justices of the peace for small amounts made final by statute, such failure need not be excused. *Clay County v. Markle*, 46 Ind. 96; *Gulf, etc., R. Co. v. Henderson*, 83 Tex. 70; *Galveston, etc., R. Co. v. Dowe*, 70 Tex. 1; *Odum v. McMahan*, 67 Tex. 292; *Jennings v. Shiner*, (Tex. Civ. App. 1897) 43 S. W. Rep. 276; *Gulf, etc., R. Co. v. Rawlins*, 80 Tex.

579.

(2) *Newly Discovered Evidence* — **In General.** — The bill must set out the newly discovered evidence in detail, and it must appear therefrom that the evidence is not merely cumulative, but that it is competent evidence and of sufficient weight to support a judgment for the plaintiff.¹ It must also appear that the evidence was discovered after judgment, and too late to take any action in the law case.² The injustice of the judgment thus appearing, the bill must allege other facts which show that the complainant could not, by the use of all the means at his command, have dis-

Remedy by Certiorari. — *Gatlin v. Kilpatrick*, 1 Law Repos. (N. Car.) 534; *King v. Vaughan*, 8 Yerg. (Tenn.) 59; *McNeill v. Hallmark*, 28 Tex. 157.

Remedy by Writ of Error Coram Nobis. — *Gunn v. Neal*, 2 Heisk. (Tenn.) 318; *Williamson v. Appleberry*, 1 Hen. & M. (Va.) 206.

Remedy by Motion or Action to Set Aside, Vacate, and the Like — *Alabama.* — *English v. Savage*, 14 Ala. 342; *Roebeling Sons Co. v. Stevens Electric Co.*, 93 Ala. 39; *National Fertilizer Co. v. Hinson*, 103 Ala. 532.

California. — *Reagan v. Fitzgerald*, 75 Cal. 230.

Iowa. — *Piggott v. Addicks*, 3 Greene (Iowa) 427.

Minnesota. — *Myrick v. Edmundson*, 2 Minn. 259.

Nebraska. — *Gould v. Loughran*, 19 Neb. 392.

Oklahoma. — *Mosely v. Southern Mfg. Co.*, 4 Okla. 492.

Pennsylvania. — *Given's Appeal*, 121 Pa. St. 260.

Wisconsin. — *McIndoe v. Hazelton*, 19 Wis. 567; *Coon v. Seymour*, 71 Wis. 340.

United States. — *Kidwell v. Master-son*, 3 Cranch (C. C.) 52.

But even though the defendant in a judgment may have an adequate remedy at law by application to open it, yet equity will interfere by injunction, if a sale under execution thereon will take place while the law court is not in session. *Staats v. Herbert*, 4 Del. Ch. 508.

Remedy by Mandamus. — *Rogers v. Kingsbury*, 22 Ga. 60; *Boyd v. Weaver*, 134 Ind. 266.

1. *Colorado.* — *Fisher v. Greene*, 5 Colo. 541.

Delaware. — *Kersey v. Rash*, 3 Del. Ch. 321.

Illinois. — *Yates v. Monroe*, 13 Ill. 212.

Kentucky. — *Hunt v. Boyier*, 1 J. J. Marsh. (Ky.) 484.

Maryland. — *Briesch v. McCauley*, 7 Gill (Md.) 190.

New Jersey. — *Maxwell v. Hannon*, 29 N. J. Eq. 525; *Hannon v. Maxwell*, 31 N. J. Eq. 318.

South Carolina. — *Forsythe v. McCreight*, 10 Rich. Eq. (S. Car.) 308.

Texas. — *Burnley v. Rice*, 21 Tex. 171.

Virginia. — *Harnsberger v. Kinney*, 13 Gratt. (Va.) 511.

United States. — *Nelson v. Killingley First Nat. Bank*, 70 Fed. Rep. 526.

See further, for illustrations of that same principle, article *BILLS OF REVIEW*, vol. 3, p. 580 *et seq.*

Newly discovered evidence in the nature of confessions or admissions made by the judgment creditor, where the judgment was obtained against the administrators on admissions of their intestate, is sufficient. *Colyer v. Langford*, 1 A. K. Marsh. (Ky.) 237.

"The newly discovered evidence should be set out verbatim, just as it can be testified to in court, and be subscribed and sworn to by each of the newly discovered witnesses." *Burnley v. Rice*, 21 Tex. 171.

In *Miller v. McGuire*, 1 Morr. (Iowa) 150, the court said: "The bill contains, in a general and vague way, an allegation of newly discovered testimony. This is not sufficient. The newly discovered testimony should have been set forth, that the court might judge of its materiality. The decree of the court below will therefore be reversed, the demurrer sustained, and the bill dismissed." See also *Forsythe v. McCreight*, 10 Rich. Eq. (S. Car.) 308.

Newly discovered evidence must not be merely "matter to repel the charge by opposing proof, but such as destroys his proof." *Houston v. Smith*, 6 Ired. Eq. (N. Car.) 264; *Pemberton v. Kirk*, 4 Ired. Eq. (N. Car.) 178.

2. *Fuller v. Little*, 69 Ill. 229; *Hannon v. Maxwell*, 31 N. J. Eq. 318, 29 N. J. Eq. 525; *Houston v. Smith*, 6 Ired. Eq. (N. Car.) 264.

covered the evidence in time to make the defense.¹ Where it appears that the evidence is matter of record, accessible to the defendant, and from its nature necessarily within his knowledge,

1. *Alabama*.—*Lee v. Insurance Bank*, 2 Ala. 21; *Perrine v. Carlisle*, 19 Ala. 686; *Cox v. Mobile, etc.*, R. Co., 44 Ala. 611.

Arkansas.—*Reed v. Harvey*, 23 Ark. 44; *Ward v. Derrick*, 57 Ark. 500.

Georgia.—*Pearce v. Chastain*, 3 Ga. 226.

Illinois.—*Hubbard v. Hobson*, 1 Ill. 190; *McGehee v. Gold*, 68 Ill. 215; *Chicago, etc.*, R. Co. v. *Hay*, 119 Ill. 493.

Iowa.—*Hoskins v. Hattenback*, 14 Iowa 314.

Louisiana.—*Lee v. Hubbell*, 20 La. Ann. 551.

Texas.—*Burnley v. Rice*, 21 Tex. 171; *Gregg v. Bankhead*, 22 Tex. 245; *Clegg v. Darragh*, 63 Tex. 357; *Alexander v. Banner*, 10 Tex. Civ. App. 111.

Virginia.—*Slack v. Wood*, 9 Gratt. (Va.) 40.

United States.—*Trefz v. Knickerbocker L. Ins. Co.*, 8 Fed. Rep. 177.

"Before the question could fairly arise it would be necessary to allege: 1st, that the newly discovered matter had not only come to the knowledge of the party after the close of the proceeding sought to be impeached, and too late to be used in connection with it, but also that it could not have been ascertained in time by proper care and diligence; 2d, that it is of such a character as to be used upon another investigation; and 3d, that it is a new substantive fact, and not merely new evidence, cumulative in character, in support or denial of some fact already passed upon and decided." *Ford v. Ford*, 2 Coldw. (Tenn.) 74. See also *Hatchett v. Conner*, 30 Tex. 104.

The bill should show by distinct and positive averments what the defense is, how and by whom it can be proven, and that the failure to acquire the knowledge of it before the trial at law was wholly unmixed with any negligence on the part of the plaintiff, or any want of attention to the means of information within the reach of a man of ordinary prudence and discretion. *Hill v. Harris*, 42 Ga. 412.

"The complainant should have shown clearly and distinctly that he sought the information earnestly and in good faith from all the sources where it was likely to be obtained, and

that he sought this information before the judgment at law, and failed to obtain it." *Greenfield v. Frierson*, 7 Heisk. (Tenn.) 633. See also *Slack v. Wood*, 9 Gratt. (Va.) 40.

"The bill should state particularly the facts to be proved, the names of the witnesses, and show the bearing and relevancy of the proposed proofs. It should also show when and how the facts discovered came to the knowledge of the plaintiffs, and why no motion for a new trial was made in the court trying the case, and before the lapse of the term." *Mulford v. Cohn*, 18 Cal. 42.

Diligence of Administrator.—In *Hewlett v. Hewlett*, 4 Edw. Ch. (N. Y.) 7, it was held that an administrator who had failed to plead, because advised that his plea would not avail, was entitled to relief on facts discovered afterwards which made his plea good, on the ground that he was one of those persons who are obliged from the nature of their office to rely upon the information of others.

Newly Discovered Parties.—It seems that a judgment creditor may never have relief in equity against his judgment on the ground that it has since been discovered that other parties jointly liable were not brought in or that the real party in interest was not sued. *Penny v. Martin*, 4 Johns. Ch. (N. Y.) 566, where the court said: "The demand is on a contract to which it is alleged they were parties, as being dormant partners with R. and M. The omission to make them parties in the action at law arose, according to the allegation in the bill, from ignorance of the fact that they were such partners. Is that ignorance a sufficient ground for transferring to this court jurisdiction of a matter properly, if not exclusively, cognizable at law? The ignorance might have been removed by due vigilance and inquiry, and perhaps by the assistance of a bill of discovery here. The plaintiffs have no particular equity entitling them to relief." See also *Brown v. Calumet River R. Co.*, 37 Ill. App. 113; *Robertson v. Smith*, 18 Johns. (N. Y.) 459; *Yellow Pine Lumber Co. v. Carroll*, (Tex. Civ. App. 1892) 21 S. W. Rep. 1002; *Willings v. Consequa*, Pet. (C. C.) 301.

no ground for relief is shown.¹ The fact that the existence of the defense was suspected, and it was unsuccessfully set up at law, will not preclude relief, where there was no lack of diligence in making the discovery.²

Evidence Obtainable by Bill of Discovery.—In jurisdictions where a discovery of evidence may be made in equity in aid of a defense at law, if it appears that the evidence detailed in the bill might have been thus obtained a failure to ask such discovery will prevent any relief against the judgment.³

c. VOID JUDGMENTS.—**A Distinction Between Void and Voidable Judgments** for purposes of equitable relief is drawn by many of the cases.⁴ A bill which alleges matters amounting only to errors

1. *Governor v. Barrow*, 13 Ala. 540; *Palmer v. Bethard*, 66 Ill. 529; *Kirby v. Pascault*, 53 Md. 531; *Lott v. Michel*, (Miss. 1895) 16 So. Rep. 794; *Metropolitan El. R. Co. v. Johnston*, 84 Hun (N. Y.) 83; *Vardeman v. Edwards*, 21 Tex. 737.

2. *Pearce v. Chastain*, 3 Ga. 226; *Trefz v. Knickerbocker L. Ins. Co.*, 8 Fed. Rep. 177.

In *Ocean Ins. Co. v. Fields*, 2 Story (U. S.) 59, the court said: "But the parties admit, for the sake of the argument, that the point of fraud was made at the trial, but that it was in effect founded upon circumstances of suspicion, not sustained by any clear and satisfactory proofs, and that the boring of the holes was not known or suspected at the trial, and that it was not and could not therefore then be a matter of controversy. Now I agree that mere cumulative evidence to the fact of fraud or any other leading fact not discovered since the trial will not ordinarily constitute any just ground for the interference of a court of equity to grant relief, for the solid reason that it is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal while men are mortal. But I do not know that it has ever been decided that in an assignable case, where the defense has been imperfectly made out at the trial from the defect of real and substantial proofs, although there were some circumstances of a doubtful character or some presumptions of a loose and indeterminable bearing before the jury, and afterwards newly discovered evidence has come out, full and direct and positive, to the very gist of the controversy, a court of equity will not interfere to grant relief and to sustain

a bill to bring forth and try the force and validity of the new evidence. My recollection does not furnish me with any case where a doctrine so strict and so binding has been positively upheld and pronounced."

3. *Alabama*.—*M'Grew v. Tombeckbee Bank*, 5 Port. (Ala.) 547.

Illinois.—*Duncan v. Ingles*, 1 Ill. 277.

Iowa.—*Kriechbaum v. Bridges*, 1 Iowa 14.

Kentucky.—*McCown v. Macklin*, 7 Bush (Ky.) 308.

Maine.—*Titcomb v. Potter*, 11 Me. 218.

Mississippi.—*Smith v. Walker*, 8 Smed. & M. (Miss.) 131.

New York.—*Thompson v. Berry*, 3 Johns. Ch. (N. Y.) 395; *M'Vickar v. Wolcott*, 4 Johns. (N. Y.) 510; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351; *Patterson v. Bangs*, 9 Paige (N. Y.) 627. See also *Norton v. Woods*, 22 Wend. (N. Y.) 520.

South Carolina.—*Forsythe v. McCreight*, 10 Rich. Eq. (S. Car.) 308.

Virginia.—*George v. Strange*, 10 Gratt. (Va.) 499.

England.—*Williams v. Lee*, 3 Atk. 223; *Barbone v. Brent*, 1 Vern. 176.

As to when a bill of discovery will lie, see article DISCOVERY, PRODUCTION AND INSPECTION, vol. 6, p. 728.

Statutory Changes.—Witnesses whose evidence under the old practice could only be discovered by application to equity are now generally made competent by statute. That they have been made competent since the judgment was rendered is no ground for relief, presumably because prior to the statute discovery in equity might have been had. *Briggs v. Smith*, 5 R. I. 213; *Greenfield v. Frierson*, 7 Heisk. (Tenn.) 633.

4. "In some states a distinction has

and irregularities in obtaining jurisdiction does not state a ground for relief. On the other hand, where it appears from the bill that the judgment is wholly void for want of jurisdiction over person or subject-matter, or for other reasons, a good cause of action exists in some states on that ground alone.¹ In these states allegations which show a defense to the indebtedness, and which negative the existence of a remedy at law, are immaterial.²

The **Contrary Doctrine**, however, seems more in accord with the nature of equitable jurisprudence, which takes cognizance of the acts of the person rather than of the defects in a law judgment.

been drawn between void and voidable judgments, the line of distinction being that as to void judgments equity will enjoin, but not if the judgment is merely irregular or erroneous; and this rule has had more extended application in connection with judgments that are void by reason of want of service of process." *Texas-Mexican R. Co. v. Wright*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1134.

1. *Dial v. Olsen*, (Arizona 1894) 36 Pac. Rep. 175; *San Juan, etc., Min., etc., Co. v. Finch*, 6 Colo. 214; *Nicholson v. Stephens*, 47 Ind. 185; *Grass v. Hess*, 37 Ind. 193; *Brickley v. Heilbruner*, 7 Ind. 488; *Jennings v. Shiner*, (Tex. Civ. App. 1897) 43 S. W. Rep. 276; *Wofford v. Booker*, 10 Tex. Civ. App. 171; *Byars v. Justin*, 2 Tex. App. Civ. Cas., § 689; *Parrott v. Craig*, 3 Tex. App. Civ. Cas., § 453; *McFaddin v. Spencer*, 18 Tex. 440. *Contra*, *St. Louis, etc., R. Co. v. Lowder*, 138 Mo. 533 [*affirming* 59 Mo. App. 3, and *overruling* *Bornschein v. Finck*, 13 Mo. App. 120, and *U. S. Mutual Acc. Ins. Co. v. Reisinger*, 43 Mo. App. 571].

In *Cain v. Goda*, 84 Ind. 209, the court said: "We are not willing to hold that a void judgment can only be set aside upon a bill of review, for such a judgment may be attacked in any of the methods recognized by law, as, for instance, by a complaint for an injunction, or by an action to have it vacated. It is, indeed, not even necessary that the attack should be a direct one, for a void judgment may be collaterally impeached."

Process Served on Insane Person. — Where a bill shows that service of process was made on a person while insane, equity will relieve against the judgment. *Litchfield's Appeal*, 28 Conn. 127.

Sheriff Serving Process a Plaintiff. — In *Kentucky*, under Civ. Code, § 737, it is

ground for relief that the process in a case wherein the sheriff was plaintiff was served by him. *Knott v. Jarboe*, 1 Metc. (Ky.) 506.

2. *San Juan, etc., Min., etc., Co. v. Finch*, 6 Colo. 214; *Wilson v. Hawthorne*, 14 Colo. 530; *Propst v. Meadows*, 13 Ill. 157; *Dobbins v. McNamara*, 113 Ind. 54; *Leonard v. Capital Ins. Co.*, (Iowa 1897) 70 N. W. Rep. 629; *Henkle v. Holmes*, 97 Iowa 695; *State Ins. Co. v. Waterhouse*, 78 Iowa 674; *Smith v. Deweese*, 41 Tex. 594; *Cunningham v. Taylor*, 20 Tex. 126.

In *Connell v. Stelson*, 33 Iowa 147, the court said: "Whether he [the plaintiff] has attempted to correct, by appeal, the erroneous decision in the certiorari proceeding here referred to, does not appear. Whether he has or not, the chancery courts of this state would not permit the void judgment to be enforced against him. The judgment being void, he might also, in a legal way, have resisted the enforcement of the execution. But such a remedy is not adequate. Chancery will interfere to grant speedy and adequate relief." See also *Arnold v. Hawley*, 67 Iowa 313.

In *Follansbee v. Scottish-American Mortg. Co.*, 7 Ill. App. 486, the court said: "It is a well-established principle that a judgment rendered without jurisdiction is void, and may be attacked collaterally in any proceeding in which its validity may be called in question. This principle is in no way affected by the fact that the defendant has a right to have such void judgment reversed on appeal or error. It is clearly within the jurisdiction of courts of equity to vacate or enjoin judgments at law which, by reason of fraud, want of jurisdiction in the court before which they were rendered, or any other circumstance, it would be inequitable and against conscience to have enforced."

Where it obtains, a bill grounded only on the invalidity does not state a cause of action, but the complainant is left to his remedy at law.¹ That a bill may be sufficient, additional facts must be alleged from which it appears that the complainant has a meritorious defense to the action and is without legal remedy through no negligence or fault on his part.² It must

1. *Alabama*. — *Rice v. Tobias*, 83 Ala. 348.

Arkansas. — *Shaul v. Duprey*, 48 Ark. 331.

California. — *Luco v. Brown*, 73 Cal. 3; *Luco v. Bushyhead*, (Cal. 1887) 14 Pac. Rep. 368; *Comstock v. Clemens*, 19 Cal. 77; *Gates v. Lane*, 49 Cal. 265; *Logan v. Hillegass*, 16 Cal. 201; *Sanchez v. Carriaga*, 31 Cal. 170.

Illinois. — *Alabama Ins. Co. v. Kingman*, 21 Ill. App. 493.

Maryland. — *Brumbaugh v. Schnebly*, 2 Md. 320.

Mississippi. — *Scroggins v. Howorth*, 23 Miss. 514.

Missouri. — *Stockton v. Ransom*, 60 Mo. 535; *St. Louis, etc., R. Co. v. Reynolds*, 89 Mo. 146; *St. Louis, etc., R. Co. v. Lowder*, 59 Mo. App. 3, *affirmed* 138 Mo. 533; *Bear v. Youngman*, 19 Mo. App. 41.

New Mexico. — *Gutierrez v. Pino*, 1 N. Mex. 392.

New York. — *Fullan v. Hooper*, 66 How. Pr. (N. Y. Supreme Ct.) 75, *affirmed* 19 N. Y. Wkly. Dig. 93; *Heiser v. New York*, 104 N. Y. 68.

North Carolina. — *Gallop v. Allen*, 113 N. Car. 24; *Emmons v. McKesson*, 5 Jones Eq. (N. Car.) 92.

South Carolina. — *Gillam v. Arnold*, 32 S. Car. 503, 35 S. Car. 612.

Tennessee. — *Palmer v. Malone*, 1 Heisk. (Tenn.) 549; *Roche v. Washington*, 7 Humph. (Tenn.) 142.

Texas. — *Galveston, etc., R. Co. v. Ware*, 74 Tex. 47.

Virginia. — *Goolsby v. St. John*, 25 Gratt. (Va.) 146.

West Virginia. — *Kanawha, etc., R. Co. v. Ryan*, 31 W. Va. 364.

Wisconsin. — *Thomas v. West*, 59 Wis. 103; *Wilkinson v. Rewey*, 59 Wis. 554; *Crandall v. Bacon*, 20 Wis. 639.

United States. — *Donham v. Springfield Hardware Co.*, 62 Fed. Rep. 110; *Ewing v. St. Louis*, 5 Wall. (U. S.) 413.

"The better rule, however, and the one most usually applied, is that equity will not grant its extraordinary power to redress a grievance where an adequate remedy exists at law for the protection of the judgment debtor against

a void judgment." *Texas-Mexican R. Co. v. Wright*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1134.

"It seems to us clear, therefore, that this action on the equity side of the court cannot be sustained where, as in this case, the complaint contains no allegations imputing to the case any features of equitable cognizance, but rests solely upon the allegation that plaintiff was never served with process in the action in which the judgment in question was recovered." *Crocker v. Allen*, 34 S. Car. 452.

2. *Alabama*. — *Reynolds v. Dothard*, 7 Ala. 664.

Arkansas. — *Rotan v. Springer*, 52 Ark. 80; *Fuller v. Townsly-Myrick Dry Goods Co.*, 58 Ark. 314; *State v. Hill*, 50 Ark. 458, *overruling* *Ryan v. Boyd*, 33 Ark. 778.

California. — *Gibbons v. Scott*, 15 Cal. 285.

Illinois. — *Colson v. Leitch*, 110 Ill. 504; *Geraty v. Druiding*, 44 Ill. App. 440.

Indiana. — *Harman v. Moore*, 112 Ind. 221.

Iowa. — *Piggott v. Addicks*, 3 Greene (Iowa) 427; *Gerrish v. Hunt*, 66 Iowa 682; *Givens v. Campbell*, 20 Iowa 79.

Mississippi. — *Stewart v. Brooks*, 62 Miss. 492.

Missouri. — *Swan v. Thompson*, 36 Mo. App. 155; *Sauer v. Kansas City*, 69 Mo. 46.

Nebraska. — *Pilger v. Torrence*, 42 Neb. 903; *Fickes v. Vick*, 50 Neb. 401; *Bankers' L. Ins. Co. v. Robbins*, (Neb. 1897) 73 N. W. Rep. 269; *Wilson v. Shipman*, 34 Neb. 573; *Janes v. Howell*, 37 Neb. 320; *Pilger v. Torrence*, 42 Neb. 903.

Ohio. — *Gifford v. Morrison*, 37 Ohio St. 502.

Texas. — *Gulf, etc., R. Co. v. Rawlins*, 80 Tex. 579; *Carter v. Griffin*, 32 Tex. 212.

Wisconsin. — *Thomas v. West*, 59 Wis. 103; *Wilkinson v. Rewey*, 59 Wis. 554.

United States. — *Massachusetts Ben. L. Assoc. v. Lohmiller*, 74 Fed. Rep. 23.

"Granting that the judgments were

also appear that in fact no notice of the action was had in time to move at law.¹

Judgments on Illegal Contracts.—Where judgments founded on gambling and other illegal contracts are declared void by statute or the policy of the law, facts showing such a contract and judgment thereon constitute sufficient equity.²

void for want of jurisdiction, the result would be the same. Courts of equity will not enjoin a judgment at law merely for want of jurisdiction in the court in which the judgment is rendered; and where a party can say nothing against the justice of the judgment equity will not interfere, but leave him to contend against it at law as best he can." *John V. Farwell Co. v. Hilbert*, 91 Wis. 437.

"The nature of the defense must be given, so that the court for itself may determine the conclusion of law as to whether or not it is a good defense, and would produce a different result if proved upon another trial. The plaintiff's oath to such a conclusion is not sufficient." *Sharp v. Schmidt*, 62 Tex. 263. See also *Coon v. Jones*, 10 Iowa 131; *Winters v. Means*, 25 Neb. 241.

Proper Cases for Relief.—A judgment obtained against a person under guardianship as being a habitual drunkard, without service upon or notice to his guardian, will be enjoined, where it does not appear from the pleadings that the contract sued upon was for necessities. *Devin v. Scott*, 34 Ind. 67.

A judgment against a sheriff and his sureties for failure to return an execution rendered without notice will be enjoined where a good defense exists against it. *Smith v. Van Bebber*, 1 Swan (Tenn.) 110; *Kinzer v. Helm*, 7 Heisk. (Tenn.) 672.

Where, in addition to the fact that the judgment is void, it appears from the bill that irreparable damage would result but for equitable interference, a good cause of action is stated. *Jones v. Pharis*, 59 Mo. App. 254.

In *Radzuweit v. Watkins*, (Neb. 1898) 73 N. W. Rep. 679, an allegation that service was had by leaving a copy of the summons at the residence of the defendant during his absence, which copy he never received or had knowledge of until a levy had been made and the property was about to be sold, was held good.

Judgment for Penalty.—The rule requiring a meritorious defense to be

alleged before relief will be granted against a judgment void for want of jurisdiction does not apply in the case of a judgment rendered for a penalty under a penal statute. *Chester v. Miller*, 13 Cal. 558.

The Statute of Limitations is a good defense. *Gerrish v. Hunt*, 66 Iowa 682; *Gerrish v. Seaton*, 73 Iowa 15; *Herbert v. Herbert*, 47 N. J. Eq. 11. *Contra*, *Estis v. Patton*, 3 Yerg. (Tenn.) 382.

1. *Raisin Fertilizer Co. v. McKenna*, (Ala. 1897) 21 So. Rep. 816; *Stubbs v. Leavitt*, 30 Ala. 352; *Harnish v. Branner*, 71 Cal. 155; *Garden City Wire, etc., Co. v. Kaue*, 67 Ill. App. 108; *Swan v. Thompson*, 36 Mo. App. 155; *Vantilburg v. Black*, 3 Mont. 459; *Kinzer v. Helm*, 7 Heisk. (Tenn.) 672; *Freeman v. Miller*, 53 Tex. 372; *Cragin v. Lovell*, 109 U. S. 194.

"So far as appears from the allegation of this bill, the complainant may have possessed full and timely information of all the proceedings, but refrained from making any motion, relying upon the assumed defect, and if such were the fact the remedies are legal only." *Massachusetts Ben. L. Assoc. v. Lohmiller*, 74 Fed. Rep. 23.

In *Bankers' L. Ins. Co. v. Robbins*, (Neb. 1897) 73 N. W. Rep. 269, it was held that the fact that the defendant had actual notice of a suit pending in a county other than that of his residence did not require him to defend.

2. *Mallett v. Butcher*, 41 Ill. 382 [*overruling* *Abrams v. Camp*, 4 Ill. 290]; *Lucas v. Nichols*, 66 Ill. 41; *West v. Carter*, 129 Ill. 249; *Emerson v. Townsend*, 73 Md. 224; *Gough v. Pratt*, 9 Md. 526; *Thomas v. Watson*, 9 Md. 536, note; *Lucas v. Waul*, 12 Smed. & M. (Miss.) 157. See also *Brown v. Watson*, 6 B. Mon. (Ky.) 588; *McKinney v. Pope*, 3 B. Mon. (Ky.) 93.

But where the contract only, and not the judgment, is void at law, equity will not interfere, except on equitable grounds recognized generally. *Owens v. Van Winkle Gin, etc., Co.*, 96 Ga. 408; *Young v. Beardsley*, 11 Paige (N. Y.) 93.

Averments of Legal Conclusions. — To show the invalidity of the judgment, the bill must set out in detail facts from which it is apparent that under no circumstances could the law court have had jurisdiction to render it. General allegations of want of jurisdiction and of invalidity are mere conclusions of law and insufficient.¹

5. Bills for Injunction Only. — Relief against a judgment is sometimes granted because of matters arising subsequent to rendition which make its enforcement inequitable and unjust. So in some jurisdictions allegations of fact from which it appears that a judgment has been paid, or that it has been discharged by subsequent agreements or transactions between the parties, will support an action for equitable relief.² The agreements or transactions by

"No relief can be had against a void contract when the defense ought to have been made at law; but if the judgment itself be void, it is a different question. Hence, on gaming contracts, chancery will give relief, because the judgment is void, although the defense might have been made at law. If the contract be void and the party fails to make his defense at law, the judgment is valid and chancery will not interfere with it. But this judgment was void by the common law and also by statute. It derives no validity from the failure to make the defense on the trial of the right of property." *Humphries v. Bartee*, 10 Smed. & M. (Miss.) 282.

1. *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158; *Gulf, etc., R. Co. v. Blankenbecker*, (Tex. Civ. App. 1896) 35 S. W. Rep. 331. See also *Brundage v. Candle*, 25 Tex. Supp. 387; *Derickson v. Predeaux*, 2 Md. 325, note; and generally article **LEGAL CONCLUSIONS**.

"It is not alleged that the judgment is void, nor do the facts alleged render it so necessarily; that it is, is left to vague inference. In this and like cases the material facts should be alleged positively and with precision." *Neville v. Pope*, 95 N. Car. 346.

"It is not sufficient that the petition alleges the absence of record evidence of necessary proceedings, but there must be an allegation that such proceedings were not had or taken, as matter of fact." *Johnson v. Van Cleve*, 23 Neb. 559.

"An injunction will only be granted in a clear case, and upon an unequivocal statement of the facts constituting the grounds therefor. The allegation of the insufficiency of the affidavit for publication of summons — if of any

importance, when other statements in the complaint are considered — is defective, since it is for the court and not the pleader to say that the affidavit is insufficient. The facts showing the insufficiency must be set out." *Ladd v. Ramsby*, 10 Oregon 207.

A bill which does not negative an appearance and waiver of service of summons, and does show a stay taken subsequent to judgment, does not state a cause of action. *Carter v. Griffin*, 32 Tex. 212.

Where a plea to the jurisdiction of the court was made and overruled, the evidence which was taken on the trial thereof must be set out in the bill. *Jennings v. Shiner*, (Tex. Civ. App. 1897) 43 S. W. Rep. 276.

2. *Fryer v. Austill*, 2 Stew. (Ala.) 119; *Fuqua v. Robinson*, 10 Ill. 128; *Bowen v. Clark*, 46 Ind. 405; *Brakke v. Hoskins*, 98 Iowa 233; *Thomas v. Brashear*, 4 T. B. Mon. (Ky.) 65; *Gurley v. Hiteshue*, 5 Gill (Md.) 217; *Todd v. Paton*, 12 La. Ann. 88; *Perry v. Kearney*, 14 La. Ann. 401; *Smith v. State*, 26 Tex. App. 49; *Love v. Powell*, 67 Tex. 15; *Harrison Mach. Works v. Templeton*, 82 Tex. 443; *Heatherly v. Farmers' Bank*, 31 W. Va. 70.

"A court of equity has jurisdiction to declare the judgment paid and to restrain the defendants from taking any steps to enforce it." *Kallander v. Neidhold*, 98 Mich. 517.

Where damages for which a judgment has been recovered are allowed as a set-off in another action at law, collection of the former judgment may be restrained on the ground that it is satisfied. *King v. Bradley*, 44 Ill. 342.

Where a bill alleges certain payments to have been made upon a judgment, whereas execution has been issued for the full amount, it states a good cause

which the judgment is settled must be detailed in the bill, that the court may judge of their sufficiency.¹ Where the action is permissible on such grounds the existence of a remedy at law, by motion or otherwise, would seem to be immaterial.² It is more generally held, however, that a bill grounded only on payment or satisfaction of a judgment is insufficient, there being an adequate remedy at law.³ In *Texas* it has been held that a bill setting up an attempt to enforce a dormant judgment exhibits good ground for relief.⁴

6. Relief — a. NATURE. — Some of the terminology in use in actions for equitable relief against judgments is unfortunate by reason of its being identical with that in use at law in direct attacks upon them. As has been stated, bills in equity were originally called bills for a new trial.⁵ Such expressions as bills to set aside, to vacate, to cancel, to annul, are, in modern times, used interchangeably therewith. But whatever term may be used, the relief granted does not run against the judgment directly nor pretend to exert any control over the court which rendered it.⁶ So the independent law tribunal need take no

of action although it is not alleged that the payments have not been credited on the execution. *Williams v. Bradbury*, 9 Tex. 487.

Tender in Replevin. — A bill which shows that a tender of a return of the property after a judgment in replevin, reasonable under the circumstances, was made and refused, states a ground for injunction against the enforcement of the alternative judgment for money. *McClellan v. Marshall*, 19 Iowa 561. See also *Putnam v. Webb*, 15 Oregon 440; *Bowman v. McGregor*, 6 Wash. 118.

Discharge in Bankruptcy. — A bill which alleges a discharge in bankruptcy after the rendition of a judgment states a good ground for relief. *Easley v. Bledsoe*, 59 Tex. 488; *Peatross v. M'Laughlin*, 6 Gratt. (Va.) 64. *Contra*, *Imlay v. Carpentier*, 14 Cal. 173; *Green v. Thomas*, 17 Cal. 86.

1. *Plunkett v. Black*, 117 Ind. 14, where the court said: "There should have been such a description of the contract in the complaint as to make known its character, and whether or not it imported a consideration, and if not, a consideration should have been averred." To the same point see *Howard v. Eddy*, 56 Kan. 498.

2. "The remedy by injunction was proper in this case, even conceding that the court in which the judgment was rendered might have the power to grant the same relief upon motion to

stay the execution." *Thompson v. Laughlin*, 91 Cal. 313. See also *Humphreys v. Leggett*, 9 How. (U. S.) 297.

3. *Perrine v. Carlisle*, 19 Ala. 686; *Harding v. Hawkins*, 141 Ill. 572 [reversing 37 Ill. App. 564]; *Plunkett v. Black*, 117 Ind. 14; *Huston v. Ditto*, 20 Md. 305; *Lansing v. Eddy*, 1 Johns. Ch. (N. Y.) 50; *Albert v. March*, 7 Pa. Co. Ct. Rep. 502; *Beckley v. Palmer*, 11 Gratt. (Va.) 625; *Howell v. Thomson*, 34 W. Va. 794; *Hall v. Taylor*, 18 W. Va. 544.

A bill states no ground for a relief against a satisfied judgment where it shows that the payment was made to a person unauthorized to receive it. *Akin v. Denny*, 37 Md. 81; *Chinn v. Mitchell*, 2 Metc. (Ky.) 92.

4. *Gabel v. McMahan*, 1 Tex. App. Civ. Cas., § 717; *Seymour v. Hill*, 67 Tex. 385; *North v. Swing*, 24 Tex. 193. See also *Cheek v. Taylor*, 22 Ga. 127.

The bill must state facts showing that the judgment has not been kept alive by the due issuance of execution according to law. *Jordan v. Corley*, 42 Tex. 285.

Such relief is no bar to a suit on the judgment or to a proceeding at law to revive it. *Watson v. Newsham*, 17 Tex. 437.

5. See *supra*, XXI. 1. *History of the Remedy*.

6. Equity acts only *in personam*. Its jurisdiction, derived from its ancient character as a court of conscience, is

cognizance of decrees in chancery which thus affect their judgments; and at first their attitude was one of bitter hostility.¹ In modern times a greater comity exists between courts whose sole object is speedily and finally to put an end to the litigation. Law courts will therefore lend what assistance they can, within the limits of their jurisdiction, to render decrees in equity effective.² But should the plaintiff at law proceed in disregard thereof, his obedience is enforced and contempt punished only by the court which laid the command upon him.³ Such being

acquired to prevent the use of an inequitable or unjust advantage. Having the plaintiff at law amenable to its authority, it will enjoin him from enforcing his judgment, where such enforcement would be unjust according to established equitable doctrines, and where such action is necessary to do complete justice will re-examine the issues and itself decree the rights of the parties. "The court, it will be remembered, according to its original constitution, operated upon the conscience of the person, not upon the property, or *in rem*, and now the primary decree is always against the person. All that is necessary, in order to enable the court to exercise its primary authority, is that the person should be amenable to its jurisdiction." 2 Spence's Eq. Jur. (Phila. 1846) 6.

"In strictness there is no such thing as an injunction to a judgment, because the court of chancery does not act upon the law court, and neither reverses, rescinds, nor annuls the judgment." Beckley v. Palmer, 11 Gratt. (Va.) 625. See also Camp v. Ward, 69 Vt. 286.

"At the hearing the court annulled the judgment, set aside the verdict of the jury, and ordered a new trial in the action at law. A court of chancery, under our system of jurisprudence, is invested with no such power as this. It may act on the parties, but not directly on the judgment, nor on the court which rendered it. Such judgment by a court having jurisdiction to render it can be vacated only by some direct proceeding at law, either in the court in which the judgment was recovered or some other court having appellate jurisdiction." Wynne v. Newman, 75 Va. 811. To the same effect see Kansas, etc., R. Co. v. Fitzhugh, 61 Ark. 341; Jackson v. Woodruff, 57 Ark. 599; Pelham v. Moreland, 11 Ark. 442; Reagan v. Fitzgerald, 75 Cal. 230; Gainty v. Russell, 40 Conn.

450; Tyler v. Hamersley, 44 Conn. 419; Mechanics' Nat. Bank v. Colehour, 44 Ill. App. 470; Young v. Davis, 1 T. B. Mon. (Ky.) 152; Bassett v. Henry, 34 Mo. App. 548; State v. Engelmann, 86 Mo. 551; Herbert v. Herbert, 47 N. J. Eq. 11; Boulton v. Scott, 3 N. J. Eq. 231; Darst v. Phillips, 41 Ohio St. 514; Hetzell v. Bentz, 8 Phila. (Pa.) 261; Brown v. Parker, 28 Wis. 21.

1. See *supra*, XXI. 1. *History of the Remedy*.

2. In *Engels v. Lubeck*, 4 Cal. 31, the court said: "This ought certainly to be considered a good reason even for granting a continuance. But we think that the propriety of the observance of the injunction by the court to whose notice it is brought may be properly placed on higher grounds. The comity which one court owes to another of concurrent jurisdiction should always prevent the one from lending itself as an instrument in permitting a contempt of the process of the other." See also *Platt v. Woodruff*, 61 N. Y. 378, where the court said: "A judge at circuit would, doubtless, if the existence of such an order should be properly brought to his knowledge; heed it, and would not, unless under very extraordinary circumstances, permit a party to disregard it."

"That the plaintiffs have proceeded contrary to the order of the court of chancery is not a reason for vacating the judgments; they may be published by that court for their contumacy. Such orders have been regarded as matter of excuse. We never compel a party to proceed when restrained by chancery, nor make him pay costs; but no case has been cited to show that we have power to deprive him of any legal advantage he may gain by such proceeding. The court of chancery has sufficient power to vindicate its authority." *Grazebrook v. M'Creddie*, 9 Wend. (N. Y.) 438.

3. "We cannot take notice of your

the general nature of equitable relief against judgments, the jurisdiction of a court of equity did not originally depend on the locality or character of the law court, but only on the presence of equitable grounds and personal jurisdiction acquired over the parties.¹

Foreign Judgments. — So the enforcement of a judgment rendered in a foreign country or in a sister state may be enjoined.²

chancery injunctions." *Booth v. Booth*, 6 Mod. 288, 1 Salk. 322.

"It acts upon the party only, restrains him from enforcing the judgment by execution, and punishes him as for a contempt for any violation of its mandate." *Beckley v. Palmer*, 11 Gratt. (Va.) 625. See also *Nichols v. Campbell*, 10 Gratt. (Va.) 560.

Proceeding in Disregard of Injunction.

—"It is believed that when a court of equity enjoins a proceeding at law, and the latter-named court disregards the injunction and proceeds with the case, its action will not, for that reason, be void. But in such a case the parties restrained by the injunction would be liable to punishment for violating the order of the chancellor." *Taylor v. Hopkins*, 40 Ill. 442. See also *Kelley v. Cowing*, 4 Hill (N. Y.) 266; *Burt v. Mapes*, 1 Hill (N. Y.) 649.

In an early case in *Indiana* it was held that a judgment obtained in violation of an injunction was void, and could be enjoined on that ground. *Collins v. Fraiser*, 27 Ind. 477.

1. *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Boulton v. Scott*, 3 N. J. Eq. 231, quoting from *Burtis v. Hopkins*, not reported.

Pendency of Writ of Error. — The bill will be entertained regardless of the status of the proceedings subsequent to the judgment, as during the pendency of a writ of error therefrom. *Johnson v. St. Louis, etc., R. Co.*, 141 U. S. 610; *Platt v. Threadgill*, 80 Fed. Rep. 192.

"The rule is pretty well settled in a case of this kind that the judgment of the lower court stands in the same position that it did before the writ of error was allowed, and may be attacked by an original bill in equity, and vacated and set aside, on the ground that it was obtained by fraud or perjury, or through accident or mistake, or for any good and sufficient equitable reasons." *Nelson v. Killingley First Nat. Bank*, 70 Fed. Rep. 526.

Effect of Affirmance of Judgment. — The

fact that judgment was obtained in another court, and has been affirmed by the court of last resort, does not prevent a court of equity from taking jurisdiction, where equitable grounds exist. *Kohn v. Lovett*, 43 Ga. 179; *State Bank v. Hancock*, 6 Dana (Ky.) 284; *Wilson v. Montgomery*, 14 Smed. & M. (Miss.) 205; *State v. Engelmann*, 86 Mo. 551.

The bill "may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal. The bill is an original bill, and may be filed although an injunction should not be awarded. The injunction arrests proceedings at law, and may be dissolved or continued without making any final decree in the case. The condition of the suit at law may be a reason for imposing terms on the party who applies for an injunction, but can be no reason for refusing it. The subpoena and injunction act on the person to whom they are directed, not on the record, and it can be of no consequence where the record is." *Parker v. Judges*, 12 Wheat. (U. S.) 561.

2. *Stanton v. Embry*, 46 Conn. 65, 595, *sub nom.* *Embry v. Palmer*, 107 U. S. 3; *Pearce v. Olney*, 20 Conn. 544, *sub nom.* *Dobson v. Pearce*, 12 N. Y. 156; *Litchfield's Appeal*, 28 Conn. 127; *Engel v. Scheuerman*, 40 Ga. 206; *Allen v. Watt*, 79 Ill. 284; *Davis v. Headley*, 22 N. J. Eq. 115; *Barry v. Brune*, 71 N. Y. 261, *affirming* 8 Hun (N. Y.) 395, 49 How. Pr. (N. Y.) 504; *Winchester v. Jackson*, 3 Hayw. (Tenn.) 306; *Turley v. Taylor*, 6 Baxt. (Tenn.) 376, 394; *Wilson v. Robertson*, 1 Overt. (Tenn.) 266; *Brown v. Parker*, 28 Wis. 21.

A bill which shows that a judgment rendered in another state has been reversed, and that the case is still pending there, shows a ground for staying proceedings to collect a judgment rendered upon it elsewhere until its final adjudication abroad. *Huntington v. Metzger*, 58 Ill. App. 372.

State and Federal Court Judgments. — Statutes or constitutional provisions which prohibit federal and state courts from interfering with one another's proceedings by injunction do not preclude relief against the judgment upon an original bill for that purpose.¹

Criminal Prosecutions and Sentences — Extraordinary Legal Remedies. — No relief may be granted in equity against judgments or proceedings other than those in civil causes. The jurisdiction of chancery does not extend to relief against criminal or quasi-criminal prosecutions or sentences, actions for mandamus, prohibition, quo warranto, and the like.²

Where the ground for relief stated in a bill is a good defense at law, equity will not interfere. *Lucas v. Darien Bank*, 2 Stew. (Ala.) 280.

1. *Cowley v. Northern Pac. R. Co.*, 46 Fed. Rep. 325; *Young v. Sigler*, 48 Fed. Rep. 182; *Smith v. Schwed*, 9 Fed. Rep. 483. *Contra*, *Phelan v. Smith*, 8 Cal. 521; *Roshell v. Maxwell*, Hempst. (U. S.) 25; *Rogers v. Cincinnati*, 5 McLean (U. S.) 337.

"These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud." *Marshall v. Holmes*, 141 U. S. 589. See also *Barrow v. Hunton*, 99 U. S. 80; *Remer v. Mackay*, 35 Fed. Rep. 86.

2. Criminal Prosecutions and Sentences — *Arkansas*. — *Portis v. Fall*, 34 Ark. 375; *Medical, etc., Institute v. Hot Springs*, 34 Ark. 559; *Taylor v. Pine Bluff*, 34 Ark. 603; *Waters-Peirce Oil Co. v. Little Rock*, 39 Ark. 412; *New Home Sewing Mach. Co. v. Fletcher*, 4 Ark. 139.

Connecticut. — *Tyler v. Hammersley*, 44 Conn. 419.

Georgia. — *Gault v. Wallis*, 53 Ga. 675; *Garrison v. Atlanta*, 68 Ga. 64; *Phillips v. Stone Mountain*, 61 Ga. 386.

Illinois. — *Stuart v. La Salle County*, 83 Ill. 347.

Indiana. — *Joseph v. Burk*, 46 Ind. 59.

Louisiana. — *Devron v. First Municipality*, 4 La. Ann. 11; *Levy v. Shreveport*, 27 La. Ann. 620.

New York. — *West v. New York*, 10 Paige (N. Y.) 539; *Davis v. American Soc., etc.*, 75 N. Y. 362.

North Carolina. — *Cohen v. Goldsboro*, 77 N. Car. 2.

United States. — *Hemsley v. Myers*, 45 Fed. Rep. 283; *Suess v. Noble*, 31 Fed. Rep. 855.

England. — *Saull v. Brownè*, L. R. 10 Ch. 64, and *Kerr v. Preston*, 6 Ch. Div. 463, *disapproving* *York v. Pilkington*, 2 Atk. 302; *Gee v. Pritchard*, 2 Swanst. 402.

But see exceptions: *M. Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106.

"And Holt, C. J., said, Surely chancery will not grant an injunction in a criminal matter under examination in this court; and that if they did this court would break it, and protect any that would proceed in contempt of it." *Holderstaffe v. Saunders*, 6 Mod. 16.

No reasons are given in the precedents for this limitation, but grounds exist which would seem to be sufficient. The granting of injunctions against the execution of criminal sentences, or to stop the proceedings, would be exercising direct control over the state and its agencies, instead of being a mere intervention *in personam* to prevent injustice. Criminal prosecutions are matters of public concern. See *Atty.-Gen. v. Cleaver*, 18 Ves. Jr. 211; *Spink v. Francis*, 19 Fed. Rep. 670, 20 Fed. Rep. 567; *Coast Line R. Co. v. Cohen*, 50 Ga. 451.

As to equitable relief against proceedings or decisions on writs for mandamus, prohibition, quo warranto,

Other Judgments — Awards. — Instances of other judgments from which relief has been granted will be found in the notes.¹

Statutory Changes. — In many states a distinct and independent relation between law and equity has ceased to exist, and the same court may sit to dispense either, as the case may be. This change has not destroyed actions by original bill for relief on equitable grounds.² But in some states it is held to have abridged the original jurisdiction, where the judgment attacked is a domestic one, and, if the court rendering it has equitable jurisdiction as well, the action can only be brought in that court. The locality of the judgment is the test.³ This doctrine is made the law of

and the like, see *Montague v. Dunman*, 2 Ves. 397, where the court said: "This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to any information, nor to a writ of prohibition, that I know of. The reason is that a mandamus is not a writ remedial, but mandatory. It is vested in the King's Superior Court of common law to compel inferior courts to do something relative to the public. That court has great latitude and discretion in cases of that kind, can judge of all the circumstances, and is not bound by such strict rules as in cases of private rights."

Quo Warranto. — *In re Sawyer*, 124 U. S. 200; *Moses v. Mobile*, 52 Ala. 198.

Forcible Entry and Detainer Judgments. — Judgments in cases of forcible entry and detainer, originally criminal in their nature, fall under the exception mentioned in the text. See article **FORCIBLE ENTRY AND DETAINER**, vol. 9, p. 82. *Davis v. Pou*, 108 Ala. 443; *McCartney v. Hunt*, 16 Ill. 76; *Petsch v. Mowry*, 1 Cinc. Super. Ct. Rep. 36.

1. Awards. — *Beam v. Macomber*, 33 Mich. 127; *Franco v. Franco*, 2 Cox 420.

Money Judgment of Admiralty Court. — *Jarvis v. Chandler*, 1 T. & R. 320.

Judgment Entry on Confession by Warrant of Attorney. — *Cooper v. Tiler*, 46 Ill. 462; *Darst v. Phillips*, 41 Ohio St. 514; *Given's Appeal*, 121 Pa. St. 260; *Brown v. Parker*, 28 Wis. 21.

Statutory Judgments on Bonds. — *Nunn v. Matlock*, 17 Ark. 512.

Probate Decrees. — *Stein v. Burden*, 30 Ala. 270; *Arrowsmith v. Gleason*, 129 U. S. 86. See generally article **PROBATE AND ADMINISTRATION**.

2. San Juan, etc., Min., etc., Co. v. Finch, 6 Colo. 214; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *Vardeman v. Edwards*, 21 Tex. 737.

"The District Court, sitting as a court of chancery, has power to grant relief in a proper case of this character. This is an ancient jurisdiction of a court of chancery, and there is nothing in our statutes which abrogates such jurisdiction. The fact that such a court has both common-law and chancery jurisdiction in no way changes or obliterates its equitable jurisdiction in the absence of express legislative restriction." *Bailey v. Stevens*, 11 Utah 175.

3. Anthony v. Dunlap, 8 Cal. 26; *Chipman v. Hibbard*, 8 Cal. 268; *Gorham v. Toomey*, 9 Cal. 77; *Uhlfelder v. Levy*, 9 Cal. 607; *Plunkett v. Black*, 117 Ind. 14; *Coon v. Seymour*, 71 Wis. 340; *Stein v. Benedict*, 83 Wis. 603; *Cardinal v. Eau Claire Lumber Co.*, 75 Wis. 404.

In *Indiana, etc., R. Co. v. Williams*, 22 Ind. 198, the court said: "The judgment which the complaint describes was rendered in the Hendricks Circuit Court, and hence it is insisted that the Common Pleas had no power to enjoin or otherwise control the process of that court. Anterior to the revision of 1852 the jurisdiction, in cases of this sort, was vested in the court of equity. But the statutes now in force abolish all distinctions between actions at law and suits in equity, and in reference to proceedings for injunctions, enact that injunctions may be granted by the Circuit Court and Court of Common Pleas in their respective counties. 2 Rev. Stat., G. & H., pp. 23, 131, §§ 1, 136. This provision simply confers jurisdiction, but does not, even impliedly, allow one of these courts to enjoin the proceedings or process of the other. Nor does it seem consistent with any correct rule of procedure that a party who has instituted an action, recovered a judgment, and ob-

some states by express statutory provision, no regard being had for the personal character of equitable relief.¹ Judgments which are absolutely void are sometimes excepted from the operation

tained final process in one court, should be compelled to litigate matters connected therewith before a different tribunal."

It may be noted that the cases relied on to support this doctrine are cases where one chancery court refused to interfere with the decrees of another, which raises a somewhat different question. See *Grant v. Quick*, 5 Sandf. (N. Y.) 612; *Smith v. American L. Ins., etc., Co.*, Clarke Ch. (N. Y.) 307; *Lane v. Clark*, Clarke Ch. (N. Y.) 309; *Dyckman v. Kernochan*, 2 Paige (N. Y.) 26; *Schell v. Erie R. Co.*, 51 Barb. (N. Y.) 368; *Riddle v. Baker*, 13 Cal. 296. But in *Erie R. Co. v. Ramsey*, 45 N. Y. 637, the distinction made by the code, as stated in the text, is clearly drawn. And in a case in *Wisconsin*, the court said in part: "It was argued in this case that because the action in the Winnebago Circuit Court was at law, the rule of the above cases is not applicable. We think otherwise. The Circuit Court of Winnebago county has full equitable as well as legal jurisdiction. It can grant equitable relief against a judgment at law rendered by it, as fully and amply as any other court can grant such relief. The whole reasoning of the court in support of the above rule applies with as much force to a proceeding or judgment at law as to one in equity. No satisfactory reason has been suggested why any distinction should be made between the two cases; in this state, at least, where the distinction between actions at law and suits in equity is abolished. Rev. Stat., § 2600." *Orient Ins. Co. v. Sloan*, 70 Wis. 611.

The following cases, which it was held should have been brought in the courts where the judgments were rendered, were rather actions in the nature of appellate proceedings than original bills in equity. *Gregory v. Perdue*, 29 Ind. 66; *Coleman v. Barnes*, 33 Ind. 93; *Wiley v. Pavey*, 61 Ind. 457; *MacLean v. Wayne Circuit Judge*, 52 Mich. 257; *Emporia First Nat. Bank v. Geneseo Town Co.*, 51 Kan. 215.

1. *Branch Bank v. Rutledge*, 13 Ala. 196; *Freeman v. McBroom*, 11 Ala. 943; *Mason v. Chambers*, 4 J. J. Marsh. (Ky.) 401; *Kelly v. Kelly*, 2 Duv. (Ky.)

363; *Phelan v. Johnson*, 80 Iowa 727; *Cocke v. Pollok*, 1 Hen. & M. (Va.) 499. See also *Harrison Mach. Works v. Templeton*, 82 Tex. 443; *Cook v. Baldrige*, 39 Tex. 250.

One court has no jurisdiction to enjoin a judgment rendered by another although the judgment has been transcribed to the court where the action is brought and execution may be issued upon it therefrom. *Neeters v. Clements*, 12 Bush (Ky.) 359; *McConnell v. Raive*, (Ky. 1886) 1 S. W. Rep. 582; *Coon v. Seymour*, 71 Wis. 340.

A good statement of the general nature of equitable relief against judgments is the following: "If this question depended on principle and analogy only, we should feel no difficulty in maintaining the power of the chancellor in *Clarke* or in *Montgomery*, to enjoin the judgment of the *Fayette Circuit Court*. The cause of action was transitory. The judgment, therefore, is for most purposes ambulatory. It is not essentially local in its character or effects. It may be enforced by action of debt, wherever the obligor or his representatives may be, either in or out of the state. It is personal and will follow them. If the judgment might be enforced out of *Fayette county*, we perceive no reason why its enforcement might not be enjoined out of *Fayette county*. Either the person or subject-matter must give jurisdiction. When the thing is personal or the remedy transitory, the person of the defendant gives jurisdiction to the chancellor as well as to the common-law judge. An injunction does not operate directly on the judgment, nor on the judge who rendered it. Its action is on the person of the judgment creditors. It acts *in personam*. And the judgment is enjoined by the action of the chancellor on the creditor, so as to prevent him from enforcing his judgment by execution. In enjoining a judgment the chancellor does not assert or assume any supremacy over the judge who rendered it. The judgment is not reversed or corrected. It is admitted to be right in law, but as its enforcement is deemed inconsistent with equity, the chancellor, by acting, not on it or the judge who gave it, but on the person of its holder, enjoins it;

of such laws;¹ and it is quite generally held that a party may attack a judgment in the court of his domicil when an execution has been issued against him from another county.² Such laws

and therefore, according to the principles of the common law, the person of the defendant in such a case will give jurisdiction. See *Billings v. Flight*, 1 Madd. 228. Upon principle, the chancellor sitting in Fayette should have no more power over a judgment of the common-law judge of Fayette than the chancellor sitting in any other county might possess. The powers of a court of general jurisdiction will not be restricted except by positive law or by the nature and purposes of its institution. And we are clear that the chancellor had power to enjoin the judgment in this case perpetually, unless his jurisdiction has been curtailed by express statute." *Mason v. Chambers*, 4 J. J. Marsh. (Ky.) 401.

It may be questioned whether the limitations placed on the jurisdiction by statutes and judicial decisions just discussed really operate to further the ends of justice. The anomalous conditions to which they might give rise are illustrated in the case of *Cocke v. Pollok*, 1 Hen. & M. (Va.) 499, in which the court said: "The record, exhibits the singular case of two chancellors in different districts disclaiming jurisdiction of a case brought before them by a bill of injunction to a judgment rendered in the District Court of Charlottesville. The chancellor of the Richmond district, it is alleged in the bill, refused to grant the injunction, although the defendants all resided within his jurisdiction, because the court whose judgment was sought to be enjoined was not within his jurisdiction. The chancellor of the Staunton district granted the injunction, but dismissed the bill afterwards, because, although the court which rendered the judgment sought to be enjoined was within his district, yet none of the defendants resided therein."

In Virginia, by the Code of 1873, c. 175, § 6, the judge of the County Court has authority to issue an injunction upon a bill addressed to the Circuit Court, whether the judgment sought to be enjoined is one of a "superior or inferior court of his county or district, or the party against whose act or proceeding the injunction be asked resides in or out of the same; provided such

act or proceeding is apprehended, or is to be done, or is doing, in his county or district." *Rosenberger v. Bowen*, 84 Va. 660.

By statute only the Circuit Court of Richmond can enjoin or affect a judgment in behalf of the commonwealth of Virginia. *Com. v. Latham*, 85 Va. 632.

In Iowa, under the code, § 3396, which provides that a suit to enjoin a judgment must be brought in the county and court in which it was obtained, the District Court cannot restrain proceedings on a judgment of the Supreme Court. *Oberholtzer v. Hazen*, (Iowa 1897) 70 N. W. Rep. 207.

1. *State Ins. Co. v. Waterhouse*, 78 Iowa 674; *Leonard v. Capital Ins. Co.*, (Iowa 1897) 70 N. W. Rep. 629; *Arnold v. Hawley*, 67 Iowa 313. *Contra*, *Jacobson v. Wernert*, (Ky. 1897) 41 S. W. Rep. 281.

2. *Caruthers v. Hartsfield*, 3 Yerg. (Tenn.) 366. See also *Bankers' L. Ins. Co. v. Robbins*, (Neb. 1897) 73 N. W. Rep. 269; *Sheriff v. Judge*, 46 La. Ann. 29. *Contra*, *Pettus v. Elgin*, 11 Mo. 411.

"The action may be maintained in any county in which an attempt is made (to the injury of the party seeking the relief) to put such judgment in force, although such judgment may have been rendered in another county." *Chambers v. King Wrought-Iron Bridge Manufactory*, 16 Kan. 270.

"One question suggested by appellant's learned counsel is that the St. Joseph Circuit Court has no jurisdiction to restrain the process of the Elkhart Circuit Court. The jurisdiction here exercised is in enjoining the officer of St. Joseph county and a citizen of St. Joseph county from enforcing against a citizen of St. Joseph county a judgment debt which has been satisfied. That this may be done is not in doubt. In our opinion there is no available error in the record, and the judgment of the Circuit Court is affirmed." *Ashcraft v. Knoblock*, 146 Ind. 169.

"If, before the clerk of the law court receives notice that an injunction is awarded, he has, in fact, divested himself of his power by actually issuing the execution into another district be-

will not be applicable where the relief against the judgment is merely incidental to an adjudication of matters which are cognizable only in equity.¹

b. EXTENT — In General. — Relief against the judgment prevents any proceedings to enforce it, whether taken at law or in equity.² The amount of the judgment was originally considered by the court called upon to grant relief against it. Unless it was large enough to be worth the expense of a suit in equity, the bill would not be entertained;³ and this rule of law has been declared by statute in some jurisdictions.⁴ In some states equitable relief is confined to grounds for a new trial at law, as enumerated by the statutory provisions.⁵

yond the limits of the chancery court, I am not at present prepared to say whether the process of the court may not pursue the execution, on the general principle that where a jurisdiction exists, every necessary power shall be implied to carry it into complete effect." *Cocke v. Pollok*, 1 Hen. & M. (Va.) 516.

In *Missouri* an original suit to set aside a judgment of partition and sale thereunder must be brought in the county where the land lies though the suit in partition was determined elsewhere. *Keyte v. Plemmons*, 28 Mo. 104.

1. *Mason v. Chambers*, 4 J. J. Marsh. (Ky.) 401; *Lester v. Stevens*, 29 Ill. 155, where the court said: "The next objection is that this is a bill to restrain the collection of a judgment rendered in the Circuit Court of Cook county. If this were the primary object of the bill, it would undoubtedly be fatal to the jurisdiction of the court, but it is not so where the principal object of the bill is for other relief, and the stay of the collection of the judgment is incidental or auxiliary, and for the purpose of making the relief complete for which the bill is filed; and for the purpose of determining these questions, even on such a plea as this, we must look into the bill itself."

2. *Little v. Price*, 1 Md. Ch. 182.

Relief from a judgment against an acceptor on a bill of exchange does not go to the extent of preventing suits against other parties to the bill. *Bohannon v. Combs*, 12 B. Mon. (Ky.) 563.

3. *Moore v. Lyttle*, 4 Johns. Ch. (N. Y.) 183. See also *Floyd v. Jayne*, 6 Johns. Ch. (N. Y.) 479. As to jurisdictional amount in chancery, see generally article JURISDICTION.

4. In *Illinois*, by statute, relief cannot be had where a judgment, or the

balance due thereon, is less than \$20 exclusive of costs. *Breckenridge v. McCormick*, 43 Ill. 491; *York v. Kile*, 67 Ill. 233.

Except Where Provided by Statute, the amount of the judgment seems, however, not to be generally regarded; and relief may be had against judgments rendered by justices of the peace which are not appealable by reason of the small amount involved. *Greenwaldt v. May*, 127 Ind. 511; *Gulf, etc., R. Co. v. King*, 80 Tex. 681; *Galveston, etc., R. Co. v. Ware*, 74 Tex. 47; *Jennings v. Shiner*, (Tex. Civ. App. 1897) 43 S. W. Rep. 276.

5. *Larson v. Williams*, (Iowa 1895) 63 N. W. Rep. 464; *Clark v. Ellsworth*, 84 Iowa 525; *Bowen v. Troy Portable Mill Co.*, 31 Iowa 460.

In *Magin v. Lamb*, 43 Minn. 80, the court said: "But the reasons for any distinction in respect to the conditions upon which relief is to be granted in an action to restrain or vacate a judgment, and in a motion for the same purpose, have disappeared with the uniting of equitable and legal jurisdictions in the same court. If now a defendant, upon motion to the court rendering the judgment, may have it set aside merely because no action was ever commenced against him, there is no longer any reason why, if he prosecutes an action in the same court, for the same purpose, any different grounds for relief should be required."

"The chancellor may direct a new trial at law (whenever a case is presented in which the common-law judge would grant it) provided satisfactory reasons are shown for failing to make the application at law." *Hunt v. Boyier*, 1 J. J. Marsh. (Ky.) 484; *Colyer v. Langford*, 1 A. K. Marsh. (Ky.) 237.

"The law has long been settled that

Decreeing Repayment of Amount Collected. — It has been held in some states that relief may be granted to the extent of decreeing repayment of the judgment or any part of it which the plaintiff at law may in the interim have collected.¹

Decree Against Complainant. — In refusing to grant relief against a judgment a court of equity cannot decree against the complainant the amount due upon the judgment.²

Relief Against Portion Inequitable. — Relief may be granted against part only of a judgment and the remainder left subject to enforce-

such applications must show sufficient matter to have entitled the party to a new trial if applied for at the term, and a sufficient legal excuse for not having then made his application." *Bryorly v. Clark*, 48 Tex. 345. See also *Cook v. De la Garza*, 13 Tex. 432; *Goss v. McClaren*, 17 Tex. 107, 8 Tex. 341; *Caperton v. Wanslow*, 18 Tex. 125; *Metzger v. Wendler*, 35 Tex. 378; *Vardeman v. Edwards*, 21 Tex. 737; *Hough v. Hammond*, 36 Tex. 657.

Contra. — In *Nealis v. Dicks*, 72 Ind. 374, the court said: "It will not do to hold that courts possess no power to annul judgments except upon the grounds and in the mode expressly specified and prescribed by statute. If courts were restricted to the exercise of mere statutory powers, they would make but a lame and halting progress in the administration of justice. The statute concerning the review of judgments does not mean that judgments shall only be vacated upon the grounds therein designated, or only in the mode there prescribed, to the exclusion of all other causes and all other modes. Neither the letter nor the spirit of the act warrants the conclusion that the legislature intended to so narrow the power of courts of general jurisdiction to relieve against judgments as to limit and confine them to the causes and modes expressly prescribed by statute. Where the statute does prescribe the causes for which a judgment may be set aside, and does provide a mode of procedure, then, of course, the statute controls, and is to be followed and obeyed."

1. *Click v. Gillespie*, 4 Hayw. (Tenn.) 4; *Lee v. Heuman*, 10 Tex. Civ. App. 666; *Branch v. Burnley*, 1 Call (Va.) 147; *Roberts v. Jordans*, 3 Munf. (Va.) 488. See also *Henry v. Meighen*, 46 Minn. 548. *Contra*, *Hunt v. Boyier*, 1 J. J. Marsh. (Ky.) 484.

No Action for Money Had and Received

Is Permissible to recover money collected on a judgment. The only remedy is in equity or in the original case where time for action has not passed. *Ryle v. Howlett*, 3 Bibb (Ky.) 348.

In **North Carolina**, under Gen. Stat. 1878, c. 66, § 285, in addition to equitable relief against the judgment, damages caused by proceedings to enforce it may be awarded. *Baker v. Sheehan*, 29 Minn. 235. *Contra*, *Adams v. Dunlap*, 1 Dana (Ky.) 584; *Yelton v. Hawkins*, 2 J. J. Marsh. (Ky.) 1; *Powell v. Watson*, 6 Ired. Eq. (N. Car.) 94.

On Final Dissolution, the court will direct that execution issue for the balance due where the judgment became dormant during the life of the injunction. *Welsh v. Childs*, 17 Ohio St. 319.

Under a Prayer for an Injunction Only, the court cannot take an account of and render a decree for money which the complainant should recover. *Forsythe v. McCreight*, 10 Rich. Eq. (S. Car.) 308. *Contra*, where the bill prays for general relief. *Bryan v. Primm*, 1 Ill. 59.

2. *San Juan, etc., Min., etc., Co. v. Finch*, 6 Colo. 214; *Richardson v. Prevo*, 1 Ill. 216; *Duncan v. Morrison*, 1 Ill. 151; *Hubbard v. Hobson*, 1 Ill. 190; *Harris v. Beaven*, 11 Bush (Ky.) 254.

Statutes sometimes provide for the rendition of such a judgment. But these are inapplicable when the bill is dismissed, not for lack of merit, but because it appears that the remedy is at law. *Kanawha, etc., R. Co. v. Ryan*, 31 W. Va. 364; *Howell v. Thomason*, 34 W. Va. 794. Nor can any damages for interference be assessed in such case. "The judgment enjoined being void, no damages were sustained by the stay of proceedings thereon." *Wingfield v. McLure*, 48 Ark. 510.

ment at law.¹ Relief will generally be granted to the extent of credits, or unjust amounts, admitted by the judgment creditor, though the bill makes out no case for equitable relief.² The injunction must not run against more than the amount decreed as unjust.³ Where necessary to determine the inequitable amount the court will reinvestigate the issues between the parties for that purpose.⁴ That part of the judgment which is justly due must be paid, or the amount deposited in court, before relief will be given; on the principle that equity, having obtained jurisdiction, will do complete justice between the parties, and that he who seeks equity must do equity.⁵

1. *Alabama*. — *Fryer v. Austill*, 2 Stew. (Ala.) 119; *Maulden v. Armistead*, 18 Ala. 500; *Moses v. Noble*, 86 Ala. 407.

Delaware. — *Small v. Collins*, 5 Del. Ch. 234.

Kentucky. — *McKinney v. Pope*, 3 B. Mon. (Ky.) 93; *Harris v. Beaven*, 11 Bush (Ky.) 254.

Maryland. — *Lyles v. Hatton*, 6 Gill & J. (Md.) 122; *Hill v. Reifsnider*, 46 Md. 555; *Key v. Knott*, 9 Gill & J. (Md.) 342.

New Mexico. — *Crenshaw v. Delgado*, 1 N. Mex. 376.

Tennessee. — *Hamlin v. Berry*, 1 Overt. (Tenn.) 39; *Brandon v. Green*, 7 Humph. (Tenn.) 130.

Texas. — *Boaz v. Graham*, 1 Tex. App. Civ. Cas., § 159.

Virginia. — *Booth v. Kesler*, 6 Gratt. (Va.) 350; *Sanders v. Branson*, 22 Gratt. (Va.) 364.

United States. — *Bell v. Cunningham*, 1 Sumn. (U. S.) 89.

Contra. — *Roach v. Duckworth*, 95 N. Y. 391, *affirming* 65 How. Pr. (N. Y.) 303, 61 How. Pr. (N. Y.) 128.

2. *Cardin v. Jones*, 23 Ga. 175; *Perry v. Kearney*, 14 La. Ann. 401; *Welch v. Parran*, 2 Gill (Md.) 320; *Webster v. Hardisty*, 28 Md. 592; *Moeschler v. Lochte*, (Supreme Ct.) 12 N. Y. St. Rep. 855; *Wilson v. Bastable*, 1 Cranch (C. C.) 394.

"If he [the plaintiff at law] voluntarily goes into the merits of the case, and in his answer admits facts which, if they had appeared to the court of law, would have there produced a different result, neither the rule nor the principle of the rule is violated by pronouncing a decree justified by his own admissions." *Vanlew v. Bohannan*, 4 Rand (Va.) 537.

Parties to a judgment may agree that the judgment be set aside and enjoined on condition that it shall not

affect the plaintiff's right to sue on the original cause of action. *Wilson v. St. Louis, etc., R. Co.*, 87 Mo. 431.

3. *French v. Garner*, 7 Port. (Ala.) 549; *Hale v. Bozeman*, 60 Miss. 965; *Alexander v. Baylor*, 20 Tex. 560; *Criswell v. Bledsoe*, 22 Tex. 656. See also *Goodsell v. Olmstead*, 42 Conn. 354.

An injunction may, however, be granted against an entire judgment where the complainant brings the amount justly due into court and all those interested in it are made parties by the bill. *Weikel v. Cate*, 58 Md. 105.

In *Illinois*, under Rev. Stat. 1874, p. 579, § 7, "only so much of any judgment at law shall be enjoined as the complainant shall show himself equitably not bound to pay, and so much as shall be sufficient to cover costs." *Colson v. Leitch*, 110 Ill. 504; *Sprague v. Lux*, 12 Ill. App. 271; *Duncan v. Morrison*, 1 Ill. 151; *Ross v. Cox*, 69 Ill. App. 430.

4. *Hadley v. Rountree*, 6 Jones Eq. (N. Car.) 107; *Franklin v. Ridenhour*, 5 Jones Eq. (N. Car.) 420; *Willis v. Gordon*, 22 Tex. 241; *Bourke v. Vanderlip*, 22 Tex. 221.

The Judgment Is Sometimes Allowed to Stand as Security for the indebtedness while an account is being taken in equity to discover the true amount due, the excess, if any, to be enjoined on final decree. *Young v. Reynolds*, 4 Md. 375; *Jones v. Slubey*, 5 Har. & J. (Md.) 372; *Rust v. Ware*, 6 Gratt. (Va.) 50. See also *Jaynes v. Brock*, 10 Gratt. (Va.) 214.

5. *Pearce v. Chastain*, 3 Ga. 226; *Flickinger v. Hull*, 5 Gill (Md.) 60; *Head v. Gervais*, Walk. (Miss.) 431; *Jones v. Kilgore*, 2 Rich. Eq. (S. Car.) 63; *Lee v. Peckham*, 17 Wis. 383; *Jarvis v. Chandler*, 1 T. & R. 320.

"But equity affords its aid only upon the terms and to the extent of doing

7. Hearing and Final Decree.—The practice upon trial of an action for equitable relief against a judgment is not uniform. A final decree in favor of the complainant, on a bill for a new trial, cannot control or direct the action of the court of law, but runs only against the judgment creditor. Where the bill is brought to enforce an equitable right which could not have been litigated at law, and relief against the judgment is collateral only to the general relief asked, no new trial is ordered. The hearing in such a case is an original hearing in equity.¹ On the other hand, when the ground for relief is a defense valid at law, the bill is strictly one for a new trial; and it seems that originally final relief consisted in perpetually enjoining the judgment and leaving the creditor to consent to open the law case and try it anew.² In more recent cases, however, the rehearing is generally had before the court of equity, and according to its practice and procedure;

exact justice between the parties. While, therefore, for the reasons suggested, it would restrain the enforcement of the judgment, it would require the payment by the judgment debtor of the debt justly due from him to the creditor." *Litchfield's Appeal*, 28 Conn. 127.

"It is a settled principle that he who seeks equity must do equity; and if the borrower comes into this court for relief against his usurious contract, he must do what is right as between the parties, by bringing into court the money actually advanced, with the legal interest, and then the court will lend him its aid as against the usurious excess." *Rogers v. Rathbun*, 1 Johns. Ch. (N. Y.) 367.

In *Tarver v. McKay*, 15 Ga. 550, a decree which wrongfully dissolved an injunction was affirmed on condition that the judgment creditor remit and release the unjust part of the judgment.

Contribution Between Cosureties.—A surety for the original indebtedness seeking to enjoin a judgment which has been paid by a cosurety will first be required to make contribution. *Estis v. Patton*, 3 Yerg. (Tenn.) 382; *Creed v. Scruggs*, 1 Heisk. (Tenn.) 590.

1. *Kersey v. Rash*, 3 Del. Ch. 321; *Cummins v. Kennedy*, 4 J. J. Marsh. (Ky.) 642; *Gash v. Ledbetter*, 6 Ired. Eq. (N. Car.) 183; *Aphorp v. Comstock*, 2 Paige (N. Y.) 482.

2. *Pelham v. Moreland*, 11 Ark. 443; *Yancey v. Downer*, 5 Litt. (Ky.) 8; *Burgess v. Lovengood*, 2 Jones Eq. (N. Car.) 457. See also *Little Rock, etc., R. Co. v. Wells*, 61 Ark. 358; *Cum-*

mins v. Kennedy, 4 J. J. Marsh. (Ky.) 649; *M'Rae v. Woods*, 2 Wash. (Va.) 80; *Finney v. Clark*, 86 Va. 354.

In *Trefz v. Knickerbocker L. Ins. Co.*, 8 Fed. Rep. 177, the court said: "The specific prayer undoubtedly is that the judgment be set aside on the ground that it was obtained by fraud. But there is also a prayer for an injunction and for general relief; and under these it has been the practice in equity, unless the case disclosed some defense peculiar to courts of equity and which would be unavailable at law, to decline to go further than to set aside the judgment and leave the parties to a new trial in the original forum. This is especially so when the prayer of the bill is for an injunction; bills of which sort, says Judge Story, are usually called bills for a new trial."

"A court of chancery has no jurisdiction to direct a court of law what it shall do. It can act only upon the party, and then generally only by way of prevention. If a judgment has been entered which equitably ought not to be enforced, the defendant may, upon terms, have an injunction upon the plaintiff against enforcing it, and by thus coercing the plaintiff induce him to consent to a new trial." *Mechanics Nat. Bank v. Colehour*, 44 Ill. App. 470.

A decree that a new trial shall be had at law is a final disposition of a bill for a new trial against a judgment; and if a new trial at law is thereafter had, such judgment cannot be again set aside by action in the original case in equity. *Bush v. Craig*, 4 Bibb (Ky.) 168.

if favorable to the complainant the rights of the parties are decreed and a perpetual injunction awarded against the judgment. This involves a trial of the preliminary question whether the case is one which calls for equitable interference, the decision upon which is not a final order from which an appeal will lie.¹ It having been determined that equitable interference is proper, a new trial of the legal issues is had in equity in the manner ordered in the particular case.² Where the judgment attacked is absolutely

1. *Banks v. Shain*, Litt. Sel. Cas. (Ky.) 451; *Gross v. McClaran*, 8 Tex. 342, 17 Tex. 107; *Moore v. Lipscombe*, 82 Va. 546; *M'Rae v. Woods*, 2 Wash. (Va.) 80; *Isaac v. Humpage*, 1 Ves. Jr. 427. See also *Bresnehan v. Price*, 57 Mo. 422; *Davis v. Wade*, 58 Mo. App. 641.

2. *Fisher v. Tribby*, 5 Ill. App. 335; *Dobbins v. McNamara*, 113 Ind. 54; *Hale v. Bozeman*, 60 Miss. 965; *Cairo, etc., R. Co. v. Titus*, 32 N. J. Eq. 397; *Oliver v. Pray*, 4 Ohio 175; *Chester v. Apperson*, 4 Heisk. (Tenn.) 639; *Roller v. Wooldridge*, 46 Tex. 485; *Smith v. Woods*, 1 Tex. App. Civ. Cas., § 681; *Galveston, etc., R. Co. v. McTieague*, 1 Tex. App. Civ. Cas., § 459; *West v. Logwood*, 6 Munf. (Va.) 491; *Ambler v. Wyld*, 2 Wash. (Va.) 36. See also *Propst v. Meadows*, 13 Ill. 170; *Whittlesey v. Delaney*, 73 N. Y. 571; *Missouri Pac. R. Co. v. Haynes*, 82 Tex. 448; *Wheeler, etc., Mfg. Co. v. Fleming*, 1 Tex. App. Civ. Cas., § 539.

"There are cases in which the court has required the defendant in chancery to submit to a new trial in the action at law, and restrained him from enforcing the judgment complained of. But the regular course would seem to be for the chancery court to order such issue or issues as may be proper, and to base its decree on the finding of the jury at the hearing, either dissolving or perpetuating the injunction, in whole or in part, according to circumstances. Such was the course pursued by this court in *Knifong v. Hendricks*, 2 Gratt. (Va.) 213. In the present case, if a new trial was proper, the court should have ordered an issue, the same as in the action at law, to be tried as other issues out of chancery are tried, the verdict of the jury, if the trial was in the law court, to be certified to the chancery court, and in the meantime continue the injunction till the hearing of the cause; and if the finding was for the defendant and affirmed, dissolve the injunction; if for the plaintiff, perpetuate the injunction and decree for

the complainant according to the verdict." *Wynne v. Newman*, 75 Va. 811. See also *Jackson v. Woodruff*, 57 Ark. 599; *Carrington v. Holabird*, 17 Conn. 531, 19 Conn. 84; *Austin v. Carpenter*, 2 Greene (Iowa) 131; *Truesdale v. Morrison*, 84 Ill. 420; *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436; *Knifong v. Hendricks*, 2 Gratt. (Va.) 212; *Moore v. Lipscombe*, 82 Va. 546.

After enjoining a judgment and directing issues to be tried by a jury, the court may afterwards, although no verdict has been certified, set aside the order and dissolve the injunction if it becomes satisfied that a new trial ought not to be had. *Vass v. Magee*, 1 Hen. & M. (Va.) 2.

Issues Directed to Be Tried by Jury. — *Bowen v. Clark*, 46 Ind. 405; *Philips v. Samuel*, 76 Mo. 657; *Smith v. Hays*, 1 Jones Eq. (N. Car.) 321; *Kennard v. Sax*, 3 Oregon 263; *Humphries v. Blevins*, 1 Overt. (Tenn.) 36; *Hord v. Dishman*, 5 Call (Va.) 283; *Nelson v. Armstrong*, 5 Gratt. (Va.) 354.

Effect of Verdict of Jury. — Where the court orders a trial to be had before a jury the verdict probably has no greater effect than in any other case where a reference is made for the information of the chancellor. In *Quick v. Van Auker*, 3 Penny. (Pa.) 476, however, it was held that "the question presented by the issue was one of fact, exclusively for the jury, and their verdict should not be disturbed unless manifest error intervened during the course of the trial." See also *Wynne v. Newman*, 75 Va. 811, and generally article ISSUES TO THE JURY, *ante*, p. 599.

Consent of Judgment Creditor. — It seems that the judgment creditor will not be compelled to submit to a new trial where it takes place in equity. But, as in the case where he is asked to consent to a new trial at law, in the event of a refusal the final decree will be a perpetual injunction against enforcing the judgment. *Isaac v. Humpage*, 1 Ves. Jr. 427.

void, the relief may extend to a new trial of the issues, or, since the original cause is not merged, may be limited to a perpetual injunction.¹

8. Injunction Bonds.² — That a court of equity may not be called upon to interfere with a law judgment except in a clear case, special statutory provisions commonly exist regulating the issuance of the restraining order. In some states it is necessary to pay the amount of the judgment and costs into court, and give security for damages which may be sustained,³ or as an alternative within the discretion of the court, to give a bond conditioned to pay the amount of the judgment, damages, and costs.⁴ A common provision is one which requires a bond conditioned to pay the judgment and any damages which may result.⁵ In *Maryland* there

1. *Edrington v. Allsbrooks*, 21 Tex. 186; *Willis v. Gordon*, 22 Tex. 241; *Witt v. Kaufman*, 25 Tex. Supp. 384. See also *Blakeslee v. Murphy*, 44 Conn. 193; *Finney v. Clark*, 86 Va. 354.

"It is true that the finding of the District Court is that the appellant had made out a *prima facie* defense. This was all the District Court was required to, and probably all he should have, found on the subject. It was not his duty to go into the merits of the alleged defense of the insurance company any further than to ascertain that the appellant had made out a *prima facie* valid defense, and that it was urging the same in good faith." *Bankers' L. Ins. Co. v. Robbins*, (Neb. 1897) 73 N. W. Rep. 269.

Where Judgment Is Satisfied. — When the ground for relief is payment of the judgment and the like, there is, of course, no rehearing of the original issues. But as in all cases, whatever is necessary to do complete justice will be done. *Mechanics Bank v. Lynn*, 1 Pet. (U. S.) 376, where the court said: "When the judgment debtor comes into the court asking protection on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant his prayer, on such conditions as justice demands." See also *Moore v. Red*, (Miss. 1898) 22 So. Rep. 948.

2. See generally article INJUNCTIONS, vol. 10, p. 869.

3. *Kinney v. Ogden*, 3 N. J. Eq. 168; *Newton v. Douglass*, 1 Hoff. Pr. 89; *Jenkins v. Wilde*, 2 Paige (N. Y.) 394.

The court may require such a deposit, but will not do so unless the bill contains positive allegations of the insolvency of the judgment creditor.

Rodgers v. Rodgers, 1 Paige (N. Y.) 426.

Such a statute applies where the attack upon the judgment is made by way of a bill of interpleader. *Morris Canal, etc., Co. v. Bartlett*, 3 N. J. Eq. 9.

In *New York* this statutory provision was not abrogated by the code. *Cook v. Dickerson*, 2 Sandf. (N. Y.) 691; *Gray v. Redfield*, 4 Daly (N. Y.) 95.

It is only when a party to the judgment brings an action for equitable relief against it that such a provision is applicable. *Packer v. Nevin*, 67 N. Y. 550.

4. *Christie v. Bogardus*, 1 Barb. Ch. (N. Y.) 167; *Eastman v. Starr*, 22 Hun (N. Y.) 465; *Fullan v. Hooper*, 66 How. Pr. (N. Y. Supreme Ct.) 75, *affirmed* in 19 N. Y. Wkly. Dig. 93.

It seems that when the amount of the judgment is paid into court the injunction will not be dissolved on motion, but will be retained until the final hearing. *Manchester v. Dey*, 6 Paige (N. Y.) 295.

A judgment entered by confession upon a bond with warrant of attorney is within the provisions of the statute which requires a money deposit or the giving of a bond before an injunction against a judgment in a personal action shall issue. *Marlatt v. Perrine*, 17 N. J. Eq. 49; *Farrington v. Freeman*, 2 Edw. Ch. (N. Y.) 572.

5. *Ex p. Fechheimer*, 103 Ala. 154; *Packer v. Roberts*, 44 Ill. App. 232; *Stirlen v. Neustadt*, 50 Ill. App. 378.

In *Dickenson v. McDermott*, 13 Tex. 248, a bond given in double the amount of the judgment enjoined was sustained, though the judge did not state in the order the amount for which it should be given, as required by statute.

are no statutory provisions requiring either a bond or a deposit of the amount.¹ Where an injunction is obtained without complying with such statutes, the defendant is entitled to summary relief, and is not put upon his motion to dissolve.² In some states a judgment creditor must give a refunding bond on obtaining a dissolution of the injunction pending the final hearing.³

9. Release of Errors. — Where the action for equitable relief is of the character here discussed it seems that the plaintiff at law should never be enjoined from proceeding with the trial, but only prevented from enforcing the judgment obtained, on the theory that he should not be harassed and delayed by different suits for the same cause. So where the complainant comes into a court of equity pending the trial at law, he must permit judgment to go against him and rely on his right to equitable relief.⁴ For the same reason the practice exists of requiring the complainant to give a release of all errors at law.⁵ It has been held that the

1. "The matter is left to the discretion of the court, but the practice has universally prevailed to require such bonds, save in extreme and exceptional cases, and generally in double the amount of the judgment sought to be restrained, as was once provided by the old Act of 1723, c. 8, § 5." *Wagner v. Shank*, 59 Md. 313.

2. *Marlatt v. Perrine*, 17 N. J. Eq. 49; *Christie v. Bogardus*, 1 Barb. Ch. (N. Y.) 167; *Jenkins v. Wilde*, 2 Paige (N. Y.) 395; *Cook v. Dickerson*, 2 Sandf. (N. Y.) 691. See also *Gamble v. Campbell*, 6 Fla. 347.

3. *Robertson v. Walker*, 51 Ala. 484; *Rice v. Tobias*, 83 Ala. 348; *Coleman v. Goyne*, 37 Tex. 552. See also *Barnard v. Davis*, 54 Ala. 565.

4. "Unless in aid of a suit at law, no injunction should be granted where the applicant for it does not submit to a judgment at law, or, as it is technically termed, confess judgment. *Mathews v. Douglass*, *Cooke* (Tenn.) 136; *Nelson v. Owen*, 3 Ired. Eq. (N. Car.) 178. The reason is that if he does not succeed in equity, he might still go on and defend at law, prosecute a writ of error, or take an appeal, and thus unreasonably delay his adversary in the obtaining of his rights. *Billing v. Flight*, 1 Madd. 228; *Anonymous*, 1 Vern. 120." *Conway v. Ellison*, 14 Ark. 361. See also *Warwick v. Norvell*, 1 Leigh (Va.) 96.

5. "The course as to injunctions in this court is that if the motion is made before declaration, you get an injunction to stay everything; if after decla-

ration, the injunction stays execution only, not trial." *Garlick v. Pearson*, 10 Ves. Jr. 450. See also *Bullen v. Ovey*, 16 Ves. Jr. 141; *Earnshaw v. Thornhill*, 18 Ves. Jr. 485; *Franco v. Franco*, 2 Cox 420.

"And even courts of equity themselves admit that the plaintiff at law may proceed so far as that he may be at liberty *eo instante* that the injunction is dissolved, to take out execution." *Epes v. Dudley*, 4 Leigh (Va.) 146. See also *Morrice v. Hankey*, 3 P. Wms 146.

So an execution may be sued out on the judgment at law before a decree refusing equitable relief against it has been entered up in the court of chancery, *Epes v. Dudley*, 4 Leigh (Va.) 145; or any action may be taken which is necessary to enable the creditor to issue execution on the judgment as soon as equitable relief is denied, as that may be revived on the ground of the death of a party. *Richardson v. Prince George County*, 11 Gratt. (Va.) 190.

5. *Branch v. Burnley*, 1 Call (Va.) 147, where the court said: "There is no hardship in confining a party to one jurisdiction. It is a general principle of equity that a man shall not be permitted to sue both in law and equity for the same thing; this principle has given rise to the practice of requiring a release of errors at law on obtaining injunctions to judgments. It is bot-tomed on a principle that a man may waive any particular right or benefit, and on the evident justice of preventing a party from being vexed and harassed in various courts for the same

injunction operates *per se* as such release.¹ But generally errors are not considered as released unless a statute or an order of the court requires such release to be made.² No release of errors is required where the relief asked does not amount to a perpetual stay of proceedings on the judgment.³

10. Dissolution of the Injunction.— Upon the dissolution of an injunction, statutes usually permit damages sustained by the interference to be assessed by the court against the complainant and his sureties.⁴

cause, but that he shall stand or fall by the election he has made.”

1. *Price v. Johnson County*, 15 Mo. 434; *Mathews v. Douglass*, Cooke (Tenn.) 136; *Ashby v. Kiger*, Gilmer (Va.) 153.

In those states where decrees in equity for the payment of money and judgments at law are placed on the same footing with respect to relief by injunction, there is no such thing as a release of errors on injunction against a decree. *San Juan, etc., Min., etc., Co. v. Finch*, 6 Colo. 214.

2. *McConnel v. Ayres*, 4 Ill. 210; *Addleman v. Mormon*, 7 Blackf. (Ind.) 31; *Dickerson v. Ripley County*, 6 Ind. 128; *Gano v. White*, 3 Ohio 20. See also *Nelson v. Owen*, 3 Ired. Eq. (N. Car.) 175; *Anonymous*, 1 Vern. 120.

So it is not ground for dismissing a writ of error at law, that the plaintiff in error, since the issuance of the writ, has obtained an injunction, where no release of errors was actually given. *Prodor v. McCaleb*, 24 Miss. 169; *Vick v. Maulding*, 1 How. (Miss.) 217.

Effect of Dismissal of Bill.— The release continues operative though the complainant afterwards dismisses his bill. *Henly v. Robertson*, 4 Yerg. (Tenn.) 172.

Failure to File Release.— Where a release is required but none is filed the injunction may be dissolved on that ground, but the bill cannot be dismissed. *Paulding v. Watson*, 21 Ala. 279.

Omission to Require Release.— That no release was granted is error without prejudice where the bill was sustained and the judgment perpetually enjoined. *Bradley v. Lamb*, Hard. (Ky.) 536.

3. *St. Louis, etc., R. Co. v. Todd*, 40 Ill. 89; *Burge v. Burns*, 1 Morr. (Iowa) 288; *Sevier v. Ross*, Freem. (Miss.) 519. See also *McConnel v. Ayres*, 4 Ill. 210.

4. *M'Grew v. Tombeckbee Bank*, 5 Port. (Ala.) 547; *Roberts v. Fahs*, 36 Ill. 268; *Stirlen v. Nuestadt*, 50 Ill. App. 378; *Higgins v. Bullock*, 73 Ill. 205; *Minor v. Stone*, 1 La. Ann. 283; *Hall v. Carroll*, 10 La. Ann. 412; *Lee v. Hubbell*, 20 La. Ann. 551; *Western v. Woods*, 1 Tex. 1; *Cook v. De la Garza*, 13 Tex. 432; *Galveston, etc., R. Co. v. Ware*, 74 Tex. 47.

Payment of the judgment cannot be decreed upon a bond which is only conditioned to pay all damages which may be adjudged by reason of the issuance of the injunction. *Grove v. Bush*, 86 Iowa 94.

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